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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303 and 347

RIN 3064–AF54

Branch Application Procedures

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is adopting a final rule to amend its application requirements for the establishment and relocation of branches and offices so that such applications no longer require statements regarding the compliance of such proposals with the National Historic Preservation Act of 1966 (NHPA) and the National Environmental Policy Act of 1969 (NEPA). The final rule amends the FDIC's regulations to remove NHPA and NEPA requirements embedded in its branch application procedures, and rescinds FDIC statements of policy regarding the NHPA and the NEPA, consistent with branch application procedures for national banks and insured state member banks supervised by the Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System.

DATES: The final rule is effective on December 14, 2020.

FOR FURTHER INFORMATION CONTACT: Navid Choudhury, Counsel, Policy Unit, Legal Division, (202) 898–6526, *nchoudhury@fdic.gov;* Patricia A. Colohan, Associate Director, Risk Management Examination Branch; (202) 898–7283, *pcolohan@fdic.gov.*

SUPPLEMENTARY INFORMATION:

Background

The NHPA and the NEPA were enacted by Congress as discrete but related laws to limit the impact of Federal Government initiatives on historic properties and the environment, respectively. These statutes apply to a limited universe of Federal Government actions. The NHPA and the NEPA seek to incorporate historic preservation and environmental considerations into the Federal Government's work and also to enhance and support state and local laws that address historic preservation and environmental policy. Historically, the FDIC has interpreted the NHPA and NEPA as having limited application to deposit insurance and branch applications.

Under Section 106 of the NHPA, Federal agencies are required to take into account the effects of their ''undertakings'' on historic properties.[1] Likewise, section 102(2)(C) of the NEPA requires that Federal agencies include, in every recommendation or report on major Federal actions significantly affecting the quality of the human environment, a detailed statement that addresses the environmental impact of the proposal.[2] The FDIC has historically interpreted the scope of the NHPA and the NEPA as limited to the potential impact on historic properties and the environment with respect to a limited universe of applications, specifically, for deposit insurance for *de novo* institutions and applications by state non-member banks to establish a domestic branch and to relocate a domestic branch or main office (Covered Applications).

The FDIC has implemented the NHPA and the NEPA with respect to Covered Applications by regulations and via three statements of policy. The FDIC's regulations generally require applicants to provide statements regarding their compliance with NEPA and NHPA in connection with main office relocation applications by state nonmember banks,[3] domestic and foreign branch establishment and relocation applications by state nonmember banks,[4] and insured branch relocation applications by foreign banks.[5] The three statements of policy are: the *Statement of Policy Regarding the National Historic Preservation Act of 1966;*[6] the *Statement of Policy Regarding the National Environmental Policy Act of 1969;*[7] and the *Statement of Policy on Applications for Deposit Insurance.*[8]

Review of Regulations and Guidance

As part of the FDIC's comprehensive review of its statements of policy and related matters in an effort to streamline FDIC regulations and other supervisory materials issued to the public, FDIC staff reviewed the requirements for branch applications. Additionally, the FDIC committed to review all published guidance in order to identify any guidance that should be revised or rescinded because such issuance is out-of-date or otherwise no longer relevant as part of its 2017 decennial report to Congress required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA).[9]

Courts generally determine whether the NHPA and the NEPA apply to a particular Federal agency action by applying similar principles to both statutes, because the NHPA and NEPA are parallel but discrete statutes. Section 106 of the NHPA applies only to a Federal ''undertaking,'' which, for the type of work the FDIC does, means an activity ''requiring a federal permit, license or approval.'' [10] Section 102(2)(C) of the NEPA applies only to a ''major Federal action,'' which includes actions with environmental effects that may be major and which are potentially subject to Federal control and responsibility. As noted in the preamble

[1] 54 U.S.C. 306108.

[2] 42 U.S.C. 4332(C).

[3] 12 CFR 303.40 and 303.42(b)(4) and (5).

[4] 12 CFR 303.40, 303.42(b)(4) and (5), and 303.182. See also section 402 (54 U.S.C. 307101) of the NHPA that requires Federal undertakings outside of the United States take into account adverse effects on sites inscribed on the World Heritage List or on the foreign nation's equivalent of the National Register for the purpose of avoiding or mitigating adverse effects. Congress added this provision to the NHPA in 1980 to govern Federal undertakings outside the United States.

[5] 12 CFR 303.184.

[6] 71 FR 42399 (July 26, 2006).

[7] 63 FR 63475 (Nov. 13, 1998).

[8] 63 FR 44756 (Nov. 20, 1998); amended 67 FR 79278 (Dec. 27, 2002). The FDIC expects to update this Statement of Policy at a later date, however, applications for deposit insurance would also be impacted similarly based on this final rule in that statements regarding the NHPA and the NEPA would not be required for deposit insurance applications.

[9] 12 U.S.C. 3311. In accordance with the EGRPRA, the FDIC regularly reviews its regulations to identify outdated or otherwise unnecessary regulatory requirements.

[10] Undertaking is a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including: (1) Those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license or approval; and (4) those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency. 54 U.S.C. 300320.

to the July notice of proposed rulemaking, in reviewing the case law on what constitutes an ''undertaking'' under NHPA or a ''major Federal action'' under the NEPA, the FDIC does not believe that approval of a Covered Application constitutes a Federal undertaking under section 106 or section 402 of the NHPA or a major Federal action under section 102(2)(C) of the NEPA as discussed below.

Section 18(d) of the Federal Deposit Insurance Act requires the FDIC's consent in connection with: An insured state nonmember bank's establishment of a domestic or foreign branch, an insured state nonmember bank's relocation of its main office or a domestic branch, and a foreign bank's relocation of an insured branch.[11] Section 3(o) defines a domestic branch as any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State of the United States or in any Territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Virgin Islands at which deposits are received or checks paid or money lent.[12] These functions (receiving deposits, paying checks, and lending money) characterize a ''domestic branch'' and are generally referred to as the ''core banking functions.'' Section 3(o) likewise defines a ''foreign branch'' as any office or place of business located outside the United States at which ''banking operations are conducted,'' [13] and an insured branch of a foreign bank is defined as a branch of a foreign bank at which insured deposits are received.[14] Section 18(d) therefore generally prohibits a state nonmember bank from engaging in specified activities at a location other than an FDIC-approved main office, domestic branch, or foreign branch, and prohibits a foreign bank from receiving insured deposits at a location other than an approved insured branch. Section 18(d) does not confer upon the FDIC the statutory authority to oversee the construction or acquisition of bank premises, but it governs the circumstances under which the FDIC may authorize a state nonmember bank or an insured branch of a foreign bank to engage in specified banking functions from bank premises. The FDIC's approval of an application under section 18(d), as well as its consideration of NHPA and NEPA in connection with deposit insurance applications, only authorizes certain banking activities to occur at a particular geographic location. Therefore, the FDIC's approval of a Covered Application does not authorize any building construction or demolition—or any other activity that could affect historic properties or the environment.

Currently, the FDIC is the only Federal banking agency that requires consideration of the NHPA and NEPA in connection with branch applications. The regulatory requirements under the Federal Reserve Board and the OCC do not incorporate review of the NHPA and the NEPA with respect to branch applications.[15] After carefully reviewing the FDIC's procedures for Covered Applications, the FDIC has concluded that consideration of the NHPA and NEPA is not required by law and is an unnecessary regulatory requirement for insured State nonmember banks.

Proposed Rule; Rescission of Policy Statements

On July 10, 2020, the FDIC published a notice of proposed rulemaking (NPR) to amend its application requirements for the establishment and relocation of branches and offices and deposit insurance for de novo institutions so that such applications would no longer require statements regarding the compliance of such proposal with the NHPA and NEPA.[16] The NPR proposed amending the FDIC regulations to remove NHPA and NEPA requirements embedded in the branch application procedures, and to rescind the statements of policy regarding the NHPA and NEPA, because consideration of these statutes during the processing of these applications is an unnecessary regulatory requirement and would make the FDIC's procedures consistent with the branch application procedures for national banks and insured State member banks supervised by the OCC and Federal Reserve System.

Comments

The FDIC issued the NPR on July 10, 2020, with a 30-day comment period. The FDIC received one comment on the NPR. The commenter supported the proposal by noting that rescinding the filing requirement would make the application process more efficient, align with timing requirements, and remove a time-consuming and onerous requirement. Consequently, the final rule is adopted without change.

Explanation of the Final Rule

The final rule amends parts 303 and 347 to remove references to compliance statements regarding the NHPA and NEPA, as well as to rescind the *Statement of Policy Regarding the National Historic Preservation Act of 1966* and the *Statement of Policy Regarding the National Environmental Policy Act of 1969.* The amendments to 12 CFR parts 303 and 347, together with the rescission of the two Statements of Policy regarding the NHPA and the NEPA, eliminate requirements that are unnecessary for insured state nonmember banks and insured branches of foreign banks, as well as improve the efficiency of the Covered Application review process. Additionally, these actions place the FDIC in alignment with the other Federal banking agencies and remove a competitive disadvantage insured state nonmember banks and insured branches of foreign banks now face relative to insured state member banks and national banks. Furthermore, insured state nonmember banks and insured branches of foreign banks remain subject to any applicable state and local historic preservation and environmental laws.

Expected Effects

According to the most recent data, the FDIC supervises 3,309 depository institutions. The final rule specifically affects 2,980 state nonmember depository institutions supervised by the FDIC and 9 insured branches of foreign banks.[17] FDIC supervised State savings banks and associations are not subject to the NHPA/NEPA requirements because 12 CFR part 303 only applies to insured state nonmember banks. As previously discussed, the final rule would (1) remove ''NEPA'' and ''NHPA'' as defined terms in 12 CFR 303.2(w) and (x); (2) amend the branch application filing procedures for state nonmember banks set forth in 12 CFR 303.42 by deleting the requirements related to the NHPA and the NEPA set forth in paragraphs (b)(4) and (5); (3) amend the foreign branch application notice procedures for state nonmember banks set forth in 12 CFR 303.182 by removing the requirements to provide a statement in accordance with NHPA set forth in paragraphs (a) and (b)(2)(i), and by removing NHPA compliance as a basis for withholding general consent to establish or relocate a foreign branch under 12 CFR 347.119(b); (4) amend the filing procedures for moving an insured branch of a foreign bank set forth in 12

[11] 12 U.S.C. 1828(d)(1) & (2).

[12] 12 U.S.C. 1813(o).

[13] *Id.*

[14] 12 U.S.C. 1813(s); *see also* 12 U.S.C. 3101(b)(6).

[15] 84 FR 51711 (Sept. 30, 2019).

[16] 85 FR 41442 (July 10, 2020).

[17] FDIC Call Report data, March 31, 2020.

CFR 303.184 by deleting the requirements related to the NHPA and the NEPA set forth in paragraphs (a)(2)(iii) and (iv) and (d)(1)(iv); and (5) rescind the *Statement of Policy Regarding the National Historic Preservation Act of 1966;* and (6) rescind the *Statement of Policy on National Environmental Policy Act Procedures Relating to Filings Made with the FDIC.* In so doing, the final rule would amend the required contents for applications for establishment of a branch and applications for relocation of a branch or main office. Between 2015 and 2018, the FDIC received 549 applications from 400 unique insured State nonmember banks per year to establish a branch, 177 applications from 152 unique insured State nonmember banks per year to relocate a branch or main office, and 1 application from insured branches of foreign banks per year to relocate a branch or main office, on average.[18] For purposes of this analysis, the FDIC is estimating that the number of unique respondents affected by the final rule would be consistent with this recent experience. Therefore, the FDIC estimates that the final rule would affect 400 insured State nonmember banks applying to establish a domestic branch, 152 insured State nonmember institutions applying to relocate a branch or main office, and 1 insured branch of a foreign bank applying to relocate a branch or main office, per year, on average.

The final rule would likely reduce the costs associated with filing branch applications for affected entities by making the process more efficient. Although the final rule is expected to reduce costs associated with Covered Applications for applicants dealing with historic properties or environmental issues, the FDIC does not believe the final rule will reduce the average hours per response for Covered Applications. Additionally, as previously discussed, the FDIC is currently the only Federal banking agency that requires consideration of the NHPA and NEPA in connection with branch applications. Therefore, the final rule is expected to remove a competitive disadvantage that insured state nonmember banks and insured branches of foreign banks now face relative to state member banks and national banks.

The FDIC believes that the associated reductions in costs and application information content as a result of the final rule are unlikely to generate significant effects on the U.S. economy. The estimated cost reductions are likely to be small because the number of entities affected is also estimated to be small. Further, as previously discussed, while covered applications of insured state nonmember banks and insured branches of foreign banks would no longer be subject to NHPA or NEPA review under federal law, they would remain subject to any applicable state and local historic preservation and environmental laws. Accordingly, outcomes for individual properties that are the subject of covered applications may differ in some states from what they would have been in the absence of the rule.

As previously discussed, after reviewing the case law on what constitutes an ''undertaking'' under NHPA or a ''major Federal action'' under the NEPA, the FDIC does not believe that approval of a Covered Application constitutes a federal undertaking under section 106 of the NHPA or a major federal action under section 102(2)(C) of the NEPA. Therefore, concurrent with the amendment of 12 CFR parts 303 and 347, the FDIC is planning on rescinding the Statements of Policy entitled *Statement of Policy Regarding the National Historic Preservation Act of 1966,* and *Statement of Policy on National Environmental Policy Act Procedures Relating to Filings Made with the FDIC.* The FDIC believes that the concurrent action to rescind these Statements of Policy will help simplify the application process by removing unnecessary information for applicants, thereby making the process more efficient.

Alternatives Considered

The FDIC considered alternatives to the final rule but believes that the amendments represent the most appropriate option for affected entities. As discussed previously, after carefully reviewing the FDIC's procedures for Covered Applications, the FDIC has concluded that consideration of the NHPA and the NEPA is not required by law and is an unnecessary regulatory requirement of the branch application review process. The FDIC considered the alternative of retaining the current regulations, but did not choose to do so. As discussed elsewhere in this preamble, the FDIC believes the regulations are unnecessary, require entities to incur unnecessary costs associated with submitting branch applications, and perpetuate a competitive disadvantage for insured state nonmember banks and insured branches of foreign banks relative to insured state member banks and national banks. Additionally, the FDIC considered retaining the Statements of Policy entitled, *Statement of Policy Regarding the National Historic Preservation Act of 1966 and Statement of Policy on National Environmental Policy Act Procedures Relating to Filings Made with the FDIC,* but did not choose to do so. Upon reevaluation of the applicability of what constitutes an ''undertaking'' under NHPA or a ''major Federal action'' under the NEPA, and deletion of requirements related to the NHPA and the NEPA in 12 CFR parts 303 and 347, these Statements of Policy would be unnecessary. Therefore, the FDIC is amending 12 CFR parts 303 and 347 by deleting the requirements related to the NHPA and the NEPA and concurrently rescinding the related Statements of Policy.

Regulatory Analysis

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that, in connection with a notice of final rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of the final rule on small entities.[19] However, a final regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification, including a statement providing a factual basis for the certification, in the **Federal Register**, together with the rule. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million.[20] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons provided below, the FDIC certifies that the final rule will not have a significant economic impact on a substantial

[18] FDIC Application Data.

[19] 5 U.S.C. 601, *et seq.*

[20] The SBA defines a small banking organization as having $600 million or less in assets, where ''a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the FDIC-supervised institution is ''small'' for the purposes of RFA.

number of small banking organizations. Accordingly, a regulatory flexibility analysis is not required.

According to the most recent data, the FDIC supervises 3,309 insured depository institutions, of which 2,548 are considered small banking organizations for the purposes of RFA.[21] As previously discussed, the final rule would (1) remove ''NEPA'' and ''NHPA'' as defined terms in 12 CFR 303.2(w) and (x); (2) amend the branch application filing procedures for state nonmember banks set forth in 12 CFR 303.42 by deleting the requirements related to the NHPA and the NEPA set forth in paragraphs (b)(4) and (5); (3) amend the foreign branch application notice procedures for state nonmember banks set forth in 12 CFR 303.182 by removing the requirements to provide a statement in accordance with NHPA set forth in paragraphs (a) and (b)(2)(i), and by removing NHPA compliance as a basis for withholding general consent to establish or relocate a foreign branch under 12 CFR 347.119(b); (4) amend the filing procedures for moving an insured branch of a foreign bank set forth in 12 CFR 303.184 by deleting the requirements related to the NHPA and the NEPA set forth in paragraphs (a)(2)(iii) and (iv) and (d)(1)(iv); (5) rescind the *Statement of Policy Regarding the National Historic Preservation Act of 1966;* and (6) rescind the *Statement of Policy on National Environmental Policy Act Procedures Relating to Filings Made with the FDIC.* In so doing, the final rule amends the required contents for applications for establishment of a branch and applications for relocation of a branch or main office. The final rule could affect the 2,352 small state nonmember depository institutions supervised by the FDIC. No insured branches of foreign banks are considered small banking organizations for the purposes of RFA.[22]

Between 2015 and 2018, the FDIC received applications from 195 unique small insured State nonmember banks per year to establish a branch and applications from 68 unique small insured State nonmember banks per year to relocate a branch or main office, on average.[23] For purposes of this analysis, the FDIC is estimating that the number of unique respondents affected by the final rule will be consistent with this recent experience. Therefore, the FDIC estimates that the final rule will affect approximately 195 small insured State nonmember banks applying to establish a domestic branch and approximately 68 small insured State nonmember institutions applying to relocate a branch or main office, per year. In total, these 263 affected entities represent no more than an estimated 10.3 percent of small FDIC-supervised institutions.

The final rule is likely to reduce the costs associated with filing Covered Applications for small entities, making the process more efficient. Although the final rule is expected to reduce costs associated with Covered Applications for small applicants dealing with historic properties or environmental issues, the FDIC does not believe the final rule will reduce the average hours per response for Covered Applications. Additionally, as previously discussed, the FDIC is currently the only Federal banking agency that requires consideration of the NHPA and NEPA in connection with branch applications. Therefore, the final rule is expected to remove a competitive disadvantage that small insured state nonmember banks and insured branches of foreign banks currently face relative to state member banks and national banks.

Based on the information above, and pursuant to section 605(b) of the RFA, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),[24] the FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently-valid Office of Management and Budget (OMB) control number. The final rule affects the FDIC's current information collection titled ''Application for a Bank to Establish a Branch or Move its Main Office'' (OMB Control No. 3064–0070). In particular, the final rule removes the requirements related to NHPA and NEPA therefore reducing the PRA burden. However, the amount of hourly burden previously indicated in connection with the PRA information collection does not distinguish between the time to comply with the NHPA and NEPA and the other non-NHPA/NEPA notification requirements. For this reason, the FDIC is assuming that any allotted time dedicated to NHPA and NEPA is minimal and will result in a zero net change in the current estimated average hourly burden for the information collection. Therefore, no submission will be made to OMB for review.

C. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[25] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[26] Because the final rule does not impose any reporting, disclosure, or other new requirements on insured depository institutions, the requirements of RCDRIA do not apply.

D. Congressional Review Act

For purposes of Congressional Review Act (CRA), the OMB makes a determination as to whether a final rule constitutes a ''major'' rule.[27] If a rule is deemed a major rule by the OMB, the CRA generally provides that the rule may not take effect until at least 60 days following its publication.[28]

The CRA defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-

[21] FDIC Call Report data for the period ending March 31, 2020.

[22] FFIEC Reports of Condition and Income (Call Report), for the period ending March 31, 2020.

[23] FDIC Application Data.

[24] 44 U.S.C. 3501–3521.

[25] 12 U.S.C. 4802(a).

[26] *Id.* at 4802(b).

[27] 5 U.S.C. 801 *et seq.*

[28] 5 U.S.C. 801(a)(3).

based enterprises in domestic and export markets.[29]

The OMB has determined that the final rule is not a major rule for purposes of the CRA and the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act [30] requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC has sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language in connection with the proposed rule.

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 347

Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Credit, Foreign banking, Investments, Reporting and recordkeeping requirements, U.S. Investments abroad.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the preamble, the FDIC amends 12 CFR parts 303 and 347 as follows:

PART 303—FILING PROCEDURES

■ 1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 478, 1463, 1467a, 1813, 1815, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831i, 1831e, 1831o, 1831p–1, 1831w, 1831z, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5412; 15 U.S.C. 1601–1607.

§ 303.2 [Amended]

■ 2. In § 303.2, remove paragraphs (w) and (x) and redesignate paragraphs (y) through (gg) as paragraphs (w) through (ee), respectively.

[29] 5 U.S.C. 804(2).

[30] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999).

§ 303.42 [Amended]

■ 3. In § 303.42, remove paragraphs (b)(4) and (5) and redesignate paragraphs (b)(6) through (8) as paragraphs (b)(4) through (6), respectively.

■ 4. Amend § 303.182 by revising paragraphs (a) and (b)(2)(i) to read as follows:

§ 303.182 Establishing, moving or closing a foreign branch of an insured state nonmember bank.

(a) *Notice procedures for general consent.* Notice in the form of a letter from an eligible depository institution establishing or relocating a foreign branch pursuant to § 347.117(a) of this chapter must be provided to the appropriate FDIC office no later than 30 days after taking such action. The notice must include the location of the foreign branch, including a street address. The FDIC will provide written acknowledgment of receipt of the notice.

(b) * * *

(2) * * *

(i) The exact location of the proposed foreign branch, including the street address.

* * * * *

■ 5. Amend § 303.184 by:

■ a. Removing paragraphs (a)(2)(iii) and (iv);

■ b. Redesignating paragraphs (a)(2)(v) and (vi) as paragraphs (a)(iii) and (iv), respectively; and

■ c. Revising paragraph (d)(1)(iv).

The revision reads as follows:

§ 303.184 Moving an insured branch of a foreign bank.

* * * * *

(d) * * *

(1) * * *

(iv) Compliance with the CRA and any applicable related regulations, including 12 CFR part 345, has been considered and favorably resolved;

* * * * *

PART 347—INTERNATIONAL BANKING

■ 6. The authority citation for part 347 continues to read as follows:

Authority: 12 U.S.C. 1813, 1815, 1817, 1819, 1820, 1828, 3103, 3104, 3105, 3108, 3109; Pub. L. 111–203, section 939A, 124 Stat. 1376, 1887 (July 21, 2010) (codified 15 U.S.C. 78o–7 note).

§ 347.119 [Amended]

■ 7. Amend § 347.119 by removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 20, 2020.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–23529 Filed 11–12–20; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0779; Product Identifier 2020–NM–092–AD; Amendment 39–21311; AD 2020–22–15]

RIN 2120–AA64

Airworthiness Directives; the Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model DC–10–10 and DC–10–10F airplanes, Model DC–10–15 airplanes, Model DC–10–30 and DC–10–30F (KC–10A and KDC–10) airplanes, Model DC–10–40 and DC–10–40F airplanes, Model MD–10–10F and MD–10–30F airplanes, and Model MD–11 and MD–11F airplanes. This AD was prompted by reports of cracked floor beams and floor beam supports in the area of the overwing exit doors located at certain stations (STA). This AD requires an inspection of the overwing floor beams for any repair, repetitive inspections of the overwing floor beams and floor beam supports at certain STA on the left and right sides for any crack, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 18, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 18, 2020.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* 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.

It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0779.

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–2020–0779; 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: Manuel Hernandez, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5256; fax: 562–627–5210; email: *Manuel.F.Hernandez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all The Boeing Company Model DC–10–10 and DC–10–10F airplanes, Model DC–10–15 airplanes, Model DC–10–30 and DC–10–30F (KC–10A and KDC–10) airplanes, Model DC–10–40 and DC–10–40F airplanes, Model MD–10–10F and MD–10–30F airplanes, and Model MD–11 and MD–11F airplanes. The NPRM published in the **Federal Register** on August 25, 2020 (85 FR 52287). The NPRM was prompted by reports of cracked floor beams and floor beam supports in the area of the overwing exit doors located at certain STA. The NPRM proposed to require an inspection of the overwing floor beams for any repair, repetitive inspections of the overwing floor beams and floor beam supports at certain STA on the left and right sides for any crack, and applicable on-condition actions.

The FAA is issuing this AD to address potential undetected overwing floor beam cracks that could grow in length until the floor beam severs, and, if limit load is applied with two adjacent severed floor beams, could adversely affect the structural integrity of the airplane, which could result in the loss of primary control systems and lead to reduced controllability of the airplane.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comments received. Boeing and Shawn Darr indicated support for the NPRM.

Conclusion

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

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020; and Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020. The service information describes procedures for a general visual inspection of the overwing floor beams for any repair; repetitive eddy current high frequency (ETHF) inspections of the overwing floor beams and floor beam supports for cracks, or repetitive ETHF inspections of the overwing floor beams and detailed inspections of the overwing floor beam supports at certain stations on the left and right sides for any crack, depending on configuration; and applicable on-condition actions. On-condition actions include repair. These documents are distinct since they apply to different airplane models. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 224 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
General visual inspection	1 work-hour × $85 per hour = $85.	$0	$85	$19,040.
ETHF and detailed inspections.	Up to 70 work-hours × $85 per hour = Up to $5,950 per inspection cycle.	0	Up to $5,950 per inspection cycle.	Up to $1,332,800 per inspection cycle.

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 375 work-hours × $85 per hour = Up to $31,875	Up to $190,576	Up to $222,451.

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):

2020–22–15 The Boeing Company: Amendment 39–21311; Docket No. FAA–2020–0779; Product Identifier 2020–NM–092–AD.

(a) Effective Date

This AD is effective December 18, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company airplanes specified in paragraphs (c)(1) through (6) of this AD, certificated in any category.

(1) Model DC–10–10 and DC–10–10F airplanes.

(2) Model DC–10–15 airplanes.

(3) Model DC–10–30 and DC–10–30F (KC–10A and KDC–10) airplanes.

(4) Model DC–10–40 and DC–10–40F airplanes.

(5) Model MD–10–10F and MD–10–30F airplanes.

(6) Model MD–11 and MD–11F airplanes.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by reports of cracked floor beams and floor beam supports in the area of the overwing exit doors located at certain stations. The FAA is issuing this AD to address potential undetected overwing floor beam cracks that could grow in length until the floor beam severs, and, if limit load is applied with two adjacent severed floor beams, could adversely affect the structural integrity of the airplane, which could result in the loss of primary control systems and lead to reduced controllability of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020; or Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020; as applicable, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020; or Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020; as applicable.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin DC10–53A184, dated February 6, 2020; or Boeing Alert Service Bulletin MD11–53A088, dated March 6, 2020; as applicable, which are referred to in Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020; and Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020; respectively.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020, uses the phrase ''the original issue date of Requirements Bulletin DC10–53A184 RB,'' this AD requires using ''the effective date of this AD,'' except where Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020, uses the phrase ''the original issue date of Requirements Bulletin DC10–53A184 RB'' in a note or flag note.

(2) Where Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020, uses the phrase ''the original issue date of Requirements Bulletin MD11–53A088 RB,'' this AD requires using ''the effective date of this AD,'' except where Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020, uses the phrase ''the original issue date of Requirements Bulletin MD11–53A088 RB'' in a note or flag note.

(3) Where Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020, specifies contacting Boeing for repair instructions or for alternative inspections: This AD requires doing the repair, or doing the alternative inspections and applicable on-condition actions before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(4) Where Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020, specifies contacting Boeing for repair instructions or for alternative inspections: This AD requires doing the repair, or doing the alternative inspections and applicable on-condition actions before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles 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 (j)(1) of this AD. Information may be emailed to: *9-ANM-LAACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Manuel Hernandez, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5256; fax: 562–627–5210; email: *Manuel.F.Hernandez@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this

paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

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

(i) Boeing Alert Requirements Bulletin DC10–53A184 RB, dated February 6, 2020.

(ii) Boeing Alert Requirements Bulletin MD11–53A088 RB, dated March 6, 2020.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.*

(4) 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.

(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 21, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–25013 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0213; Project Identifier 2019–NE–03–AD; Amendment 39–21324; AD 2020–23–08]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG (Type Certificate Previously Held by Rolls-Royce plc) Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Rolls-Royce Deutschland Ltd & Co KG (RRD) Tay 611–8C model turbofan engines. This AD was prompted by reports of low-pressure compressor (LPC) rotor blade retention lug failure. This AD requires limiting the service life of the LPC rotor blades based on the number of dry-film lubricant (DFL) re-applications. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 18, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 18, 2020.

ADDRESSES: For service information identified in this final rule, contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlewitz, Blankenfelde-Mahlow, Germany; phone: +49 0 33–7086–4040; fax: +49 0 33–7086–51–4040; email: *rrd.techhelp@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 at *https://www.regulations.gov* by searching for and locating Docket No.FAA–2019–0213.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0213; 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, the mandatory continuing airworthiness information (MCAI), 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: Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; fax: (781) 238–7199; email: *barbara.caufield@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 certain RRD Tay 611–8C model turbofan engines. The NPRM published in the **Federal Register** on May 6, 2019 (84 FR 19745). The NPRM was prompted by reports of LPC rotor blade retention lug failures. In the NPRM, the FAA proposed to require a determination of the number of DFL re-applications that have been applied to the LPC rotor blades and, depending on the number of DFL re-applications, replacement of LPC rotor blades. The FAA is issuing this AD to address the unsafe condition on these products.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2018–0055, dated March 12, 2018 (referred to after this as ''the MCAI''), to address the unsafe condition on these products. The MCAI states:

> The airworthiness limitations for the Tay 611–8C engines, which are approved by EASA, are currently defined and published in the ALS. Among others, the ALS contains limitation(s) applicable to the maximum number of Dry Film Lubrication (DFL) treatments applied on fan blade retention lugs. These instructions have been identified as mandatory for continued airworthiness. Failure to accomplish these instructions could result in an unsafe condition.
>
> In addition to the ALS, RRD issued the NMSB to provide alternative methods to establish, in case this cannot be determined from the engine maintenance records, the number of DFL treatments that have been applied to an engine.

You may obtain further information by examining the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0213.

Comments

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

Request To Modify Applicability

NetJets Aviation (NJA) requested that engines which have incorporated the 12,000 cycle life limit on LPC rotor blade, part number JR58319, per the Airworthiness Limitations section 05–10–01–870–002, chapter 05–10–01, Rolls-Royce (RR) Tay Propulsion System Time Limits Manual, be excluded from the applicability of this AD.

The FAA disagrees because the low cycle fatigue life limit of 12,000 cycles for the LPC rotor blade is a separate requirement from the requirement of this AD to also limit the number of dry film lubricant re-applications.

Comment Regarding DFL Re-application Limit

NJA noted that dry film re-application is only accomplished in an engine overhaul shop, and the 12 DFL-application limit every 1,300 cycles will not be exceeded if the life limit is being tracked. The FAA disagrees. The FAA notes that there are tasks in the Aircraft Maintenance Manual (AMM) for DFL re-applications that are not limited to shop visits. Therefore, this AD is necessary to address those cases in which the AMM DFL re-application tasks are necessary and the engine is not in the shop. This AD requires that when a complete

record of the total number of DFL re-applications is unavailable, count one DFL re-application for every 1,300 flight cycles of blade use.

Request to Add Engine Serial Numbers

NJA requested that the serial numbers for the 12 affected engines be included in this AD.

The FAA disagrees. The applicability of this AD is to RRD Tay 611–8C model turbofan engines, with LPC rotor blades, P/N JR58319, installed, and is not based on serial numbers of the engines. The number ''12'' in the Costs of Compliance section is an estimate of the number of affected engines installed on airplanes of U.S. registry.

Conclusion

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

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

Related Service Information under 1 CFR Part 51

The FAA reviewed RRD Non-Modification Service Bulletin TAY–72–1835, Initial Issue, dated December 15, 2017. The service information describes procedures for marking the LPC rotor blades with a suffix code during the next scheduled LPC fan blade removal. 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 **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 12 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
Record Search to establish number of DFL re-applications.	1.5 work-hours × $85 per hour = $127.50	$0	$127.50	$1,530

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace LPC rotor blade	2 work-hours × $85 per hour = $170.	$11,270	$11,440

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 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.

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):

2020–23–08 Rolls-Royce Deutschland Ltd & Co KG (Type Certificate Previously Held by Rolls-Royce plc): Amendment 39–21324; Docket No. FAA–2019–0213; Project Identifier 2019–NE–03–AD.

(a) Effective Date

This airworthiness directive (AD) is effective December 18, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG (RRD) Tay 611–8C model turbofan engines, with low-pressure compressor (LPC) rotor blades, part number (P/N) JR58319, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code, 7230 Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by reports of LPC rotor blade retention lug failures. The FAA is issuing this AD to prevent failure of the LPC rotor blade. The unsafe condition, if not addressed, could result in loss of engine power in flight and reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within 30 days after the effective date of this AD, determine the number of dry film lubrication (DFL) re-applications that were applied to each LPC rotor blade by reviewing the maintenance records. If a complete record of the total number of DFL re-applications is unavailable, count one DFL re-application for every 1,300 flight cycles of blade use.

(i) If the number of DFL re-applications is less than 13, mark the LPC rotor blade with a suffix code during the next scheduled LPC fan blade removal using the instructions in the Accomplishment Instructions, paragraph 3.B.(1)(c)[2] or 3.F.(1)(c)[2], as applicable, of RRD Non-Modification Service Bulletin TAY–72–1835, Initial Issue, dated December 15, 2017.

(ii) If the number of DFL re-applications is 13 or more, replace the LPC rotor blade with a part eligible for installation before further flight.

(2) [Reserved]

(h) Installation Prohibition

After the effective date of this AD, do not install a LPC rotor blade on any engine unless it has been determined that the LPC rotor blade has less than 13 DFL re-applications and has been marked in accordance with paragraph (g)(1)(i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(j) Related Information

(1) For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; fax: (781) 238–7199; email: *barbara.caufield@faa.gov.*

(2) Refer to European Union Aviation Safety Agency (EASA) AD 2018–0055, dated March 12, 2018, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2019–0213.

(k) Material Incorporated by Reference

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

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

(i) Rolls-Royce Deutschland Ltd & Co KG (RRD) Non-Modification Service Bulletin TAY–72–1835, Initial Issue, dated December 15, 2017.

(ii) [Reserved]

(3) For RRD service information identified in this AD, contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, Dahlewitz, Blankenfelde-Mahlow, Germany; phone: +49 0 33–7086–4040; fax: +49 0 33–7086–51–4040; email: *rrd.techhelp@rolls.royce.com.*

(4) 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.

(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 November 3, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–25106 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31339 Amdt. No. 3929]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective November 13, 2020. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of November 13, 2020.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29,

Room 104, Oklahoma City, OK 73169. Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, 8260–15B, and 8260–15C when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPS, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

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. 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. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on October 30, 2020.

Wade Terrell,

Aviation Safety, Manager, Flight Procedures & Airspace Group, Flight Technologies and Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 3 December 2020

San Diego, CA, Brown Field Muni, RNAV (GPS) RWY 8L, Amdt 1C
Longmont, CO, Vance Brand, Takeoff Minimums and Obstacle DP, Amdt 2
Danbury, CT, KDXR, LOC RWY 8, Amdt 6B
Danbury, CT, KDXR, RNAV (GPS) RWY 8, Orig–A
Mc Rae, GA, KMQW, RNAV (GPS) RWY 21, Amdt 1B
Abingdon, VA, Virginia Highlands, Takeoff Minimums and Obstacle DP, Amdt 3
Sturgeon Bay, WI, Door County Cherryland, Takeoff Minimums and Obstacle DP, Amdt 1

Effective 31 December 2020

Atqasuk, AK, Atqasuk Edward Burnell Sr Memorial, RNAV (GPS) RWY 7, Amdt 2
Atqasuk, AK, Atqasuk Edward Burnell Sr Memorial, RNAV (GPS) RWY 25, Amdt 2
Atqasuk, AK, Atqasuk Edward Burnell Sr Memorial, Takeoff Minimums and Obstacle DP, Orig–A
Gulkana, AK, PAGK, VOR RWY 15L, Orig–A
Juneau, AK, Juneau Intl, JUNEAU SIX, Graphic DP
Kiana, AK, Bob Baker Memorial, SELAWIK TWO, Graphic DP
Kiana, AK, Bob Baker Memorial, Takeoff Minimums and Obstacle DP, Amdt 1
Noorvik, AK, Robert/Bob/Curtis Memorial, RNAV (GPS) RWY 6, Amdt 1
Noorvik, AK, Robert/Bob/Curtis Memorial, RNAV (GPS) RWY 24, Amdt 1
Noorvik, AK, Robert/Bob/Curtis Memorial, Takeoff Minimums and Obstacle DP, Amdt 1
Muscle Shoals, AL, KMSL, VOR RWY 12, Amdt 6C
Riverside, CA, Riverside Muni, RIVERSIDE TWO, Graphic DP
Riverside, CA, Riverside Muni, Takeoff Minimums and Obstacle DP, Amdt 12
Punta Gorda, FL, KPGD, RNAV (GPS) RWY 15, Amdt 2
Punta Gorda, FL, KPGD, RNAV (GPS) RWY 33, Amdt 2
Punta Gorda, FL, Punta Gorda, Takeoff Minimums and Obstacle DP, Amdt 4
Lanai City, HI, PHNY, ILS OR LOC RWY 3, Amdt 1B
Lanai City, HI, PHNY, RNAV (GPS) RWY 3, Orig–C
Sioux City, IA, Sioux Gateway/Brig Gen Bud Day Field, RNAV (GPS) RWY 18, Amdt 2
Sioux City, IA, Sioux Gateway/Brig Gen Bud Day Field, RNAV (GPS) RWY 36, Amdt 1
Sioux City, IA, Sioux Gateway/Brig Gen Bud Day Field, Takeoff Minimums and Obstacle DP, Amdt 4
Decatur, IL, KDEC, ILS OR LOC RWY 6, Amdt 14A

Pinckneyville, IL, KPJY, RNAV (GPS) RWY 18, Amdt 1C
Quincy, IL, KUIN, RNAV (GPS) RWY 4, Orig–A
Quincy, IL, KUIN, RNAV (GPS) RWY 13, Orig–A
Quincy, IL, KUIN, RNAV (GPS) RWY 18, Orig–A
Quincy, IL, KUIN, RNAV (GPS) RWY 22, Orig–A
Quincy, IL, KUIN, RNAV (GPS) RWY 31, Orig–A
Quincy, IL, KUIN, RNAV (GPS) RWY 36, Orig–A
Angola, IN, Tri-State Steuben County, Takeoff Minimums and Obstacle DP. Amdt 1
Indianapolis, IN, KTYQ, ILS OR LOC RWY 36, Amdt 5D
Elizabethtown, KY, KEKX, RNAV (GPS) RWY 5, Amdt 1
Elizabethtown, KY, KEKX, RNAV (GPS) RWY 23, Orig–B
Elizabethtown, KY, Addington Field, VOR–A, Amdt 3A, CANCELLED
Louisville, KY, KSDF, LOC RWY 29, Amdt 1A
Marion, KY, 5M9, RNAV (GPS) RWY 7, Amdt 2A
Marion, KY, 5M9, RNAV (GPS) RWY 25, Amdt 2A
Frenchville, ME, Northern Aroostook Rgnl, RNAV (GPS) RWY 14, Amdt 1A
Majuro Atoll, MH, PKMJ, NDB RWY 7, Amdt 1B
Majuro Atoll, MH, PKMJ, NDB RWY 25, Amdt 1B
Majuro Atoll, MH, PKMJ, RNAV (GPS) RWY 7, Orig–E
Majuro Atoll, MH, PKMJ, RNAV (GPS) RWY 25, Orig–E
Princeton, MN, KPNM, NDB RWY 15, Amdt 1A, CANCELLED
Princeton, MN, KPNM, RNAV (GPS) RWY 16, Orig–E
Princeton, MN, KPNM, RNAV (GPS) RWY 34, Orig–D
Princeton, MN, Princeton Muni, Takeoff Minimums and Obstacle DP, Amdt 1A
Gulfport, MS, KGPT, RNAV (GPS) RWY 14, Amdt 2A
Conrad, MT, SO1, RNAV (GPS) RWY 24, Orig–A
New Town, ND, 05D, Takeoff Minimums and Obstacle DP, Orig
Teterboro, NJ, Teterboro, RNAV (GPS) X RWY 19, Orig
Elmira/Corning, NY, KELM, ILS OR LOC RWY 6, Amdt 6
Elmira/Corning, NY, Elmira/Corning Rgnl, ILS OR LOC RWY 24 Amdt 20
Elmira/Corning, NY, KELM, RNAV (GPS) RWY 6, Amdt 3
Elmira/Corning, NY, Elmira/Corning Rgnl, RNAV (GPS) RWY 10, Amdt 2B
Elmira/Corning, NY, Elmira/Corning Rgnl, RNAV (GPS) RWY 28, Amdt 3C
Ithaca, NY, Ithaca Tompkins Rgnl, ILS OR LOC RWY 32, Amdt 7A
Pendleton, OR, KPDT, ILS OR LOC RWY 26, Amdt 25D
Pendleton, OR, KPDT, RNAV (GPS) RWY 26, Orig–F
Philadelphia, PA, KPHL, VOR–A, Amdt 3B
Pottsville, PA, Schuykill County/Joe Zerbey, RNAV (GPS) RWY 11, Amdt 3
Pottsville, PA, Schuykill County/Joe Zerbey, Takeoff Minimums and Obstacle DP, Amdt 3
Reedsville, PA, KRVL, LOC RWY 6, Amdt 8C
Reedsville, PA, KRVL, RNAV (GPS) RWY 6, Orig–B
Reedsville, PA, KRVL, RNAV (GPS) RWY 24, Orig–C
Denton, TX, Denton Enterprise, Takeoff Minimums and Obstacle DP, Amdt 4
Blacksburg, VA, KBCB, NDB–A, Amdt 4A, CANCELLED
Petersburg, WV, W99, RNAV (GPS) Y RWY 31, Orig–B
Petersburg, WV, W99, RNAV (GPS) Z RWY 31, Orig–B

[FR Doc. 2020–24987 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31340; Amdt. No. 3930]

Standard Instruction Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective November 13, 2020. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of November 13, 2020.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg 29 Room 104, Oklahoma City, OK 73169. Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This

amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

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. 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. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on October 30, 2020.

Wade Terrell,

Aviation Safety, Manager, Flight Procedures & Airspace Group, Flight Technologies and Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

Airac date	State	City	Airport	FDC No.	FDC date	Subject
3-Dec-20	CA	Grass Valley	Nevada County	0/1559	10/19/20	RNAV (GPS) RWY 7, Orig-B.
3-Dec-20	IA	Waterloo	Waterloo Rgnl	0/1726	10/19/20	Takeoff Minimums and Obstacle DP, Orig.
3-Dec-20	VA	Richmond	Richmond Intl	0/2620	10/15/20	VOR RWY 20, Amdt 1D.
3-Dec-20	OR	Mc Minnville	Mc Minnville Muni	0/2923	10/15/20	RNAV (GPS) RWY 22, Orig-A.
3-Dec-20	MA	Taunton	Taunton Muni—King Field	0/4694	10/20/20	RNAV (GPS) RWY 12, Orig.
3-Dec-20	GA	Atlanta	Cobb County Intl-Mccollum Field.	0/4744	10/20/20	ILS OR LOC RWY 27, Amdt 4D.
3-Dec-20	NC	Mount Olive	Mount Olive Muni	0/4746	10/20/20	RNAV (GPS) RWY 5, Orig-B.
3-Dec-20	MI	Cadillac	Wexford County	0/4764	10/20/20	ILS OR LOC RWY 7, Orig-D.
3-Dec-20	TX	Fort Stockton	Fort Stockton-Pecos County	0/5061	10/20/20	RNAV (GPS) RWY 12, Amdt 1A.
3-Dec-20	CA	Byron	Byron	0/6122	10/21/20	RNAV (GPS) RWY 30, Amdt 1A.
3-Dec-20	ID	Paris	Bear Lake County	0/7120	10/19/20	RNAV (GPS) RWY 28, Orig.
3-Dec-20	ID	Paris	Bear Lake County	0/7122	10/19/20	RNAV (GPS) RWY 10, Orig.

[FR Doc. 2020–24988 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9909]

RIN 1545–BP35

Limitation on Deduction for Dividends Received From Certain Foreign Corporations and Amounts Eligible for Section 954 Look-Through Exception; Correcting Amendment

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final regulations (Treasury Decision 9909) that were published in the **Federal Register** on Thursday, August 27, 2020. Treasury Decision 9909 contained final regulations under sections 245A and 954 of the Internal Revenue Code (the ''Code'') that limit the deduction for certain dividends received by United States persons from foreign corporations under section 245A and the exception to subpart F income under section 954(c)(6) for certain dividends received by controlled foreign corporations.

DATES: These corrections are effective on November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Arielle M. Borsos or Logan M. Kincheloe at (202) 317–6937 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9909) that are the subject of this correction are issued under sections 245A, 954(c)(6), and 6038 of the Internal Revenue Code.

Need for Correction

As published on August 27, 2020 (85 FR 53068), the final regulations (TD 9909; FR Doc. 2020–18543) contain errors that need to be corrected.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.245A–5 is amended by:

■ a. Adding a sentence after the first sentence of paragraph (e)(3)(i)(A); and

■ b. Revising paragraphs (i)(8) and (9) and the first sentence of paragraph (j)(10)(ii).

The addition and revisions read as follows:

§ 1.245A–5 Limitation of section 245A deduction and section 954(c)(6) exception.

* * * * *

(e) * * *

(3) * * *

(i) * * *

(A) * * * Because the determination as to whether there would be an extraordinary reduction amount or tiered extraordinary reduction amount greater than zero is made without regard to this paragraph (e)(3)(i), this determination is made without taking into account any elections that may be available, or other events that may occur, solely by reason of an election described in this paragraph (e)(3)(i), such as the application of section 954(b)(4) to a short taxable year created as a result of the election. * * *

* * * * *

(i) * * *

(8) *Extraordinary disposition E&P.* The term *extraordinary disposition E&P* has the meaning set forth in paragraph (c)(3)(i)(C) of this section.

(9) *Extraordinary disposition ownership percentage.* The term *extraordinary disposition ownership percentage* has the meaning set forth in paragraph (c)(3)(i)(B) of this section.

* * * * *

(j) * * *

(10) * * *

(ii) * * * Because the loan from CFC1 to CFC2 and the subsequent distribution of cash were carried out with a principal purpose of avoiding the purposes of this section, appropriate adjustments are required to be made under the anti-abuse rule in paragraph (h) of this section. * * *

Crystal Pemberton,

Senior Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2020–23632 Filed 11–12–20; 8:45 am]

BILLING CODE 4830–01–P

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2201

Regulations Implementing the Freedom of Information Act

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Review Commission (OSHRC) is amending its regulations implementing the Freedom of Information Act (FOIA). The amendments to the FOIA regulations concern minor issues that have arisen since the regulations were last revised in 2016.

DATES: Effective November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Ron Bailey, Attorney Advisor, Office of General Counsel, by telephone at (202) 606–5410 or by email at *rbailey@oshrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Revisions to Part 2201

OSHRC's regulations implementing FOIA, 29 CFR part 2201, were last revised on December 27, 2016, 81 FR 95035. OSHRC is making several minor revisions to these regulations.

In 29 CFR 2201.5, OSHRC is revising the reference to its Privacy Act regulation—from § 2400.6 to § 2400.4—based on the re-designation of section numbers in 29 CFR part 2400, 85 FR 65221.

In 29 CFR 2201.6(a)(1), the regulation presently states that the 20-day period for granting or denying a FOIA request can be tolled under two different circumstances: ''(1) The agency may toll the 20-day period once while awaiting information that it has reasonably requested from the requester under this section . . . ; or (2) The agency may toll the 20-day period as many times as are necessary to clarify any issue regarding fee assessment.'' OSHRC is revising the word ''or'' to ''and,'' because guidance from the Department of Justice's Office of Information Policy (OIP) indicates that tolling under one circumstance does not preclude the agency from subsequently tolling based on the other circumstance. This guidance, from November 18, 2008, is available at *https://www.justice.gov/oip/oip-guidance.*

In 29 CFR 2201.8(e), the third sentence of that paragraph states: ''In cases in which a requester has been notified that actual or estimated fees amount to more than $25, the request shall not be considered received and further work shall not be done on it

until the requester agrees to pay the actual or estimated total fee.'' OSHRC is revising the phrase, ''the request shall not be considered received,'' to read, ''the time period for responding to the request shall be tolled in accordance with 2201.6(a)(2).'' OSHRC considers it more accurate, pursuant to the 5 U.S.C. 552(a)(6)(A), to treat this as a fee clarification that can be tolled under 29 CFR 2201.6(a), rather than a request that has not been received.

II. Statutory and Executive Order Reviews

Executive Orders 12866 and 13132, and the Unfunded Mandates Reform Act of 1995: OSHRC is an independent regulatory agency and, as such, is not subject to the requirements of E.O. 12866, E.O. 13132, or the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

Regulatory Flexibility Act: The Chairman of OSHRC certifies under the Regulatory Flexibility Act, 5 U.S.C. 605(b), that these rules will not have a significant economic impact on a substantial number of small entities. The revisions to part 2201 merely clarify existing procedures and, therefore, would have no economic impact on small entities. For this reason, a regulatory flexibility analysis is not required.

Paperwork Reduction Act of 1995: OSHRC has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* does not apply because these rules do not contain any information collection requirements that require the approval of OMB.

Congressional Review Act: These revisions do not constitute a ''rule,'' as defined by the Congressional Review Act, 5 U.S.C. 804(3)(C), because they involve changes to agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 29 CFR Part 2201

Freedom of information.

James J. Sullivan, Jr.,
Chairman.

For the reasons set forth in the preamble, OSHRC amends 29 CFR part 2201 as follows:

PART 2201—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

■ 1. The authority citation for part 2201 continues to read as follows:

Authority: 29 U.S.C. 661(g); 5 U.S.C. 552.

§ 2201.5 [Amended]

■ 2. Amend § 2201.5 by removing the reference ''29 CFR 2400.6'' in paragraph (b) and adding, in its place, the reference ''29 CFR 2400.4''.

§ 2201.6 [Amended]

■ 3. Amend § 2201.6 by removing the word ''or'' at the end of paragraph (a)(1) and adding, in its place, the word ''and''.

■ 4. Amend § 2201.8 by revising the third sentence of paragraph (e) to read as follows:

§ 2201.8 Fees for copying, searching, and review.

* * * * *

(e) * * * In cases in which a requester has been notified that actual or estimated fees amount to more than $25, the time period for responding to the request shall be tolled in accordance with § 2201.6(a)(2) and further work shall not be done on it until the requester agrees to pay the actual or estimated total fee. * * *

* * * * *

[FR Doc. 2020–24003 Filed 11–12–20; 8:45 am]

BILLING CODE 7600–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe certain interest assumptions under the regulation for plans with valuation dates in December 2020. These interest assumptions are used for paying certain benefits under terminating single-employer plans covered by the pension insurance system administered by PBGC.

DATES: Effective December 1, 2020.

FOR FURTHER INFORMATION CONTACT: Gregory Katz (*katz.gregory@pbgc.gov*), Attorney, Regulatory Affairs Division, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005, (202) 229–3829. (TTY users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to (202) 229–3829.)

SUPPLEMENTARY INFORMATION: PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribes actuarial assumptions—including interest assumptions—for paying plan benefits under terminated single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The interest assumptions in the regulation are also published on PBGC's website (*https://www.pbgc.gov*).

PBGC uses the interest assumptions in appendix B to part 4022 (''Lump Sum Interest Rates for PBGC Payments'') to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Because some private-sector pension plans use these interest rates to determine lump sum amounts payable to plan participants (if the resulting lump sum is larger than the amount required under section 417(e)(3) of the Internal Revenue Code and section 205(g)(3) of ERISA), these rates are also provided in appendix C to part 4022 (''Lump Sum Interest Rates for Private-Sector Payments'').

This final rule updates appendices B and C of the benefit payments regulation to provide the rates for December 2020 measurement dates.

The December 2020 lump sum interest assumptions will be 0.00 percent for the period during which a benefit is (or is assumed to be) in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for November 2020, these assumptions represent no change in the immediate rate and are otherwise unchanged.

PBGC updates appendices B and C each month. PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to issue new interest assumptions promptly so that they are available for plans that rely on our publication of them each month to calculate lump sum benefit amounts.

Because of the need to provide immediate guidance for the payment of benefits under plans with valuation dates during December 2020, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, rate set 326 is added at the end of the table to read as follows:

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*	*	*
326	12–1–20	1–1–21	0.00	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, rate set 326 is added at the end of the table to read as follows:

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*	*	*
326	12–1–20	1–1–21	0.00	4.00	4.00	4.00	7	8

Issued in Washington, DC.

Stephanie Cibinic,

Deputy Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2020–25116 Filed 11–12–20; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 253

[Docket ID: DOD–2019–OS–0006]

RIN 0790–AK50

Assignment of American National Red Cross and United Service Organizations, Inc., Employees to Duty with the Military Services

AGENCY: Office of the Under Secretary of Defense for Intelligence, DoD.

ACTION: Final rule.

SUMMARY: This final rule removes a DoD regulation which was originally established in 1983 for the purpose of determining the security acceptability of American Red Cross and United Service Organizations, Inc. personnel for assignment to duty overseas with the Military Services. It has not been updated since it was established, and contains outdated internal policy. Current policy and bilateral agreements between the Department and the organizations govern this process.

DATES: This rule is effective on November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Joshua Freedman at 703–692–3724.

SUPPLEMENTARY INFORMATION: It has been determined that publication of this rule removal in the CFR for public comment is impracticable, unnecessary, and contrary to public interest since it is based on removing outdated internal information. Current policy will continue to be maintained in DoD Instruction 5200.08, ''Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/520008_2005_ch3.pdf*), DoD Manual 5200.08 volume 3, ''Physical Security Program: Access to DoD Installations'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520008_vol3.pdf*); and bilateral agreements with the organizations involved. These USO/Red Cross individuals are only assigned overseas at the invitation of DoD, and the specifics of their eligibility should be established in the Memorandum of Understanding between DoD and the invited organizations.

This rule is not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.'' Therefore, E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs'' does not apply. This removal supports a recommendation of the DoD Regulatory Reform Task Force.

List of Subjects in 32 CFR Part 253

Armed forces, Red Cross, Security measures, United Service Organizations (USO).

PART 253—[REMOVED]

■ Accordingly, by the authority of 5 U.S.C. 301, 32 CFR part 253 is removed.

Dated: October 23, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–23836 Filed 11–12–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

34 CFR Part 668

[Docket ID ED–2020–OGC–0165]

The Department's Enforcement Authority for Failure to Adequately Report Under Section 117 of the Higher Education Act of 1965, as Amended

AGENCY: Office of the General Counsel, Department of Education.

ACTION: Notification of interpretation; request for comments.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority for failure to adequately report under section 117 of the Higher Education Act of 1965, as amended (HEA).

DATES: This interpretation is effective November 13, 2020. Comments must be received by the Department on or before December 14, 2020.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''Help.''
- *Postal Mail, Commercial Delivery, or Hand Delivery:* The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments about the interpretation, address them to Levon Schlichter, U.S. Department of Education, 400 Maryland Avenue SW, 6E–235, Washington, DC 20202.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Levon Schlichter, U.S. Department of Education, 400 Maryland Avenue SW, Room 6E–235, Washington, DC 20202–5076. Telephone: (202) 453–6387. Email: *Levon.Schlichter@ed.gov.*

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this interpretation. We will consider these comments in determining whether to take any future action. See **ADDRESSES** for instructions on how to submit public comments.

During and after the comment period, you may inspect all public comments about the interpretation by accessing *Regulations.gov.* Due to the novel coronavirus 2019 pandemic, the Department buildings are currently not open to the public. However, upon reopening, you may also inspect the comments in person at 400 Maryland Ave. SW, 6E–251, Washington, DC, between 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays. To schedule a time to inspect comments, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the interpretation. To schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Background: Section 117 of the HEA (20 U.S.C. 1011f) provides that institutions of higher education (IHEs) must file a disclosure report with the Secretary of Education, on January 31 or July 31, whichever is sooner, whenever the institution is owned or controlled by a foreign source or receives a gift from or enters into a contract with a foreign source, the value of which is $250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year.

The current version of this disclosure requirement was adopted in 1998, *see* Public Law 105–244, Higher Education Amendments of 1998, Title I, sec. 102(a), adding HEA Title I, sec. 117 (Oct. 7, 1998); but a substantially similar disclosure requirement has been in place since 1986. *See* Public Law 99–498, Higher Education Amendments of 1986, Title XII, sec. 1206, adding HEA Title XII, sec. 1207 (Oct. 17, 1986) (then codified at 20 U.S.C. 1145d).

We have attempted to collect Section 117 information via our approved Application to Participate in Federal Student Financial Aid Program (e-App), Office of Management and Budget (OMB) Control Number 1845–0012, but did not receive sufficient information to faithfully enforce the statute. Consequently, on February 10, 2020, we established a new information collection request (ICR) pursuant to the Paperwork Reduction Act (OMB Number 1801–0006). This new collection is necessary to ensure institutions provide congressionally mandated transparency with respect to covered gifts from and contracts with foreign sources, the public has ready and meaningful access to this information, and the Secretary receives more detailed information about covered gifts or contracts involving a foreign source and ownership or control of the institution by a foreign source, to determine whether it appears an institution has failed to comply with the requirements of 20 U.S.C. 1011f.

The prior reporting by institutions through the e-App plainly did not collect sufficient information to determine compliance with 20 U.S.C. 1011f, to encourage institutions full reporting of covered gifts and contracts from foreign sources, and to provide members of the public with statutorily mandated access to accurate information regarding institutions' gifts from and contracts with foreign sources. Government Accountability Office reports (see *https://www.gao.gov/assets/700/696859.pdf; https://www.gao.gov/assets/700/697156.pdf;* and *https://www.gao.gov/assets/680/679322.pdf*); a comprehensive congressional report regarding the operation of Chinese government propaganda centers on U.S. campuses (see *http://www.hsgac.senate.gov/download/majority-and-minority-staff-report_-chinas-impact-on-the-us-education-system*); and evidence obtained by the Department through its civil investigations, confirm the majority, and perhaps the vast majority, of institutions failed to file required disclosures to the Department when institutions were using the e-App to submit Section 117 information. For example, our investigations regarding potential noncompliance with Section 117 have preliminarily shown that institutions have failed to disclose approximately $6.5 billion of gifts from and contracts with foreign sources. Therefore, we issued an ICR to ensure that institutions comply with the statutory disclosure requirement and provide the public with information as Congress has intended.

Through this notification of interpretation, the Department clarifies

its enforcement authority with respect to institutions that fail to report accurate and complete Section 117 information.

Interpretation:

Institutions Are Required Under Their Program Participation Agreements (PPA) To Report Section 117 Data

Section 20 U.S.C. 1094(a)(17) of the HEA provides that in order to be an eligible institution for the purposes of any program authorized under the subchapter, an institution must enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirement: The institution will complete surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or *any other Federal postsecondary institution data collection effort,* as designated by the Secretary, in a timely manner and to the satisfaction of the Secretary.

The program participation agreement requirement was adopted in 1986, *see* Public Law 99–498, Higher Education Amendments of 1986, Title IV, sec. 407(a), adding HEA Title IV, sec. 487 (Oct. 17, 1986); and subsection (a)(17) was added in 1992, *see* Public Law 102–325, Higher Education Amendments of 1992, Title IV, sec. 490 (July 23, 1992).

On April 29, 1994, the Department promulgated 34 CFR 668.14 to implement the 1992 amendments. See 59 FR 22425; see also 59 FR 9526, 9538 (Feb. 28, 1994) (notice of proposed rulemaking explaining that the regulatory text is ''without substantive modifications'' from 20 U.S.C. 1094(a)(17)). Section 668.14(b)(19) provides that by entering into a program participation agreement, an institution agrees that it will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or *any other Federal collection effort,* as designated by the Secretary, regarding data on postsecondary institutions.

The Secretary, in light of widespread underreporting, clarifies via this notification that the Section 117 information collection is part of a 1094(a)(17) ''Federal data collection effort, as designated by the Secretary'' to ensure the public understands ED's enforcement authority. The requirement that institutions ''file a disclosure report with the Secretary'' comes within the plain and ordinary public meaning of 20 U.S.C. 1094(a)(17) at the time of its enactment. *See Bostock* v. *Clayton County,* 140 S.Ct. 1731, 1749 (2020). Indeed, a substantially similar foreign gift reporting requirement had already been in place for six years when Congress added Section 1094(a)(17) in 1992. *See* Public Law 99–498, Higher Education Amendments of 1986, Title XII, sec. 1206, adding HEA Title XII, sec. 1207 (Oct. 17, 1986) (then codified at 20 U.S.C. 1145d). And when Congress expanded that reporting requirement in 1998, it did not exempt the new Section 117 from Section 1094(a)'s requirements. Congress' consistent understanding is reflected in statutory language adopted in 2008, when Congress incorporated Section 117 standards into Title VI, and expressly referred to Section 117 reporting as a ''data requirement.'' *See* 20 U.S.C. 1132–7; Public Law 110–315, Higher Education Opportunity Act, Title VI, sec. 622, adding HEA sec. 638 (Aug. 14, 2008). Finally, to the extent it is relevant, we note that there is nothing in the legislative history of 20 U.S.C. 1094(a)(17) suggesting that Congress intended to narrow the plain meaning of the words ''any other Federal postsecondary institution data collection effort.''

Under 20 U.S.C. 1094(a)(17), where an institution fails to report Section 117 information timely and accurately, the institution has failed to comply with its reporting obligations under 20 U.S.C. 1011f and failed to comply with a requirement in its PPA. Under 20 U.S.C. 1094(a), the Department has authority to implement a range of corrective measures for an institution that violates its PPA, including termination of the institution's Title IV participation. We note that under 34 CFR 668.81 through 668.99 institutions have administrative appeal rights when the Department imposes fines, limitations, suspensions, or termination of the institution's Title IV participation.

The Department Has Authority to Administratively Subpoena Information From Parties When Investigating Possible Violations of Section 117

An institution's failure to adequately report Section 117 gifts and contracts is a violation of an institution's participation in the HEA programs and PPA under 20 U.S.C. 1094(a)(17). Therefore, in addition to obtaining records and employee interviews under 34 CFR 668.24 in furtherance of any investigation about the sufficiency of an institution's Section 117 reporting, under 20 U.S.C. 1097a, ''the Secretary is authorized to require by subpoena the production of information, documents, reports, answers, records, accounts, papers, and other documentary evidence pertaining to participation in any program under [Title IV of the HEA].'' Consistent with applicable law, the Secretary is also authorized to share such evidence with other agencies of the U.S. Government for law enforcement and other lawful purposes.

Title VI Reporting

For institutions that receive Title VI funds, 20 U.S.C. 1132–7 imposes a reporting obligation that is similar to Section 117. While the monetary threshold is almost identical in Section 117 and 20 U.S.C. 1132–7, they reference different time periods. Section 117 requires IHEs to disclose reportable transactions greater or equal to $250,000 occurring within a *calendar year* while 20 U.S.C. 1132–7 requires IHEs to disclose reportable transactions greater than $250,000 occurring during a *fiscal year.* Institutions that receive Title VI funds and participate in the HEA programs are advised to be mindful of this temporal difference when designing corporate compliance processes since failure to adequately report under 20 U.S.C. 1132–7 may result in administrative enforcement actions similar to those described above for failure to comply with Section 117 reporting requirements and 20 U.S.C. 1094(a)(17).

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

your search to documents published by the Department.

Reed D. Rubinstein,

Principal Deputy General Counsel delegated the authority to perform the functions and duties of the General Counsel for the Office of the General Counsel.

[FR Doc. 2020–23526 Filed 11–12–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AQ92

Administrative Procedures: Guidance Documents

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is establishing in regulation its processes and procedures for issuing guidance documents. This final rulemaking will implement the mandates of Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.

DATES: This rule is effective December 14, 2020.

FOR FURTHER INFORMATION CONTACT: Richard Murphy, Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue NW, Washington, DC 20420, (202) 714–8507. (This is not a toll-free telephone number).

SUPPLEMENTARY INFORMATION: On October 9, 2019, the President signed Executive Order (E.O.) 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.

Section 4 of the E.O. mandates that each agency finalize regulations to set forth processes and procedures for issuing guidance documents. This rule complies with that mandate by adding part 5 to title 38 Code of Federal Regulations (38 CFR part 5). Part 5 is titled ''Administrative Procedures: Guidance Documents,'' and informs the public about VA's general processes and procedures for issuing guidance documents. Prior to this rulemaking, VA has not previously published procedures relating to the issuance of guidance documents.

5.0 Purpose

VA is stating the purpose of part 5 in § 5.0, which is to provide VA's processes and procedures for issuing and managing guidance documents in accordance with E.O. 13891. Section 4 of the E.O. requires each agency to finalize regulations or amend existing regulations to set forth processes and procedures for issuing guidance documents within 300 days of the date on which the Office of Management and Budget (OMB) issues an implementing memorandum under section 6 of the E.O.. OMB issued its memorandum, M–20–02, on October 31, 2019. Section 4 of the E.O.; shall require that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract; and shall include procedures for the public to petition for withdrawal or modification of a particular guidance document. For significant guidance documents, section 4 of the E.O. contains additional requirements. These include that there must be a period of notice and comment of at least 30 days and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to public interest. Significant guidance documents must be approved on a non-delegable basis by the agency head or agency component head appointed by the President. They must be reviewed by OIRA under E.O. 12866 before issuance, and they must comply with applicable requirements for significant regulatory actions set forth in E.O.s. 12866, 13563, 13609, 13771, and 13777.

5.10 Definitions Relating to Guidance Documents

Section 5.10 is the definitions section. The section generally tracks the requirements of E.O. 13891, as applied to VA. Because the definition of guidance document is broad, this rule clarifies that a guidance document is an agency statement of general applicability (*i.e.,* it applies to more than just one person, event, or transaction), that is intended to have a future effect on the behavior or actions of regulated parties (to include non-VA actors), and that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. The section mirrors the exclusion in section 2(b)(i)–(vi) of the E.O. for those documents that VA does not consider guidance documents.

VA is mirroring the definition of significant guidance document to that provided in section 2(c) of the E.O. with minor clarifying edits.

VA is also defining VA to mean the Department of Veterans Affairs.

5.15 Procedures for Issuing Guidance Documents

VA is implementing the requirements of section 4(a)(i) and (iii) of the E.O. in § 5.15. We are stating the requirements of section 4(a)(i) in paragraph (a)(1) by stating that each guidance document must clearly and prominently state that it does not bind the public, except as authorized by law or as incorporated into a contract. VA is adding sample language of the disclaimer for guidance documents as follows: The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Paragraph 5.15(a)(2) states the information that must be included in each guidance document. VA is stating that a guidance document must include the following information: The term guidance; the agency or office issuing the document; to what and to whom the document applies; the date of issuance; title and unique identification number of the document; citation to statutory or regulatory authority that the guidance document interprets or applies; a short summary of the subject matter covered at the beginning of the guidance document; the statement required under paragraph (a)(1) of this section; and as applicable, the guidance document being revised or replaced.

Paragraph 5.15(b) states the procedures for significant guidance documents as required in section 4(a)(iii) of the E.O. Significant guidance documents must follow the requirements provided in paragraph 5.15(a). Further, unless the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), pursuant to review under E.O. 12866, and VA agree that exigency, safety, health, or other compelling cause warrants an exemption, the following additional procedures apply to significant guidance documents. Paragraph (b)(1) states that VA will provide for a period of public notice and comment of at least 30 days before issuance of such significant guidance document and will provide a public response to major concerns raised in comments, except when VA for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Paragraph (b)(2) states that the Secretary or a VA component head appointed by

the President must approve any significant guidance document prior to issuance; in addition, pursuant to section 4(a)(iii)(B) of the E.O., this approval authority is not delegable. Paragraph (b)(3) establishes that significant guidance documents must be reviewed by OIRA under E.O. 12866 prior to issuance. Paragraph (b)(4) requires that significant guidance documents comply with the applicable requirements for regulations or rules set forth in E.O.s 12866, 13563, 13609, 13771, and 13777.

5.20 Procedures for Petition for the Withdrawal or Modification of a Guidance Document

Section 5.20 implements the requirements in section 4(a)(ii) of the E.O and states the procedures for the public to petition for the withdrawal or modification of a guidance document. Paragraph (a) provides the addresses for submitting such petitions. The email address is: *OEIDMO@va.gov.* The public may also submit requests via mail to the following address: Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue NW, Washington, DC 20420.

Paragraph (b) provides the information that must be included in a petition, including: (1) The petitioner's name and address; (2) information identifying the guidance document to which the petition pertains; and (3) a statement of the reasons the petitioner believes the document should be withdrawn or modified.

We are stating in paragraph (c) that VA will provide a response to such petition within 90 days of receipt of the request.

5.25 Guidance Website

Section 5.25 states that VA has a guidance website that contains, or links to, guidance documents that are currently in effect and that VA will not cite, use, or rely on any guidance document that is not posted on the website existing under E.O. 13891, except to establish historical facts. Section 5.25 further provides the address for the guidance portal that is required by section 3 of E.O. 13891. The guidance portal can be accessed at *www.VA.gov/guidance.*

Administrative Procedure Act

The Secretary of Veterans Affairs is publishing this rule without prior opportunity for public comment pursuant to 5 U.S.C. 553(b)(A) as this rule is a rule of agency organization, procedure, or practice, and thus is published as a final rule.

Paperwork Reduction Act

This rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final 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. 601–612. The regulations established by this rulemaking do not impose burdens or otherwise regulate the activities of any entities outside of VA. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Orders 12866, 13563 and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. OIRA has determined that this rule is not a significant regulatory action under E.O. 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date.''

This final rule is not expected to be an E.O. 13771 regulatory action because this final rule is not significant under E.O. 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There are no Catalog of Federal Domestic Assistance numbers and titles for this rule.

Congressional Review Act

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

List of Subjects in 38 CFR Part 5

Administrative practice and procedure.

Signing Authority

The Secretary of Veterans Affairs approved this document on November 6, 2021, for publication and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

■ For the reasons stated in the preamble, the Department of Veterans Affairs adds 38 CFR part 5 as follows:

PART 5—Administrative Procedures: Guidance Documents

Sec.

5.0 Purpose.
5.10. Definitions relating to guidance documents.
5.15. Procedures for issuing guidance documents.
5.20. Procedures for petition for the withdrawal or modification of a guidance document
5.25. Guidance website.

Authority: 38 U.S.C. 501; E.O. 13891, 84 FR 55235.

§ 5.0 Purpose.

Sections 5.0 through 5.25 provide VA's processes and procedures for issuing and managing guidance documents in accordance with Executive Order 13891.

§ 5.10 Definitions relating to guidance documents.

The following definitions apply to §§ 5.0 through 5.25.

Guidance document means an agency statement of general applicability (*i.e.,* it applies to more than just one person, event, or transaction), that is intended to have a future effect on the behavior or actions of regulated parties (to include non-VA actors), and that sets forth a policy on a statutory, regulatory, or

technical issue, or an interpretation of a statute or regulation. A guidance document does not include the following:

(1) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, 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;

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

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

(6) Internal executive branch legal advice or legal opinions addressed to executive branch officials.

Significant guidance document means a guidance document that the Administrator of the Office of Information and Regulatory Affairs determines is reasonably 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.

VA means the Department of Veterans Affairs.

§ 5.15 Procedures for issuing guidance documents.

(a) *General.* (1) Each guidance document must clearly and prominently state that it does not bind the public, except as authorized by law or as incorporated into a contract. Guidance documents may include the following or similar disclaimer language: The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

(2) Each guidance document must include the following information in the published guidance document:

(i) The term guidance;

(ii) The agency or office issuing the document;

(iii) To what and to whom the document applies;

(iv) The date of issuance;

(v) The title and unique identification number of the document;

(vi) Citation to statutory or regulatory authority that the guidance document interprets or applies;

(vii) A short summary of the subject matter covered at the beginning of the guidance document;

(viii) The statement required under paragraph (a)(1) of this section; and

(ix) As applicable, the guidance document being revised or replaced.

(b) *Significant guidance documents.* We will refer to the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, or the Administrator's designee, the question of whether a guidance document is significant. Significant guidance documents must follow the requirements provided in paragraph 5.15(a). Additionally, unless the Administrator of OIRA, pursuant to review under E.O. 12866, and VA agree that exigency, safety, health, or other compelling cause warrants an exemption, the following additional procedures apply:

(1) VA will provide for a period of public notice and comment of at least 30 days before issuance of such significant guidance document and will provide a public response to major concerns raised in comments, except when VA for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest.

(2) The Secretary or a VA component head appointed by the President (with or without confirmation by the Senate), or by an official who is serving in an acting capacity as either of the foregoing, must approve any significant guidance document prior to issuance; pursuant to section 4(a)(iii)(B) of Executive Order 13891, this approval authority is not delegable.

(3) Significant guidance documents must be submitted to OIRA for review under Executive Order 12866 prior to issuance.

(4) Significant guidance documents must comply with the applicable requirements for regulations or rules set forth in Executive Orders 12866, 13563, 13609, 13771, and 13777.

§ 5.20 Procedures for petition for the withdrawal or modification of a guidance document.

Petitions for withdrawal or modification of a guidance document. The following procedures apply for the public to petition for withdrawal or modification of a guidance document.

(a) A member of the public wishing to petition for withdrawal or modification of a guidance document may submit such petition via email to: *OEIDMO@va.gov.* Petitions may also be mailed to the following address: Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue NW, Washington, DC 20420.

(b) A petition for withdrawal or modification of a guidance document must contain the following information:

(1) The petitioner's name and address;

(2) Information identifying the guidance document to which the petition pertains;

(3) A statement of the reasons the petitioner believes the document should be withdrawn or modified.

(c) VA will provide a response to a petition within 90 days of receipt of the request.

§ 5.25 Guidance website.

VA has a guidance website that contains, or links to, guidance documents that are currently in effect. VA will not cite, use, or rely on any guidance document that is not posted on the website existing under Executive Order 13891, except to establish historical facts. The website can be found at the following address: *www.VA.gov/guidance.*

[FR Doc. 2020–25121 Filed 11–12–20; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0346; FRL–10012–87]

Mefenoxam; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of mefenoxam in or on the tree nut, crop group 14–12 and almond, hulls. Syngenta Crop Protection requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 13, 2020. Objections and requests for hearings must be received on or before January 12, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0346, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

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

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2019–0346 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 12, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2019–0346, by one of the following methods:

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

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of June 24, 2020 (85 FR 37806) (FRL–10010–82), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F8759) by Syngenta Crop Protection LLC, P.O. Box 18300, Greensboro, NC 27419. The petition requested that 40 CFR 180.546 be amended by establishing a tolerance for residues of mefenoxam, (methyl *N*-(2,6-dimethylphenyl)-*N*-(methoxyacetyl)-*DL*-alaninate) including its metabolites and degradate, in or on tree nuts crop group 14–12 at 0.3 parts per million (ppm). Syngenta's petition was intended to cover residues of mefenoxam in or on nut commodities from domestic use of the pesticide, although EPA erroneously stated in the Notice of Filing that Syngenta had requested a tolerance to cover residues of mefenoxam on imported nut commodities. EPA hereby clarifies that error and has evaluated the request as submitted by the petition. The error did not substantially impact the way EPA evaluated the petition. In addition, although not mentioned in EPA's document, Syngenta's petition also requested that currently established tolerances for residues of metalaxyl in/on almond and walnut at 0.5 ppm be removed from 40 CFR 180.408, under the premise these commodities would be adequately covered by the proposed tree nut, crop group 14–12 tolerance for mefenoxam, which is the single enantiomer of the racemic mixture metalaxyl. A summary document of the petition prepared by Syngenta Crop Protection, the registrant, is available in the docket, *http://www.regulations.gov.* One comment was received in response to the notice of filing, although it was not germane to the petition for mefenoxam tolerances.

III. Aggregate Risk Assessment and Determination of Safety

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

408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

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

On December 21, 2018, EPA published in the **Federal Register** a final rule establishing tolerances for residues of mefenoxam in or on several commodities based on the Agency's conclusion that aggregate exposure to mefenoxam is safe for the general population, including infants and children. *See* 83 FR 65541 (FRL–9985–52). Because the Agency's position concerning several sections of that document have not changed, EPA is incorporating them by reference here—the toxicological profile and points of departure, description of the assumptions for assessing exposure from residues in or on food, in drinking water, and residential exposures, the Agency's conclusion about cumulative risk, and Agency's determination regarding the children's safety factor. Further information about EPA's risk assessment and determination of safety supporting the tolerances established in the December 21, 2018 **Federal Register** action, as well as the new mefenoxam tolerance can be found at *http://www.regulations.gov* in the document titled ''Mefenoxam (Metalaxyl-M). Human Health Risk Assessment for the Establishment of Permanent Tolerances and New Uses in/on Wasabi, Cacao, and Crop Group Expansion from Kiwifruit to Fruit, Small, Vine Climbing, Except Grape, Crop Subgroup 13–07E.'' dated June 5, 2018, in docket ID EPA–HQ–OPP–2017–0562 and the document titled, ''Mefenoxam (Metalaxyl-M). Human Health Risk Assessment for the Proposed New Use in/on Tree Nuts, Crop Group 14–12 and the Establishment of a Permanent Tolerance.'' in docket ID number EPA–HQ–OPP–2019–0346.

EPA's exposure assessments have been updated to include the additional exposure from use of mefenoxam on tree nut, crop group 14–12. EPA's aggregate exposure assessment incorporated this additional dietary exposure, as well as exposures from drinking water and residential sources, although those latter exposures are not impacted by the new uses on the tree nut, crop group 14–12 and thus have not changed since the last assessment.

Acute dietary risks are below the Agency's level of concern: 52% of the acute population adjusted dose (aPAD) for children 1 to 2 years old, the population group of concern. Due to the lack of a chronic endpoint, a chronic dietary risk is not expected. As required by the FFDCA, EPA considered aggregate exposures to mefenoxam, *i.e.,* exposures from food, drinking water, and residential uses, in its risk assessment. There are no residential uses expected to result in acute, intermediate-term, or chronic exposures; therefore, aggregate risks for those exposure durations are equal to the dietary risks for those exposure durations and not of concern.

Based on the absence of increased hazard from repeated exposures to mefenoxam, short-term aggregate risk assessments are protective of potential effects from longer-term exposures. Additionally, residential exposures are not expected to occur beyond the short-term time interval.

Using the exposure assumptions described for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate margins of exposures above the level of concern of 100 for all scenarios assessed and are not of concern.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to mefenoxam residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

There are adequate residue analytical methods for enforcing tolerances for mefenoxam residues of concern in/on the registered plant and livestock commodities. These several methods include gas chromatography equipped with an alkali flame ionization detector (GC/AFID), gas chromatography equipped with a nitrogen/phosphorus detector (GC/NPD), the multiresidue method in PAM, Vol. I Section 302 (Protocol D) in the nitrogen-specific mode, and gas-liquid chromatography/mass spectrometry in the chemical ionization mode with selected ion monitoring (SIM) of the M+1 ion at *m/z* 268 for determining residues in/on nut crops and livestock.

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

B. International Residue Limits

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

The Codex has not established an MRL for mefenoxam or metalaxyl in or on the tree nut, crop group 14–12.

C. Revisions to Petitioned-For Tolerances

There are no revisions to the requested tolerance petition of mefenoxam. The petition requested that upon establishment of tolerances in or on tree nuts crop group 14–12 at 0.3 ppm, the currently established tolerances for residues of metalaxyl in or on almond and walnuts at 0.5 ppm be removed from 40 CFR 180.408, because residues in or on these commodities were anticipated to be adequately covered by the new tree nut crop group 14–12 tolerance. EPA has decided not to remove the existing tolerances for metalaxyl on almond and walnut. Existing registrations permit use of metalaxyl on almond and walnut, and those uses would result in residues of metalaxyl on those commodities that would not be covered by the new mefenoxam tolerances. Therefore, removal of such tolerances would result in adulterated commodities.

Although a tolerance on almond hulls was not requested, available processing data demonstrates that residues from treated almonds concentrate on hulls during processing; therefore, a separate

tolerance is needed to cover those residues. Based on application rates for mefenoxam and extrapolating from the available data concerning concentration during processing for metalaxyl, EPA concludes a tolerance level of 5 ppm for residues of mefenoxam in or on almond hulls is appropriate. EPA is establishing that tolerance here. The FFDCA anticipates that residues of pesticides applied to raw agricultural commodities may pass through to processed commodities and allows tolerances on raw agricultural commodities to cover processed forms of those commodities as long as residues remain within tolerance levels. 21 U.S.C. 346a(a)(2). Where residues concentrate in the processed food, a separate tolerance is necessary. Given the potential to pass-through, EPA examines whether tolerances on the raw agricultural commodities will cover residues on the processed food, and if not, establishes them. EPA believes it is reasonable to expect that a tolerance may need to be established in processed forms of commodities for which tolerances on the raw agricultural commodities are requested.

V. Conclusion

Therefore, tolerances are established for residues of mefenoxam, including its metabolites and degradates in or on the tree nut, crop group 14–12 at 0.3 ppm and almond hulls at 5 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: October 9, 2020.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. In § 180.546 amend paragraph (a) by designating the table as Table 1 to paragraph (a) and adding in alphabetical order to newly designated Table 1 to paragraph (a) entries for ''Almond, hulls'' and ''Tree nut, crop group 14–12'' to read as follows:

§ 180.546 Mefenoxam; tolerances for residues.

* * * * *

TABLE 1 TO PARAGRAPH (a)

Commodity	Parts per million
* * * * *	
Almond hulls	5
* * * * *	
Tree nut, crop group 14–12	0.3
* * * * *	

* * * * *

[FR Doc. 2020–23423 Filed 11–12–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Parts 502, 503, 520, 530, 535, 540, 550, 555, and 560

[Docket No. 20–18]

RIN 3072–AC83

Update of Existing User Fees

AGENCY: Federal Maritime Commission

ACTION: Direct final rule; request for comments.

SUMMARY: The Federal Maritime Commission (Commission) is updating its current user fees and amending the relevant regulations to reflect these updates. The Commission is also correcting an internal citation and clarifying the applicability of a fee in an existing regulation.

DATES: The rule is effective without further action on January 27, 2021, unless significant adverse comments are filed prior to December 14, 2020. If significant adverse comments are received, the Commission will publish a timely withdrawal of the rule in the **Federal Register** no later than December 28, 2020.

ADDRESSES: You may submit comments, identified by Docket No. 20–18, by the following method:

• *Email: secretary@fmc.gov.* For comments, include in the subject line: ''Docket 20–18, Comments on User Fee Update.'' Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Both confidential and public versions of confidential comments and petitions should be submitted by email.

Instructions: For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to the Commission's website, unless the commenter has requested confidential treatment.

Docket: For access to the docket to read background documents or comments received, go to the Commission's Electronic Reading Room at: *http://www2.fmc.gov/readingroom/proceeding/20-18.*

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary. *Phone:* (202) 523–5725. *Email: secretary@fmc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Independent Offices Appropriation Act of 1952 (IOAA), 31 U.S.C. 9701, authorizes agencies to establish charges (user fees) for services and benefits that they provide to specific recipients. Under the IOAA, charges must be fair and based on the costs to the Government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts. The IOAA also provides that regulations implementing user fees are subject to policies prescribed by the President, which are currently set forth in Office of Management and Budget (OMB) Circular A–25, *User Charges* (revised July 8, 1993).

Under OMB Circular A–25, fees must be established for Government-provided services that confer benefits on identifiable recipients over and above those benefits received by the general public. OMB Circular A–25 further provides that, generally, user fees must be sufficient to recover the full cost to the government for providing the service, resource, or good. Agencies are advised to determine or estimate costs based on the best available records in the agency and to ensure that cost computations cover the direct and indirect costs to the agency of providing the service. OMB Circular A–25 also states that agencies are permitted to set user fees below costs if conditions justify the exception.

OMB Circular A–25 also directs agencies to review biennially: (1) user charges for agency programs to assure that existing charges are adjusted to reflect unanticipated changes in costs or market values; and (2) all other agency programs to determine whether fees should be assessed. The Commission last reviewed and updated its user fees in 2018. 83 FR 50290 (Oct. 5, 2018).

II. Fee Adjustments

The Commission has reviewed its data on the time and cost involved in providing particular services to arrive at the updated direct and indirect labor costs for those services. As part of its assessment, the Commission utilized salaries of Full Time Equivalents (FTEs) assigned to fee-generating activities to identify the various direct and indirect costs associated with providing such services. Direct labor costs include clerical and professional time expended on an activity. Indirect labor costs include labor provided by bureaus and offices that provide direct support to the fee-generating offices in their efforts to provide services and include managerial and supervisory costs associated with providing a particular service. Other indirect costs include Government overhead costs, such as fringe benefits and other wage-related Government contributions contained in OMB Circular A–76, *Performance of Commercial Activities* (revised May 29, 2003) and office general and administrative expenses.[1] The sum of these indirect cost components gives an indirect cost factor that is added to the direct labor costs of an activity to arrive at the fully distributed cost. A more detailed description of the Commission's methodology has been included in the docket.

The Commission is increasing some fees to reflect salary increases for FTEs assigned to certain fee-generating services. For some services, an increase in processing or review time may account for all or part of the increase in the amount of the fees. For other services, the Commission is decreasing fees due to an overall reduced cost to provide those services or a decrease in overhead costs resulting from fewer FTEs employed by the Commission and fewer FTEs assigned to fee-generating activities.

The Commission is including two supporting documents providing detailed information on the updated user fee calculations in the docket. The first document shows the direct and indirect costs for each service for which a fee is assessed based on FY 2019 cost data. The second document compares the current fee amounts established in 2018 with the updated fee amounts reflecting the current costs, showing the percentage increase or decrease and change in dollar amount.

A. Significant Change in User Fees

The Commission briefly describes below changes in user fees that result in more than a 10 percent increase or decrease to a particular fee.

1. Record Search and Document Duplication Fees (Part 503)

The hourly rate for document searches conducted by clerical/administrative personnel in response to Freedom of Information Act (FOIA) requests is decreasing from $52 per hour to $39 per hour. This updated fee reflects the lower average hourly salaries of the non-professional staff who conduct record searches. The minimum charge for a records search is increasing from $31 to $39. This updated rate reflects the higher average salary of the FTEs performing this service. The minimum duplication charge is also increasing from $6 to $7, which reflects the higher salaries of staff performing these services.

2. Passenger Vessel Operator Performance and Casualty Certificates (Part 540)

The application fees for Certificates of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation are increasing as follows: From $3,272 to $4,332 for general applications; and from $1,652 to $2,180 for applications to add or substitute a vessel to the applicant's fleet. For Certificates of

[1] OMB Circular A–76 lists the following indirect labor costs: Leave and holidays, retirement, worker's compensation, awards, health and life insurance, and Medicare. General and administrative costs are expressed as a percentage of basic pay. These include all salaries and overhead such as rent, utilities, supplies, and equipment allocated to Commission offices that provide direct support to fee-generating offices such as the Office of Information Technology, Office of Human Resources, Office of Budget and Finance, and the Office of Management Services.

Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages, the application fees are increasing as follows: from $1,441 to $1,889 for general applications; and from $718 to $921 for applications to add or substitute a vessel to the applicant's fleet. These increases are primarily due to a change in grade level of the staff reviewing and processing these applications.

B. Ocean Transportation Intermediary License Application Fees (Part 515)

In Docket No. 18–11, the Commission revised 46 CFR part 515 relating to Ocean Transportation Intermediary (OTI) license applications. *See* 84 FR 62464 (Nov. 15, 2019). The Commission amended §§ 515.5(b) and 515.12(a) to eliminate the paper application option for OTI license applications. 84 FR at 62465, 62467. As noted in the 2018 direct final rule, the fees for the electronic filing of OTI applications will be addressed when the entire FMC–18 automated system is complete and operational and the costs of the system and its impact on the review of OTI applications can be quantified. Because the automated system is not yet complete, the Commission is not revising the fees in Part 515.

C. Other Revisions

The Commission is making two minor revisions that are related to user fees. These additional changes update internal citations and clarify existing Commission regulations but do not substantively amend the meaning of the following sections.

1. Update in § 502.27

The Commission is revising § 502.27 to reflect a change to an internal citation that resulted from a previous rulemaking proceeding.

2. Clarification in § 550.402

The Commission is also revising § 550.402. In addition to updating the fee in the last sentence, the Commission is deleting the first sentence of § 550.402, which provides that other than petitions for rulemaking, requests for relief from conditions unfavorable to shipping in the foreign trade under 46 U.S.C. ch. 421 must be by written petition. This sentence was inadvertently included in a 2016 final rule amending the Commission's user fees. 81 FR 59141 (Aug. 29, 2016). Because § 550.403 requires that all petitions under part 550 must include a recommended regulation for the Commission to promulgate, this sentence has created confusion as to whether written petitions are required. The Commission is therefore deleting this sentence to confirm that a petition seeking a regulation that adjusts or meets conditions unfavorable to shipping in the foreign trade of the United States must be in writing.

III. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via email to the email address listed above under **ADDRESSES**. Please include the docket number associated with this notice and the subject matter in the subject line of the email. Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Both non-confidential and confidential comments should be submitted by email.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following by email to the email address listed above under **ADDRESSES**:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked ''Confidential-Restricted,'' and the confidential material clearly marked on each page.
- A public version of your comments with the confidential information excluded. The public version must state ''Public Version—confidential materials excluded'' on the cover page and on each affected page and must clearly indicate any information withheld.

Will the Commission consider late comments?

The Commission will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. Because this is a direct final rule that will go into effect as specified in the **DATES** section in the absence of significant adverse comment received during the comment period, the Commission will not consider any comments filed after the comment closing date.

How can I read comments submitted by other people?

You may read the comments received by the Commission at the Commission's Electronic Reading Room at the address listed above under **ADDRESSES**.

IV. Rulemaking Analyses and Notices

Direct Final Rule Justification

The Commission expects the user fee updates to be noncontroversial. Under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), a final rule may be issued without notice and comment when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. This rule merely updates the user fee amounts for various services provided by the Commission based on a review of the costs to provide these services and makes minor corrections to some of the provisions specifying user fees. This rule makes no substantive changes to the Commission's regulations nor does it affect any filing or other requirement. Accordingly, the Commission has determined that providing an opportunity for comment prior to publication of this direct final rule is unnecessary under 5 U.S.C. 553(b)(B).

This rule will therefore become effective on the date listed in the **DATES** section unless the Commission receives significant adverse comments within the specified period. The Commission recognizes that parties may have information that could impact the Commission's views and intentions with respect to the revised regulations, and the Commission intends to consider any comments filed. The Commission will withdraw the rule by the date specified in the **DATES** section if it receives significant adverse comments.

We note that the scope of the rulemaking is limited to the amounts charged for Commission services and minor revisions to user-fee-related regulations, and any substantive changes to the underlying regulations governing those services or related requirements would be outside this scope. Accordingly, comments on the underlying regulations and related requirements will not be considered adverse. Filed comments that are not adverse may be considered for

modifications to the Commission's regulations at a future date. If no significant adverse comments are received, the rule will become effective without additional action by the Commission.

Congressional Review Act

The rule is not a ''major rule'' as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The rule will not result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the APA (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis (FRFA) describing the impact of the rule on small entities. 5 U.S.C. 604. An agency is not required to publish a FRFA, however, for the following types of rules, which are excluded from the APA's notice-and-comment requirement: Interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553(b).

As discussed above, the Commission has for good cause determined that notice and comment in this case is unnecessary. Therefore, the APA does not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare a FRFA.

National Environmental Policy Act

The Commission's regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. This rule updates user fees for services that fall within various categorical exclusions, and no environmental assessment or environmental impact statement is required. In particular, rulemakings related to the following fall under categorical exclusions: certification of financial responsibility of passenger vessels under part 540 (§ 504.4(a)(2)); promulgation of procedural rules under part 502 (§ 504.4(a)(4)); receipt of service contracts (§ 504.4(a)(5)); consideration of special permission applications under part 520 (§ 504.4(a)(6)); consideration of agreements (§ 504.4(a)(9)–(13), (30)–(35)); action taken on special docket applications under § 502.271 (§ 504.4(a)(19)); and action regarding access to public information under part 503 (§ 504.4(a)(24)).

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988 titled, ''Civil Justice Reform,'' to minimize litigation, eliminate ambiguity, and reduce burden.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in rules to OMB in conjunction with the publication of a rule. 5 CFR 1320.11. This rule does not contain any collections of information as defined by 44. U.S.C. 3502(3) and 5 CFR 1320.3(c).

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at *http://www.reginfo.gov/public/do/eAgendaMain.*

List of Subjects

46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

46 CFR Part 503

Classified information, Freedom of Information, Privacy, Sunshine Act.

46 CFR Part 520

Common carrier, Freight, Intermodal transportation, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 530

Freight, Maritime carriers, Report and recordkeeping requirements.

46 CFR Part 535

Administrative practice and procedure, Maritime carriers, Reporting and recordkeeping requirements.

46 CFR Part 540

Insurance, Maritime carriers, Penalties, Reporting and recordkeeping requirements, Surety bonds.

46 CFR Part 550

Administrative practice and procedure, Maritime carriers.

46 CFR Part 555

Administrative practice and procedure, Investigations, Maritime carriers.

46 CFR Part 560

Administrative practice and procedure, Maritime carriers.

For the reasons set forth above, the Federal Maritime Commission amends 46 CFR parts 502, 503, 520, 530, 535, 540, 550, 555, and 560 as follows:

PART 502—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 502 is amended to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561–569, 571–584; 591–596; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103–40104, 40304, 40306, 40501–40503, 40701–40706, 41101–41109, 41301–41309, 44101–44106; 5 CFR part 2635.

■ 2. Amend § 502.27 by revising the last sentence in paragraph (a)(1) to read as follows:

§ 502.27 Persons not attorneys at law.

(a)(1) * * * Applications by persons not attorneys at law for admission to practice before the Commission shall be made on the forms prescribed therefor, which may be obtained from the Secretary of the Commission, and shall be addressed to the Federal Maritime Commission, Washington, DC, 20573, and shall be accompanied by a fee as required by § 503.50(d) of this chapter.

* * * * *

■ 3. Amend § 502.62 by revising paragraph (a)(6) to read as follows:

§ 502.62 Private party complaints for formal adjudication.

(a) * * *

(6) *Filing fee.* The complaint must be accompanied by remittance of a $288 filing fee.

* * * * *

■ 4. Amend § 502.93 by revising paragraph (a)(3) to read as follows:

§ 502.93 Declaratory orders and fee.

(a) * * *

(3) Petitions must be accompanied by remittance of a $306 filing fee.

* * * * *

■ 5. Amend § 502.94 by revising paragraph (b) to read as follows:

§ 502.94 Petitions-general and fee.

* * * * *

(b) Petitions must be accompanied by remittance of a $306 filing fee. [Rule 94.]

■ 6. Amend § 502.271 by revising paragraph (d)(5) to read as follows:

§ 502.271 Special docket application for permission to refund or waive freight charges.

* * * * *

(d) * * *

(5) Applications must be accompanied by remittance of a $115 filing fee.

* * * * *

■ 7. Amend § 502.304 by revising the last sentence of paragraph (b) to read as follows:

§ 502.304 Procedure and filing fee.

* * * * *

(b) * * * Such claims must be accompanied by remittance of a $112 filing fee.

* * * * *

PART 503—PUBLIC INFORMATION

■ 8. The authority citation for part 503 continues to read as follows:

Authority: 5 U.S.C. 331, 552, 552a, 552b, 553; 31 U.S.C. 9701; 46 U.S.C. 303; E.O. 13526 of January 5, 2010 75 FR 707, 3 CFR, 2010 Comp., p. 298, sections 5.1(a) and (b).

■ 9. Amend § 503.50 by revising paragraphs (c)(1)(i) and (ii); the first sentence of paragraph (c)(2); and paragraphs (c)(3)(ii) and (iii), (c)(4), and (d) to read as follows:

§ 503.50 Fees for services.

* * * * *

(c) * * *

(1) * * *

(i) Search will be performed by clerical/administrative personnel at a rate of $39 per hour and by professional/executive personnel at a rate of $77 per hour.

(ii) Unless an exception provided in paragraph (b)(2) of this section applies, the minimum charge for record search is $39.

(2) Charges for review of records to determine whether they are exempt from disclosure under § 503.33 must be assessed to recover full costs at the rate of $108 per hour. * * *

(3) * * *

(ii) By Commission personnel, at the rate of ten cents per page (one side) plus $39 per hour.

(iii) Unless an exception provided in paragraph (b)(2) of this section applies, the minimum charge for copying is $7.

* * * * *

(4) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $111 for each certification.

(d) Applications for admission to practice before the Commission for persons not attorneys at law must be accompanied by a fee of $206 pursuant to § 502.27 of this chapter.

■ 10. Amend § 503.69 by revising paragraph (b)(2) to read as follows:

§ 503.69 Fees.

* * * * *

(b) * * *

(2) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $111 for each certification.

* * * * *

PART 520—CARRIER AUTOMATED TARIFFS

■ 11. The authority citation for part 520 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40101–40102, 40501–40503, 40701–40706, 41101–41109.

■ 12. Amend § 520.14 by revising the last sentence of paragraph (c)(1) to read as follows:

§ 520.14 Special permission.

* * * * *

(c) * * *

(1) * * * Every such application must be submitted to the Bureau of Trade Analysis and be accompanied by a filing fee of $307.

* * * * *

PART 530—SERVICE CONTRACTS

■ 13. The authority citation for part 530 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40301–40306, 40501–40503, 41307.

■ 14. Amend § 530.10 by revising paragraph (c) introductory text to read as follows:

§ 530.10 Amendment, correction, cancellation, and electronic transmission errors.

* * * * *

(c) *Corrections.* Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within one-hundred eighty (180) days of the contract's filing with the Commission, accompanied by remittance of a $97 service fee, and must include:

* * * * *

PART 535—OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR AGREEMENTS SUBJECT TO THE SHIPPING ACT OF 1984

■ 15. The authority citation for part 535 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40101–40104, 40301–40307, 40501–40503, 40901–40904, 41101–41109, 41301–41302, and 41305–41307.

■ 16. Amend § 535.401 by revising paragraph (g) to read as follows:

§ 535.401 General requirements.

* * * * *

(g) The filing fee is $3,454 for new agreements and any agreement modifications requiring Commission review and action; $526 for agreements processed under delegated authority (for types of agreements that can be processed under delegated authority, see § 501.27(e) of this chapter); $296 for carrier exempt agreements; and $87 for terminal exempt agreements.

* * * * *

PART 540—PASSENGER VESSEL FINANCIAL RESPONSIBILITY

■ 17. The authority citation for part 540 continues to read as follows:

Authority: 5 U.S.C. 552, 553; 31 U.S.C. 9701; 46 U.S.C. 305, 44101–44106.

■ 18. Amend § 540.4 by revising paragraph (e) to read as follows:

§ 540.4 Procedure for establishing financial responsibility.

* * * * *

(e) An application for a Certificate (Performance), excluding an application for the addition or substitution of a vessel to the applicant's fleet, must be accompanied by a filing fee remittance of $4,332. An application for a Certificate (Performance) for the addition or substitution of a vessel to the applicant's fleet must be accompanied by a filing fee remittance of $2,180. Administrative changes, such as the renaming of a vessel will not incur any additional fees.

* * * * *

■ 19. Amend § 540.23 by revising the last two sentences of paragraph (b) to read as follows:

§ 540.23 Procedure for establishing financial responsibility.

* * * * *

(b) * * * An application for a Certificate (Casualty), excluding an application for the addition or substitution of a vessel to the applicant's fleet, must be accompanied by a filing fee remittance of $1,889. An application for a Certificate (Casualty) for the addition or substitution of a vessel to the applicant's fleet must be accompanied by a filing fee remittance of $921.

* * * * *

PART 550—REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

■ 20. The authority citation for part 550 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 301–307; sec. 19 (a)(2), (e), (f), (g), (h), (i), (j), (k) and (l) of the Merchant Marine Act, 1920, 46 U.S.C. 42101 and 42104–42109; and sec. 10002 of the Foreign Shipping Practices Act of 1988, 46 U.S.C. 42301–42307.

■ 21. Revise § 550.402 to read as follows:

§ 550.402 Filing of petitions.

All requests for relief from conditions unfavorable to shipping in the foreign trade must be by written petition. An original and fifteen copies of a petition for relief under the provisions of this part must be filed with the Secretary, Federal Maritime Commission, Washington, DC 20573. The petition must be accompanied by remittance of a $306 filing fee.

PART 555—ACTIONS TO ADDRESS ADVERSE CONDITIONS AFFECTING U.S.-FLAG CARRIERS THAT DO NOT EXIST FOR FOREIGN CARRIERS IN THE UNITED STATES

■ 22. The authority citation for part 555 continues to read as follows:

Authority: 5 U.S.C. 553; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. 42301–42307).

■ 23. Amend § 555.4 by revising the last sentence of paragraph (a) to read as follows:

§ 555.4 Petitions.

(a) * * * The petition must be accompanied by remittance of a $306 filing fee.

* * * * *

PART 560—ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

■ 24. The authority citation for part 560 continues to read as follows:

Authority: 5 U.S.C. 553; secs. 13(b)(6), 15 and 17 of the Shipping Act of 1984, 46 U.S.C. 305, 40104, and 41108(d); sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. 42301–42307).

■ 25. Amend § 560.3 by revising the last sentence of paragraph (a)(2) to read as follows:

§ 560.3 Petitions for relief.

(a) * * *

(2) * * * the petition must be accompanied by remittance of a $306 filing fee.

* * * * *

By the Commission.

Rachel Dickon,

Secretary.

[FR Doc. 2020–23763 Filed 11–12–20; 8:45 am]

BILLING CODE 6730–02–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No: 200428–0122; RTID 0648–XA507]

Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2020 Management Area 1A Sub-Annual Catch Limit Harvested

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is closing the directed fishery for Herring Management Area 1A. This closure is required because NMFS projects that 92 percent of the catch amount for Management Area 1A has been caught. This action is intended to prevent overharvest of Atlantic herring in Management Area 1A, which will result in additional quota reductions next year.

DATES: Effective 00:01 hr local time, November 11, 2020, through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Aly Pitts, Fishery Management Specialist, (978) 281–9352.

SUPPLEMENTARY INFORMATION: The Regional Administrator of the Greater Atlantic Regional Office monitors Atlantic herring fishery catch in each of the management areas based on vessel and dealer reports, state data, and other available information. The regulations at 50 CFR 648.201 require that when Atlantic herring catch will reach 92 percent of the Management Area 1A sub-annual catch limit (sub-ACL), federally permitted vessels are prohibited from fishing for, possessing, transferring, receiving, landing, or selling more than 2,000 lb (907.2 kg) of Atlantic herring per trip or calendar day in or from the specified management area.

The Regional Administrator has projected, based on vessel and dealer reports, and other available information, that the Atlantic herring fleet will have caught 92 percent of the Management Area 1A sub-ACL by November 11, 2020. Therefore, effective 00:01 hr local time, November 11, 2020, vessels may not fish for, possess, transfer, receive, land, or sell more than 2,000 lb (907.2 kg) of Atlantic herring per trip or calendar day, in or from Management Area 1A, through December 31, 2020. Vessels that have entered port before 00:01 hr local time, November 11, 2020, may land and sell more than 2,000 lb (907.2 kg) of Atlantic herring from Area 1A from that trip. A vessel may transit through Area 1A with more than 2,000 lb (907.2 kg) of Atlantic herring on board, provided all herring was caught outside of Area 1A and all fishing gear is stowed and not available for immediate use as defined by § 648.2. All herring vessels must land in accordance with state landing restrictions.

Effective 00:01 hr local time, November 11, 2020, through 24:00 hr local time, December 31, 2020, federally permitted dealers may not purchase, possess, receive, sell, barter, trade or transfer more than 2,000 lb (907.2 kg) of Atlantic herring per trip or calendar day from Area 1A from a vessel issued and holding a valid Federal herring permit, unless it is from a trip landed by a vessel that entered port before 00:01 hr local time, November 11, 2020, and that catch is landed in accordance with state regulations.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(3)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest and impracticable. NMFS also finds good cause to waive the 30-day delayed effectiveness in accordance with 5 U.S.C 553(d)(3).

NMFS is required by Federal regulation to implement a 2,000-lb (907.2-kg) Atlantic herring possession limit for Management Area 1A through the calendar year when 92 percent of the area quota is projected to be harvested. The 2020 Atlantic herring fishing year began on January 1, 2020, and Management Area 1A opened to fishing on June 1, 2020. Data indicating the Atlantic herring fleet will have landed at least 92 percent of the 2020 sub-ACL allocated to Management Area 1A only recently became available. High-volume catch and landings in this fishery increase total catch relative to the sub-ACL quickly, especially in this fishing year where annual catch limits are unusually low. If implementation of this closure is delayed to solicit prior public comment, the sub-ACL for Management Area 1A for this fishing year will likely be exceeded; thereby, undermining the conservation objectives of the FMP. If sub-ACLs are exceeded, the excess must be deducted from a future sub-ACL and would reduce future fishing opportunities. In addition, the public had prior notice and full opportunity to comment on this process when these provisions were put in place. The public expects these actions to occur in a timely way consistent with the fishery management plan's objectives.

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

Dated: November 9, 2020.

Jennifer M. Wallace,

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

[FR Doc. 2020–25195 Filed 11–10–20; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 200227–0066; RTID 0648–XA632]

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Atka Mackerel in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of the 2020 Atka mackerel incidental catch allowance (ICA) for the Bering Sea subarea and Eastern Aleutian district (BS/EAI) to the Amendment 80 cooperative allocation in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the 2020 total allowable catch of Atka mackerel in the BS/EAI of the BSAI to be fully harvested.

DATES: Effective November 6, 2020, 2020 through 2400 hrs, A.l.t., December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2020 Atka mackerel ICA for the BS/EAI is 800 metric tons (mt) and the 2020 Atka mackerel total allowable catch allocated to the Amendment 80 cooperative is 18,904 mt as established by the final 2020 and 2021 harvest specifications for groundfish in the BSAI (85 FR 13553, March 9, 2020).

The Administrator, Alaska Region, NMFS, has determined that 200 mt of the Atka mackerel ICA for the BS/EAI will not be harvested. Therefore, in accordance with § 679.91(f), NMFS reallocates 200 mt of Atka mackerel from the BS/EAI ICA to the Amendment 80 cooperative in the BSAI. In accordance with § 679.91(f), NMFS will reissue cooperative quota permit for the reallocated Atka mackerel following the procedures set forth in § 679.91(f)(3).

The harvest specifications for Atka mackerel included in the harvest specifications for groundfish in the BSAI (85 FR 13553, March 9, 2020) are revised as follows: 600 mt of Atka mackerel for the BS/EAI ICA and 19,104 mt of Atka mackerel for the Amendment 80 cooperative allocation in the BS/EAI of the BSAI. Table 6 is revised and republished in its entirety as follows:

TABLE 6—FINAL 2020 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

Sector [1]	Season [2 3 4]	2020 Allocation by area		
		Eastern aleutian district/ bering sea	Central aleutian district [5]	Western aleutian district
TAC	n/a	24,535	14,721	20,049
CDQ reserve	Total	2,625	1,575	2,145
	A	1,313	788	1,073
	Critical Habitat	n/a	473	644
	B	1,313	788	1,073
	Critical Habitat	n/a	473	644
Non-CDQ TAC	n/a	21,910	13,146	17,904
ICA	Total	600	75	20
Jig [6]	Total	106	.....	.....
BSAI trawl limited access	Total	2,100	1,307	.....
	A	1,050	654	.....
	Critical Habitat	n/a	392	.....
	B	1,050	654	.....
	Critical Habitat	n/a	392	.....
Amendment 80 sector	Total	19,104	11,764	17,884
	A	9,552	5,882	8,942
	Critical Habitat	n/a	3,529	5,365
	B	9,552	5,882	8,942

TABLE 6—FINAL 2020 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC—Continued

[Amounts are in metric tons]

Sector [1]	Season [2 3 4]	2020 Allocation by area		
		Eastern aleutian district/ bering sea	Central aleutian district [5]	Western aleutian district
	Critical Habitat	n/a	3,529	5,365

[1] Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtracting the CDQ reserves, jig gear allocation, and ICAs, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to 50 CFR part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31).

[2] Sections 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery.

[3] The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

[4] Section 679.23(e)(3) authorizes directed fishing for Atka mackerel with trawl gear during the A season from January 20 to June 10 and the B season from June 10 to December 31.

[5] Section 679.20(a)(8)(ii)(C)(*1*)(*i*) limits no more than 60 percent of the annual TACs in Areas 542 and 543 to be caught inside of Steller sea lion critical habitat; section 679.20(a)(8)(ii)(C)(*1*)(*ii*) equally divides the annual TACs between the A and B seasons as defined at § 679.23(e)(3); and section 679.20(a)(8)(ii)(C)(*2*) requires that the TAC in Area 543 shall be no more than 65 percent of ABC in Area 543.

[6] Section 679.20(a)(8)(i) requires that up to 2 percent of the Eastern Aleutian District and the Bering Sea subarea TAC be allocated to jig gear after subtracting the CDQ reserve and the ICA. NMFS sets the amount of this allocation for 2020 at 0.5 percent. The jig gear allocation is not apportioned by season.

Note: Seasonal or sector apportionments may not total precisely due to rounding.

This will enhance the socioeconomic well-being of harvesters dependent upon Atka mackerel in this area. The Regional Administrator considered the following factors in reaching this decision: (1) The current catch of Atka mackerel ICA in the BS/EAI, (2) the harvest capacity and stated intent on future harvesting patterns of the Amendment 80 cooperative that participates in this BS/EAI fishery.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the harvest of Atka mackerel in the BE/EAI fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 3, 2020.

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

Dated: November 6, 2020.

Jennifer M. Wallace,

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

[FR Doc. 2020–25043 Filed 11–6–20; 5:00 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 201020–0271]

RIN 0648–BJ64

Fisheries of the Exclusive Economic Zone Off Alaska; Removing the Prohibition on Continuing To Fish After a Partial Offload in the Bering Sea and Aleutian Islands Crab Rationalization Program

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to remove the regulatory prohibition on continuing to fish after a partial offload in the Bering Sea and Aleutian Islands (BS/AI) Crab Rationalization (CR) Program. This final rule is needed to provide CR crab fishery participants operational flexibility to conduct their business in an efficient manner, in particular when emergencies or special circumstances arise. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Fishery Management Plan (FMP) for BS/AI King and Tanner Crabs (Crab FMP), and other applicable laws.

DATES: Effective December 14, 2020.

ADDRESSES: Electronic copies of the Regulatory Impact Review (referred to as the ''Analysis'') and the Categorical Exclusion prepared for this final rule may be obtained from *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Megan Mackey, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Authority for Action

NMFS manages the king and Tanner crab fisheries in the exclusive economic zone (EEZ) of the BS/AI under the Crab FMP. The North Pacific Fishery Management Council (Council) prepared the Crab FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations implementing most provisions of the Crab FMP, including the CR Program, are located at 50 CFR part 680. Regulations implementing specific provisions of the Crab FMP that pertain to the License Limitation Program are located at 50 CFR part 679.

The proposed rule to implement this action was published in the **Federal Register** on August 4, 2020, with comments invited through September 3, 2020 (85 FR 47157). NMFS received two comment letters containing a total of two unique comments. The comments are summarized and responded to under the heading Comments and Responses below.

A detailed review of the provisions and rationale for this action is provided in the preamble to the proposed rule (85 FR 47157, August 4, 2020) and is briefly summarized in this final rule.

Background

The CR Program was implemented on April 1, 2005 (70 FR 10174, March 2, 2005). The CR Program established a

limited access program (LAP) for nine crab fisheries in the BS/AI and assigned quota share (QS) to persons based on their historic participation in one or more of those nine BS/AI crab fisheries during a specific period. Each year, a person who holds QS may receive an exclusive harvest privilege for a portion of the annual total allowable catch (TAC). This annual exclusive harvest privilege is called individual fishing quota (IFQ).

NMFS also issued processor quota share (PQS) under the CR Program. Each year, PQS yields an exclusive privilege to process a portion of the IFQ in each of the nine BS/AI CR crab fisheries. This annual exclusive processing privilege is called individual processor quota (IPQ). Only a portion of the QS issued yields IFQ that is required to be delivered to a processor with IPQ. Each year there is a one-to-one match between the total pounds of IFQ that must be delivered to a processor with IPQ and the total pounds of IPQ issued in each CR crab fishery.

Under current regulations, a person may offload a portion of CR crab from a vessel at multiple processors. However, except for the Western Aleutian Islands golden king crab fishery, regulations at 50 CFR 680.7(b)(3) prohibit a person from fishing again or taking CR crab on board the vessel until all of the crab originally on board the vessel have been offloaded. The prohibition against resuming fishing once an offload has commenced and until it is completed applies to CR Program crab, which includes IFQ and Community Development Quota (CDQ) crab landings. In December 2019, the Council recommended removing the regulatory prohibition on resuming fishing for CR crab between partial offloads for all CR crab fisheries. This final rule is a regulatory amendment that will remove this prohibition against continuing to fish in the BS/AI CR crab fisheries once offloading has commenced and until all CR crab are landed.

Removal of the prohibition will provide IFQ and CDQ participants in CR crab fisheries operational flexibility to conduct their business in an efficient manner, in particular when emergencies or special circumstances arise, such as inclement weather. With adjustments by the State of Alaska (State) to its data collection protocols, proper catch accounting will be maintained with this action. The following sections of this preamble provide (1) a brief history of the prohibition on crab partial offloads, (2) the expected effects of and need for this action, and (3) a description of the regulatory change made by this final rule.

Brief History of the Prohibition on Crab Partial Offloads

The regulatory prohibition on returning to fish after a partial offload of crab was originally established with the implementation of the CR Program. NMFS published the final rule to implement the CR Program on March 2, 2005 (70 FR 10174). Fishing under the CR Program started with the 2005/2006 crab fishing year. The regulatory prohibition on partial offloads at 50 CFR 680.7(b)(3) was intended to address enforcement concerns associated with a potential change in discarding behavior due to the new management of the fisheries.

Experience with the CR Program has shown that illegal (unreported) crab discards are unlikely for several reasons. First, there is no prohibition on sorting crab at the rail, and this is where undesirable crab are often discarded. These discards are accounted for by the Alaska Department of Fish and Game (ADF&G) and ADF&G has communicated to industry that high levels of discarding at the rail would be reflected in the stock assessments and ultimate crab TACs. Second, while discarding crab later in the trip is prohibited, dumping crab at sea once it has gone into the tanks would be dangerous and impractical. Third, the risk of quota overages has been greatly reduced due to the cooperative structure of the CR Program, online quota transfers, and post-delivery quota transfers, giving the industry many options to resolve a potential overage. Finally, the structure of the CR Program means more people than just the vessel operators are put at risk by this sort of illegal activity. Experience with the CR Program also has shown that the prohibition against continuing to fish for CR crab after an offload has begun and until the offload is complete has simplified dockside sampling and catch accounting.

In April 2018, the Council received a proposal from the Pacific Northwest Crab Industry Advisory Committee, requesting removal of the regulatory prohibition on continuing to fish after a partial offload in the BS/AI CR Program. In February 2019, the Council decided to examine the proposal, stating that while the Council was interested in providing operational flexibility, particularly in emergencies or special circumstances, it also wanted to ensure that ADF&G would be able to maintain proper catch monitoring and accounting in the CR crab fisheries.

The Expected Effects of and Need for This Action

While fishing after a partial delivery was fairly common practice by vessels racing to catch and deliver crab before the CR Program was implemented, the CR Program has increased coordination between harvesters and processors, allowing for an increase in the efficiency of offloads. Under the CR Program, it is more economically efficient for vessels to offload all crab before resuming fishing in order to avoid deadloss of the crab sitting in tanks on the vessel. For this, and other reasons described earlier, the Council and NMFS do not anticipate that the resumption of fishing after a crab partial offload will become a routine operating procedure. The flexibility resulting from this action is expected to be used only in emergency situations, such as inclement weather, or special circumstances related to the economics of the operations. Therefore, the impacts of this action are expected to be minimal and only beneficial.

While the prohibition at § 680.7(b)(3) may no longer be needed to address enforcement concerns, the prohibition has greatly simplified dockside sampling and catch accounting. Section 2.7.4 of the Analysis for this action examined the effects of removing this prohibition for all CR fisheries on the State's monitoring and catch accounting procedures and whether modifications would be necessary and if necessary, what modifications would be required. Section 2.7.4 concludes that without modifications by ADF&G to accommodate the change, removal of the prohibition could complicate some aspects of the State's dockside sampling, catch accounting, and Observer Program, and may degrade the spatial quality of some of the data collected in these fisheries. ADF&G indicated that it could adjust its monitoring and catch accounting procedures and protocols to accommodate the action and maintain data quality, and that it would make those adjustments upon implementation of the action.

The Council determined, and NMFS agrees, that this action will provide CR Program fishery participants with additional operational flexibility to conduct their business in an efficient manner, in particular when emergencies or special circumstances arise, such as inclement weather. The Council also acknowledged that with adjustments by the State to its data collection protocols, proper catch accounting will be maintained with this action.

Final Rule

This final rule removes the prohibition on continuing to fish after a partial offload of crab in the BS/AI CR crab fisheries. To make this change, this final rule removes the prohibition language in paragraph (b)(3) under 50 CFR 680.7 and redesignates subsequent paragraphs under § 680.7(b).

Comments and Responses

NMFS received two comment letters containing a total of two unique comments.

Comment 1: NMFS should deny this rule change.

Response: NMFS sees no reason to deny this rule change, which the Council and NMFS anticipate will rarely be used and will provide flexibility to CR crab fishery participants to conduct their business in an efficient manner.

Comment 2: Removal of the prohibition would provide IFQ and CDQ participants in CR crab fisheries operational flexibility to conduct their business in an efficient manner, in particular when emergencies or special circumstances arise, such as inclement weather, while also ensuring proper catch accounting.

Response: NMFS acknowledges the comment and is implementing this final rule.

Changes From the Proposed Rule

No changes were made 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 Council's regulatory amendment, the Crab FMP, other provisions of the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

This final rule is considered an Executive Order 13771 deregulatory action.

Certification Under the Regulatory Flexibility Act

The Chief Counsel for Regulation for 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 contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 680

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: October 20, 2020.

Samuel D. Rauch III,

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

For reasons set out in the preamble, NMFS amends 50 CFR part 680 as follows:

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 680 continues to read as follows:

Authority: 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

§ 680.7 Amended

■ 2. In § 680.7, remove paragraph (b)(3) and redesignate paragraphs (b)(4) through (7) as (b)(3) through (6), respectively.

[FR Doc. 2020–23626 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 220
Friday, November 13, 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.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG91

Small Business Size Standards: Professional, Scientific and Technical Services; Management of Companies and Enterprises; Administrative and Support and Waste Management and Remediation Services

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to increase its receipts-based small business size definitions (commonly referred to as ''size standards'') for North American Industry Classification System (NAICS) sectors related to Professional, Scientific and Technical Services; Management of Companies and Enterprises; Administrative and Support and Waste Management and Remediation Services. SBA proposes to increase size standards for 46 industries in those sectors, including 27 industries in NAICS Sector 54 (Professional, Scientific and Technical Services), 2 industries in Sector 55 (Management of Companies and Enterprises), and 17 industries in Sector 56 (Administrative and Support and Waste Management and Remediation Services). SBA's proposed revisions relied on its recently revised ''Size Standards Methodology'' (Methodology). SBA seeks comments on its proposed changes to size standards in the above sectors, and the data sources it evaluated to develop the proposed size standards.

DATES: SBA must receive comments to this proposed rule on or before January 12, 2021.

ADDRESSES: Identify your comments by RIN 3245–AG91 and submit them by one of the following methods: (1) Federal eRulemaking Portal: *www.regulations.gov.* Follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Khem R. Sharma, Ph.D., Chief, Office of Size Standards, 409 Third Street SW, Mail Code 6530, Washington, DC 20416.

SBA will post all comments to this proposed rule on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* you must submit such information to U.S. Small Business Administration, Khem R. Sharma, Ph.D., Chief, Office of Size Standards, 409 Third Street SW, Mail Code 6530, Washington, DC 20416, or send an email to *sizestandards@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review your information and determine whether it will make the information public.

FOR FURTHER INFORMATION CONTACT: Jorge Laboy-Bruno, Ph.D., Economist, Office of Size Standards, (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION:

Discussion of Size Standards

To determine eligibility for Federal small business assistance, SBA establishes small business size definitions (usually referred to as ''size standards'') for private sector industries in the United States. SBA uses two primary measures of business size for size standards purposes: Average annual receipts and average number of employees. SBA uses financial assets for certain financial industries and refining capacity, in addition to employees, for the petroleum refining industry to measure business size. In addition, SBA's Small Business Investment Company (SBIC), Certified Development Company (504), and 7(a) Loan Programs use either the industry-based size standards or tangible net worth and net income-based alternative size standards to determine eligibility for those programs.

In September 2010, Congress passed the Small Business Jobs Act of 2010 (Pub. L. 111–240, 124 Stat. 2504, September 27, 2010) (''Jobs Act''), requiring SBA to review all size standards every 5 years and make necessary adjustments to reflect current industry and market conditions. In accordance with the Jobs Act, in early 2016, SBA completed the first 5-year review of all size standards—except those for agricultural enterprises for which size standards were previously set by Congress—and made appropriate adjustments to size standards for a number of industries to reflect current industry and Federal market conditions.

During the previous 5-year comprehensive review, SBA reviewed the receipts-based size standards for 45 industries and 3 exceptions within NAICS Sector 54 (Professional, Scientific and Technical Services), 2 industries within Sector 55 (Management of Companies and Enterprises), and 44 industries in Sector 56 (Administrative and Support and Waste Management and Remediation Services). These reviews of receipts-based size standards occurred during October 2010 to December 2013. SBA's analyses of the relevant industry and Federal contracting data available at that time supported increasing size standards for 37 industries and maintaining current size standards for 11 industries in Sector 54 (77 FR 10943, February 10, 2012), increasing size standards for 2 industries in Sector 55 (78 FR 37409, June 20, 2013), and increasing size standards in 37 industries and retaining existing size standards in 7 industries in Sector 56 (77 FR 72291, December 6, 2012). Table 1, Size Standards Revisions During the First 5-Year Review, provides a summary of these revisions by NAICS sector.

TABLE 1—SIZE STANDARDS REVISIONS DURING THE FIRST 5-YEAR REVIEW

Sector	Sector name	Number of size standards reviewed	Number of size standards increased	Number of size standards decreased	Number of size standards maintained
54	Professional, Scientific and Technical Services	48	37	0	11
55	Management of Companies and Enterprises	2	2	0	0

TABLE 1—SIZE STANDARDS REVISIONS DURING THE FIRST 5-YEAR REVIEW—Continued

Sector	Sector name	Number of size standards reviewed	Number of size standards increased	Number of size standards decreased	Number of size standards maintained
56	Administrative and Support and Waste Management and Remediation Services.	44	37	0	7
Total		94	76	0	18

Currently, there are 27 different size standards levels covering 1,023 NAICS industries and 14 subindustry activities (commonly known as ''exceptions'' in SBA's table of size standards). 16 of these size levels are based on average annual receipts, 9 are based on average number of employees, and 2 are based on other measures.

SBA also adjusts its monetary-based size standards for inflation at least once every 5 years. An interim final rule on SBA's latest inflation adjustment to size standards, effective August 19, 2019, was published in the **Federal Register** on July 18, 2019 (84 FR 34261). SBA also updates its size standards every 5 years to adopt the Office of Management and Budget's (OMB) quinquennial NAICS revisions to its table of small business size standards. Effective October 1, 2017, SBA adopted the OMB's 2017 NAICS revisions to its size standards (82 FR 44886, September 27, 2017).

This proposed rule is one of a series of proposed rules that will review size standards of industries grouped by various NAICS sectors. Rather than review all size standards at one time, SBA is reviewing size standards by grouping industries within various NAICS sectors that use the same size measure (*i.e.,* employees or receipts). In the current review, SBA will review size standards in six (6) groups of NAICS sectors. (In the prior review, SBA reviewed size standards mostly on a sector-by-sector basis.) Once SBA completes its review of size standards for a group of sectors, it issues for public comments a proposed rule to revise size standards for those industries based on the latest available data and other factors deemed relevant by the SBA's Administrator.

Below is a discussion of SBA's revised ''Size Standards Methodology'' (Methodology), available at *www.sba.gov/size,* for establishing, reviewing, or modifying receipts-based size standards that SBA has applied to this proposed rule. SBA examines the structural characteristics of an industry as a basis to assess industry differences and the overall degree of competitiveness of an industry and of firms within the industry. Industry structure is typically examined by analyzing four primary factors: Average firm size, degree of competition within an industry, start-up costs and entry barriers, and distribution of firms by size. To assess the ability of small businesses to compete for Federal contracting opportunities under the current size standards, as the fifth primary factor, SBA also examines, for each industry averaging $20 million or more in average annual Federal contract dollars, the small business share of Federal contract dollars relative to the small business share of total industry receipts. When necessary, SBA also considers other secondary factors that are relevant to the industries and the interests of small businesses, including impacts of size standards changes on small businesses.

Size Standards Methodology

SBA has recently revised its Methodology for establishing, reviewing, or modifying size standards when necessary. See the notification in the April 11, 2019, edition of the **Federal Register** (84 FR 14587). The revised Methodology is available on SBA's size standards web page at *www.sba.gov/size.* Prior to finalizing the revised Methodology, SBA issued a notification in the April 27, 2018, edition of the **Federal Register** (83 FR 18468) to solicit comments from the public and notify stakeholders of the proposed changes to the Methodology. SBA considered all public comments in finalizing the revised Methodology. For a summary of comments and SBA's responses, refer to the SBA's April 11, 2019, **Federal Register** notification cited above.

The revised Methodology represents a major change from the previous methodology, which was issued on October 21, 2009 (74 FR 53940). Specifically, in its revised Methodology, SBA is replacing the ''anchor'' approach applied in the previous methodology with a ''percentile'' approach for evaluating differences in characteristics among various industries. Under the ''anchor'' approach, SBA generally evaluated the characteristics of individual industries relative to the average characteristics of industries with the anchor size standard to determine whether they should have a higher or a lower size standard than the anchor. In the ''percentile'' approach, SBA ranks each industry among all industries with the same measure of size standards (such as receipts or employees) in terms of four primary industry factors, discussed in the Industry Analysis subsection below. The ''percentile'' approach is explained more fully in the Industry Analysis section below. For a more detailed explanation, please see the revised Methodology at *www.sba.gov/size.*

Additionally, as the fifth factor, SBA evaluates the difference between the small business share of Federal contract dollars and the small business share of total industry receipts to compute the size standard for the Federal contracting factor. The overall size standard for an industry is then obtained by averaging all size standards supported by each primary factor. The evaluation of the Federal contracting factor is explained more fully in the Industry Analysis section below.

SBA does not apply all aspects of its Methodology to all proposed rules because not all features are relevant for every industry covered by each proposed rule. For example, since all industries covered by this proposed rule have receipts-based size standards, the Methodology described in this proposed rule applies only to establishing, reviewing, or modifying receipts-based size standards. SBA's Methodology is available on its website at *www.sba.gov/size.*

Industry Analysis

Congress granted SBA's Administrator discretion to establish detailed small business size standards. 15 U.S.C. 632(a)(2). Specifically, section 3(a)(3) of the Small Business Act (15 U.S.C. 632(a)(3)) requires that ''. . . the [SBA] Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the

Administrator.'' Accordingly, the economic structure of an industry is the basis for establishing, reviewing, or modifying small business size standards. In addition, SBA considers current economic conditions, its mission and program objectives, the Administration's current policies, impacts on small businesses under current size and proposed or revised size standards, suggestions from industry groups and Federal agencies, and public comments on the proposed rule. SBA also examines whether a size standard based on industry and other relevant data successfully excludes businesses that are dominant in the industry.

The goal of SBA's size standards review is to determine whether its existing small business size standards reflect the current industry structure and Federal market conditions and revise them when the latest available data suggest that revisions are warranted. In the past, SBA compared the characteristics of each industry with the average characteristics of a group of industries associated with the ''anchor'' size standard. For example, in the first 5-year comprehensive review of size standards under the Jobs Act, $7.0 million (now $8.0 million due to the inflation adjustment in 2019; see 84 FR 34261, July 18, 2019) was considered the ''anchor'' for receipts-based size standards and 500 employees was the ''anchor'' for employee-based size standards. If the characteristics of a specific industry under review were similar to the average characteristics of industries in the anchor group, SBA generally adopted the anchor size standard for that industry. If the specific industry's characteristics were significantly different from those in the anchor group, SBA assigned a size standard that was higher or lower than the anchor. To determine a size standard above or below the anchor size standard, SBA evaluated the characteristics of a second comparison group of industries with higher size standards. For industries with receipts-based standards, the second comparison group consisted of industries with size standards between $23.0 million and $35.5 million, with the weighted average size standard for the group equaling $29.0 million. For manufacturing industries and other industries with employee-based size standards (except for Wholesale Trade and Retail Trade), the second comparison group included industries with a size standard of 1,000 employees or 1,500 employees, with the weighted average size standard of 1,323 employees. Using the anchor size standard and average size standard for the second comparison group, SBA computed a size standard for an industry's characteristic (factor) based on the industry's position for that factor relative to the average values of the same factor for industries in the anchor and second comparison groups.

Under the ''percentile'' approach, for each industry factor, an industry is ranked and compared with the 20th percentile and 80th percentile values of that factor among the industries sharing the same measure of size standards (*i.e.,* receipts or employees). Combining that result with the 20th percentile and 80th percentile values of size standards among the industries with the same measure of size standards, SBA computes a size standard supported by each industry factor for each industry. In the previous Methodology, comparison industry groups were predetermined independent of the data, while in the revised Methodology they are established using the actual data. A more detailed description of the percentile method is provided in SBA's Methodology, available at *www.sba.gov/size.*

The primary factors that SBA evaluates to examine industry structure include average firm size, startup costs and entry barriers, industry competition, and distribution of firms by size. SBA also evaluates, as an additional primary factor, small business success in receiving Federal contracting assistance under the current size standards. Specifically, for the Federal contracting factor, SBA examines the small business share of Federal contract dollars relative to small business share of total receipts within an industry. These are, generally, the five most important factors SBA examines when establishing, reviewing, or revising a size standard for an industry. However, SBA will also consider and evaluate other secondary factors that it believes are relevant to a particular industry (such as technological changes, growth trends, SBA financial assistance, and other program factors). SBA also considers possible impacts of size standard revisions on eligibility for Federal small business assistance, current economic conditions, the Administration's policies, and suggestions from industry groups and Federal agencies. Public comments on proposed rules also provide important additional information. SBA thoroughly reviews all public comments before making a final decision on its proposed revisions to size standards. Below are brief descriptions of each of the five primary factors that SBA has evaluated for each industry being reviewed in this proposed rule. A more detailed description of this analysis is provided in the SBA's Methodology, available at *www.sba.gov/size.*

1. Average Firm Size

SBA computes two measures of average firm size: Simple average and weighted average. For industries with receipts-based size standards, the simple average is the total receipts of the industry divided by the total number of firms in the industry. The weighted average firm size is the summation of all the receipts of the firms in an industry multiplied by their share of receipts in the industry. The simple average weighs all firms within an industry equally regardless of their size. The weighted average overcomes that limitation by giving more weight to larger firms. The size standard supported by average firm size is obtained by averaging size standards supported by simple average firm size and weighted average firm size.

If the average firm size of an industry is higher than the average firm size for most other industries, this would generally support a size standard higher than the size standards for other industries. Conversely, if the industry's average firm size is lower than that of most other industries, it would provide a basis to assign a lower size standard as compared to size standards for most other industries.

2. Startup Costs and Entry Barriers

Startup costs reflect a firm's initial size in an industry. New entrants to an industry must have sufficient capital and other assets to start and maintain a viable business. If firms entering an industry under review have greater capital requirements than firms in most other industries, all other factors remaining the same, this would be a basis for a higher size standard. Conversely, if the industry has smaller capital needs compared to most other industries, a lower size standard would be considered appropriate.

Given the lack of actual data on startup costs and entry barriers by industry, SBA uses average assets as a proxy for startup costs and entry barriers. To calculate average assets, SBA begins with the sales to total assets ratio for an industry from the Risk Management Association's Annual Statement Studies, available at *https://rmau.org.* SBA then applies these ratios to the average receipts of firms in that industry obtained from the Economic Census tabulation. An industry with average assets that are significantly

higher than most other industries is likely to have higher startup costs; this in turn will support a higher size standard. Conversely, an industry with average assets that are similar to or lower than most other industries is likely to have lower startup costs; this will support either lowering or maintaining the size standard.

3. Industry Competition

Industry competition is generally measured by the share of total industry receipts generated by the largest firms in an industry. SBA generally evaluates the share of industry receipts generated by the four largest firms in each industry. This is referred to as the ''4-firm concentration ratio,'' a commonly used economic measure of market competition. Using the 4-firm concentration ratio, SBA compares the degree of concentration within an industry to the degree of concentration of the other industries with the same measure of size standards. If a significantly higher share of economic activity within an industry is concentrated among the four largest firms compared to most other industries, all else being equal, SBA would set a size standard that is relatively higher than for most other industries. Conversely, if the market share of the four largest firms in an industry is appreciably lower than the similar share for most other industries, the industry will be assigned a size standard that is lower than for most other industries.

4. Distribution of Firms by Size

SBA examines the shares of industry total receipts accounted for by firms of different receipts and employment sizes in an industry. This is an additional factor SBA considers in assessing competition within an industry besides the 4-firm concentration ratio. If the preponderance of an industry's economic activity is attributable to smaller firms, this generally indicates that small businesses are competitive in that industry, which would support adopting a smaller size standard. A higher size standard would be supported for an industry in which the distribution of firms indicates that most of the economic activity is concentrated among the larger firms.

Concentration is a measure of inequality of distribution. To determine the degree of inequality of distribution in an industry, SBA computes the Gini coefficient, using the Lorenz curve. The Lorenz curve presents the cumulative percentages of units (firms) along the horizontal axis and the cumulative percentages of receipts (or other measures of size) along the vertical axis. (For further detail, see SBA's Methodology on its website at *www.sba.gov/size*.) Gini coefficient values vary from zero to one. If receipts are distributed equally among all the firms in an industry, the value of the Gini coefficient will equal zero. If an industry's total receipts are attributable to a single firm, the Gini coefficient will equal one.

SBA compares the degree of inequality of distribution for an industry under review with other industries with the same type of size standards. If an industry shows a higher degree of inequality of distribution (hence a higher Gini coefficient value) compared to most other industries in the group, this would, all else being equal, warrant a size standard that is higher than the size standards assigned to most other industries. Conversely, an industry with lower degree of inequality (*i.e.,* a lower Gini coefficient value) than most others will be assigned a lower size standard relative to others.

5. Federal Contracting

As the fifth factor, SBA examines the success small businesses are having in winning Federal contracts under the current size standard as well as the possible impact a size standard change may have on Federal small business contracting opportunities. The Small Business Act requires the Federal Government to ensure that small businesses receive a ''fair proportion'' of Federal contracts. The legislative history also discusses the importance of size standards in Federal contracting. To incorporate the Federal contracting factor in the size standards analysis, SBA evaluates small business participation in Federal contracting in terms of the share of total Federal contract dollars awarded to small businesses relative to the small business share of total receipts within an industry. In general, if the share of Federal contract dollars awarded to small businesses in an industry is significantly smaller than the small business share of total industry receipts, all else remaining the same, a justification would exist for considering a size standard higher than the current size standard. In cases where small business share of the Federal market is already appreciably high relative to the small business share of the overall market, SBA generally assumes that the existing size standard is adequate with respect to the Federal contracting factor.

The disparity between the small business Federal market share and industry-wide small business share may be due to various factors, such as extensive administrative and compliance requirements associated with Federal contracts, the different skill set required to perform Federal contracts as compared to typical commercial contracting work, and the size of Federal contracts. These, as well as other factors, are likely to influence the type of firms within an industry that compete for Federal contracts. By comparing the small business Federal contracting share with the industry-wide small business share, SBA includes in its size standards analysis the latest Federal market conditions. Besides the impact on Federal contracting, SBA also examines impacts on SBA's loan programs both under the current and revised size standards.

Sources of Industry and Program Data

SBA's primary source of industry data used in this proposed rule for evaluating industry characteristics and developing size standards is a special tabulation of the Economic Census from the U.S. Census Bureau (*www.census.gov/econ/census*). The tabulation based on the 2012 Economic Census is the latest available. The special tabulation provides industry data on the number of firms, number of establishments, number of employees, annual payroll, and annual receipts of companies by Industry (6-digit level), Industry Group (4-digit level), Subsector (3-digit level), and Sector (2-digit level). These data are arrayed by various classes of firms' size based on the overall number of employees and receipts of the entire enterprise (all establishments and affiliated firms) from all industries. The special tabulation also contains information for different levels of NAICS categories on average and median firm size in terms of both receipts and employment, total receipts generated by the four and eight largest firms, the Herfindahl-Hirschman Index (HHI), the Gini coefficient, and size distributions of firms by various receipts and employment size groupings.

In some cases where data were not available due to disclosure prohibitions in the Census Bureau's tabulation, SBA either estimated missing values using available relevant data or examined data at a higher level of industry aggregation, such as at the NAICS Sector (2-digit), Subsector (3-digit), or Industry Group (4-digit) level. In some instances, SBA's analysis was based only on those factors for which data were available or estimates of missing values were possible.

To evaluate some industries that are not covered by the Economic Census, SBA used a similar special tabulation of the latest County Business Patterns

(CBP) published by the U.S. Census Bureau (*www.census.gov/programs-surveys/cbp.html*). Similarly, to evaluate industries in NAICS Sector 11 that are also not covered by the Economic Census and CBP, SBA evaluated a similar special tabulation based on the 2012 Census of Agriculture (*www.nass.usda.gov*) from the National Agricultural Statistics Service (NASS). Besides the Economic Census, Agricultural Census and CBP tabulations, SBA also evaluates relevant industry data from other sources when necessary, especially for industries that are not covered by the Economic Census or CBP. These include the Quarterly Census of Employment and Wages (QCEW, also known as ES–202 data) (*www.bls.gov/cew/*) and Business Employment Dynamics (BED) data (*www.bls.gov/bdm/*) from the U.S. Bureau of Labor Statistics. Similarly, to evaluate certain financial industries that have asset-based size standards, SBA examines the data from the Statistics on Depository Institutions (SDI) database (*www5.fdic.gov/sdi/main.asp*) of the Federal Depository Insurance Corporation (FDIC) data. Finally, to evaluate the capacity component of the Petroleum Refiners (NAICS 324110) size standard, SBA evaluates the petroleum production data from the Energy Information Administration (*www.eia.gov*).

To calculate average assets, SBA used sales to total assets ratios from the Risk Management Association's Annual eStatement Studies, 2016–2018 (*https://rmau.org*). To evaluate Federal contracting trends and evaluate two exceptions in Sector 11 and one exception in Sector 23, SBA examined the data on Federal prime contract awards from the Federal Procurement Data System—Next Generation (FPDS–NG) (*www.fpds.gov)* for fiscal years 2016–2018. To assess the impact on financial assistance to small businesses, SBA examined its internal data on 7(a) and 504 loan programs for fiscal years 2016–2018. For some portion of impact analysis, SBA also evaluated the data from the System of Award Management (SAM) (*www.sam.gov*).

Data sources and estimation procedures SBA uses in its size standards analysis are documented in detail in SBA's Methodology, which is available at *www.sba.gov/size.*

Dominance in Field of Operation

Section 3(a) of the Small Business Act (15 U.S.C. 632(a)) defines a small business concern as one that is: (1) Independently owned and operated; (2) not dominant in its field of operation; and (3) within a specific small business definition or size standard established by the SBA Administrator. SBA considers as part of its evaluation whether a business concern at a proposed size standard would be dominant in its field of operation. For this, SBA generally examines the industry's market share of firms at the proposed or revised size standard as well as the distribution of firms by size. Market share and size distribution may indicate whether a firm can exercise a major controlling influence on a national basis in an industry where a significant number of business concerns are engaged. If a contemplated size standard includes a dominant firm, SBA will consider a lower size standard to exclude the dominant firm from being defined as small.

Selection of Size Standards

In the 2009 Methodology, which SBA applied to the first 5-year comprehensive review of size standards, SBA adopted a fixed number of size standards levels as part of its effort to simplify size standards. In response to public comments to the 2009 Methodology white paper, and the 2013 amendment to the Small Business Act (section 3(a)(8)) under section 1661 of the National Defense Authorization Act for Fiscal Year 2013 (''NDAA 2013'') (Pub. L. 112–239, January 2, 2013), in the revised Methodology, SBA has relaxed the limitation on the number of small business size standards. Specifically, section 1661 of NDAA 2013 states, ''SBA cannot limit the number of size standards, and shall assign the appropriate size standard to each industry identified by NAICS.''

In the revised Methodology, SBA calculates a separate size standard for each NAICS industry. However, to account for errors and limitations associated with various data that SBA evaluates in the size standards analysis, SBA rounds the calculated size standard value for a receipts-based size standard to the nearest $500,000, except for agricultural industries in Subsectors 111 and 112 for which the calculated size standards will be rounded to the nearest $250,000. This rounding procedure is applied both in calculating a size standard for each of the five primary factors and in calculating the overall size standard for the industry.

As a policy decision, SBA continues to maintain the minimum and maximum levels for both receipts and employee-based size standards. Accordingly, SBA will not generally propose or adopt a size standard that is either below the minimum level or above the maximum, even though the calculations yield values below the minimum or above the maximum. The minimum size standard reflects the size an established small business should be to have adequate capabilities and resources to be able to compete for and perform Federal contracts (but does not account for small businesses that are newly formed or just starting operations). On the other hand, the maximum size standard represents the level above which businesses, if qualified as small, would outcompete much smaller businesses when accessing Federal assistance.

With respect to receipts-based size standards, SBA has established $6.0 million and $41.5 million, respectively, as the minimum and maximum size standard levels (except for most agricultural industries in NAICS Subsectors 111 and 112). These levels reflect the current minimum of $6.0 million and the current maximum of $41.5 million in SBA's existing size standards. The industry data suggests that $6.0 million minimum and $41.5 million maximum size standards would be too high for agricultural industries. Accordingly, SBA has established $1.0 million as the minimum size standard and $5.0 million as the maximum size standard for industries in Subsector 111 (Crop Production) and Subsector 112 (Animal Production and Aquaculture).

Evaluation of Industry Factors

As mentioned earlier, to assess the appropriateness of the current size standards, SBA evaluates the structure of each industry in terms of four economic characteristics or factors: Average firm size, average assets size as a proxy for startup costs and entry barriers, the 4-firm concentration ratio as a measure of industry competition, and size distribution of firms using the Gini coefficient. For each size standard type (*i.e.,* receipts-based or employee-based), SBA ranks industries both in terms of each of the four industry factors and in terms of the existing size standard and computes the 20th percentile and 80th percentile values for both. SBA then evaluates each industry by comparing its value for each industry factor to the 20th percentile and 80th percentile values for the corresponding factor for industries under a particular type of size standard.

If the characteristics of an industry under review within a particular size standard type are similar to the average characteristics of industries within the same size standard type in the 20th percentile, SBA will consider adopting as an appropriate size standard for that industry the 20th percentile value of size standards for those industries. For each size standard type, if the industry's

characteristics are similar to the average characteristics of industries in the 80th percentile, SBA will assign a size standard that corresponds to the 80th percentile in the size standard rankings of industries. A separate size standard is established for each factor based on the amount of differences between the factor value for an industry under a particular size standard type and 20th percentile and 80th percentile values for the corresponding factor for all industries in the same type. Specifically, the actual level of the new size standard for each industry factor is derived by a linear interpolation using the 20th percentile and 80th percentile values of that factor and corresponding percentiles of size standards. Each calculated size standard is bounded between the minimum and maximum size standards levels, as discussed before. As noted earlier, the calculated value for a receipts-based size standard for each industry factor is rounded to the nearest $500,000, except for industries in Subsectors 111 and 112 for which a calculated size standard is rounded to the nearest $250,000.

Table 2, 20th and 80th Percentiles of Industry Factors for Receipts-Based Size Standards, shows the 20th percentile and 80th percentile values for average firm size (simple and weighted), average assets size, 4-firm concentration ratio, and Gini coefficient for industries with receipts-based size standards.

TABLE 2—20TH AND 80TH PERCENTILES OF INDUSTRY FACTORS FOR RECEIPTS-BASED SIZE STANDARDS

Industries/percentiles	Simple average receipts size ($ million)	Weighted average receipts size ($ million)	Average assets size ($ million)	4-Firm concentration ratio (%)	Gini coefficient
Industries, excluding Subsectors 111 and 112					
20th percentile	0.83	19.42	0.34	7.9	0.686
80th percentile	7.52	830.65	5.19	42.4	0.834
Industries in Subsectors 111 and 112					
20th percentile	0.06	1.48	0.07	1.7	0.608
80th percentile	0.83	13.32	0.88	12.3	0.908

Estimation of Size Standards Based on Industry Factors

An estimated size standard supported by each industry factor is derived by comparing its value for a specific industry to the 20th percentile and 80th percentile values for that factor. If an industry's value for a particular factor is near the 20th percentile value in the distribution, the supported size standard will be one that is close to the 20th percentile value of size standards for industries in the size standards group, which is $8.0 million. If a factor for an industry is close to the 80th percentile value of that factor, it would support a size standard that is close to the 80th percentile value in the distribution of size standards, which is $35.0 million. For a factor that is within, above, or below the 20–80th percentile range, the size standard is calculated using linear interpolation based on the 20th percentile and 80th percentile values for that factor and the 20th percentile and 80th percentile values of size standards.

For example, if an industry's simple average receipts are $1.9 million, that would support a size standard of $12.5 million. According to Table 2, the 20th percentile and 80th percentile values of average receipts are $0.83 million and $7.52 million, respectively. The $1.9 million is 15.9% between the 20th percentile value ($0.83 million) and the 80th percentile value ($7.52 million) of simple average receipts (($1.9 million − $0.83 million) ÷ ($7.52 million − $0.83 million) = 0.159 or 15.9%). Applying this percentage to the difference between the 20th percentile value ($8 million) and 80th percentile ($35.0 million) value of size standards and then adding the result to the 20th percentile size standard value ($8.0 million) yields a calculated size standard value of $12.32 million ([{$35.0 million − $8.0 million} * 0.159] + $8.0 million = $12.32 million). The final step is to round the calculated $12.32 million size standard to the nearest $500,000, which in this example yields $12.5 million. This procedure is applied to calculate size standards supported by other industry factors.

Detailed formulas involved in these calculations are presented in SBA's Methodology, which is available on its website at *www.sba.gov/size.*

Derivation of Size Standards Based on Federal Contracting Factor

Besides industry structure, SBA also evaluates Federal contracting data to assess the success of small businesses in getting Federal contracts under the existing size standards. For each industry with $20 million or more in annual Federal contract dollars, SBA evaluates the small business share of total Federal contract dollars relative to the small business share of total industry receipts. All other factors being equal, if the share of Federal contracting dollars awarded to small businesses in an industry is significantly less than the small business share of that industry's total receipts, a justification would exist for considering a size standard higher than the current size standard. Conversely, if the small business share of Federal contracting activity is near or above the small business share of total industry receipts, this will support the current size standard.

SBA increases the existing size standards by certain percentages when the small business share of total industry receipts exceeds the small business share of total Federal contract dollars by 10 or more percentage points. Proposed percentage increases generally reflect receipts levels needed to bring the small business share of Federal contracts on par with the small business share of industry receipts. These proposed percentage increases for receipts-based size standards are given in Table 3, Proposed Adjustments to Size Standards Based on Federal Contracting Factor.

TABLE 3—PROPOSED ADJUSTMENTS TO SIZE STANDARDS BASED ON FEDERAL CONTRACTING FACTOR

Size standards	Percentage difference between the small business shares of total Federal contract dollars in an industry and of total industry receipts		
	> −10%	−10% to −30%	< − 30%
Receipts-based standards:			
< $15.0 million	No change	Increase 30%	Increase 60%.
$15.0 million to < $25.0 million	No change	Increase 20%	Increase 40%.
$25.0 million to < $41.5 million	No change	Increase 15%	Increase 25%.

For example, if an industry with the current size standard of $8.0 million had an average of $50 million in Federal contracting dollars, of which 15% went to small businesses, and if that small businesses accounted for 40% of total receipts of that industry, the small business share of total Federal contract dollars would be 25% less than the small business share of total industry receipts (40%–15%). According to the adjustment above, the new size standard for the Federal contracting factor for that industry would be set by multiplying the current $8.0 million standard by 1.3 (*i.e.,* 30% increase) and then by rounding the result to the nearest $500,000, yielding a size standard of $10.5 million.

SBA evaluated the small business share of total Federal contract dollars for the 61 industries covered by this proposed rule—31 in Sector 54, and 30 in Sector 56—that had $20 million or more in average annual Federal contract dollars during fiscal years 2016–2018. The Federal contracting factor was significant (*i.e.,* the difference between the small business share of total industry receipts and small business share of Federal contracting dollars was 10 percentage points or more) in 28 of these industries, prompting an upward adjustment of their existing size standards based on that factor. For the remaining 33 industries that averaged $20 million or more in average annual contract dollars, the Federal contracting factor was not significant, and the existing size standard was applied for that factor. For industries with less than $20 million in average annual contract dollars, no size standard was calculated for the Federal contracting factor.

Derivation of Overall Industry Size Standard

The SBA's Methodology presented above results in five separate size standards based on evaluation of the five primary factors (*i.e.,* four industry factors and one Federal contracting factor). SBA typically derives an industry's overall size standard by assigning equal weights to size standards supported by each of these five factors. However, if necessary, SBA's Methodology would allow assigning different weights to some of these factors in response to its policy decisions and other considerations. For detailed calculations, see SBA's Methodology, available on its website at *www.sba.gov/size.*

Calculated Size Standards Based on Industry and Federal Contracting Factors

Table 4, Size Standards Supported by Each Factor for Each Industry (Receipts), shows the results of analyses of industry and Federal contracting factors for each industry and subindustry (exception) covered by this proposed rule. NAICS industries in columns 2, 3, 4, 5, 6, 7, and 8 show two numbers. The upper number is the value for the industry or Federal contracting factor shown on the top of the column and the lower number is the size standard supported by that factor. Column 9 shows a calculated new size standard for each industry. This is the average of the size standards supported by each factor (the size standard for average firm size is an average of size standards supported by simple average firm size and weighted average firm size), rounded to the nearest $500,000 for non-agriculture industries and rounded to the nearest $250,000 for agriculture industries. Analytical details involved in the averaging procedure are described in SBA's Methodology, which is available on its website at *www.sba.gov/size.* For comparison with the calculated new size standards, the current size standards are in column 10 of Table 4.

TABLE 4—SIZE STANDARDS SUPPORTED BY EACH FACTOR FOR EACH INDUSTRY (RECEIPTS)

[Upper value = calculated factor, lower value = size standard supported]

NAICS code NAICS industry title	Type	Simple average firm size ($ million)	Weighted average firm size ($ million)	Average assets size ($ million)	Four-firm ratio %	Gini coefficient	Federal contract factor (%)	Calculated size standard ($ million)	Current size standard ($ million)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
541110 Offices of Lawyers	Factor	$1.5	$223.3	$0.3	2.7	0.775	−20.8	$13.5	$12.0
	Size Std	10.5	15.0	8.0	$6.0	$24.0	$15.5		
541191 Title Abstract and Settlement Offices	Factor	1.3	278.1	0.5	27.5	0.763		17.0	12.0
	Size Std	9.5	16.5	8.5	$23.5	$22.0			
541199 All Other Legal Services	Factor	1.1	95.9	0.4	29.6	0.792	−38.8	18.0	12.0
	Size Std	9.0	10.5	8.0	$25.0	$27.5	$19.0		
541211 Offices of Certified Public Accountants	Factor	1.4	2,879.6	0.5	37.2	0.782	−14.0	23.5	22.0
	Size Std	10.5	41.5	8.5	$31.0	$25.5	$26.5		
541213 Tax Preparation Services	Factor	0.3	641.9	0.2		0.708		12.0	22.0
	Size Std	6.0	28.5	7.0		$12.0			
541214 Payroll Services	Factor	6.5	2,094.0	2.9	49.6	0.854		34.5	22.0
	Size Std	30.5	41.5	22.5	$40.5	$38.5			
541219 Other Accounting Services	Factor	0.5	282.8	0.2	18.8	0.751	−35.3	17.5	22.0
	Size Std	6.5	17.0	7.0	$16.5	$20.0	$31.0		
541310 Architectural Services	Factor	1.4	54.8	0.5	5.8	0.748	−12.8	11.0	8.0
	Size Std	10.5	9.0	9.0	$6.5	$19.5	$10.5		
541320 Landscape Architectural Services	Factor	0.6	4.3	0.2	4.5	0.642		6.5	8.0
	Size Std	7.0	7.5	7.0	$6.0	$6.0			
541330 Engineering Services	Factor	4.5	1,396.0	1.7	13.1	0.839	0.1	22.5	16.5
	Size Std	23.0	41.5	16.0	$12.0	$36.0	$16.5		

TABLE 4—SIZE STANDARDS SUPPORTED BY EACH FACTOR FOR EACH INDUSTRY (RECEIPTS)—Continued
[Upper value = calculated factor, lower value = size standard supported]

NAICS code NAICS industry title	Type	Simple average firm size ($ million)	Weighted average firm size ($ million)	Average assets size ($ million)	Four-firm ratio %	Gini coefficient	Federal contract factor (%)	Calculated size standard ($ million)	Current size standard ($ million)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Except Military and Aerospace Equipment and Military Weapons.	Factor	3,225.7	70,551.0	1,271.8	35.7	0.883	12.6	39.0	41.5
	Size Std	41.5	41.5	41.5	$30.0	$41.5	$41.5		
Except Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992.	Factor							39.0	41.5
	Size Std								
Except Marine Engineering and Naval Architecture	Factor	2,639.7	73,130	1,055.9	52.5	0.882	3.4	41.5	41.5
	Size Std	41.5	41.5	41.5	$41.5	$41.5	$41.5		
541340 Drafting Services	Factor	0.4	2.9	0.1	7.2	0.673		7.0	8.0
	Size Std	6.0	7.5	7.0	$7.5	$6.0			
541350 Building Inspection Services	Factor	0.4	18.1	0.1	12.5	0.702	−65.2	10.0	8.0
	Size Std	6.0	8.0	7.0	$11.5	$11.0	$13.0		
541360 Geophysical Surveying and Mapping Services	Factor	4.5	201.6	1.7	43.2	0.861	−3.5	25.0	16.5
	Size Std	22.5	14.0	15.5	$35.5	$40.0	$16.5		
541370 Surveying and Mapping (except Geophysical) Services.	Factor	0.7	57.4	0.3	16.6	0.730	−42.3	14.0	16.5
	Size Std	7.5	9.5	7.5	$15.0	$16.0	$23.0		
541380 Testing Laboratories	Factor	3.0	111.5	1.3	13.2	0.766	−16.8	16.5	16.5
	Size Std	16.5	11.0	13.5	$12.0	$22.5	$20.0		
541410 Interior Design Services	Factor	0.7	4.6	0.2	2.4	0.640		6.5	8.0
	Size Std	7.5	7.5	7.0	$6.0	$6.0			
541420 Industrial Design Services	Factor	1.2	37.4	0.5	24.3	0.756		15.0	8.0
	Size Std	9.5	8.5	8.5	$21.0	$21.0			
541430 Graphic Design Services	Factor	0.5	6.7	0.2	3.5	0.688	16.5	7.5	8.0
	Size Std	6.5	7.5	7.0	$6.0	$8.5	$8.0		
541490 Other Specialized Design Services	Factor	0.8	14.7	0.3	15.3	0.741		12.0	8.0
	Size Std	8.0	8.0	7.5	$14.0	$18.0			
541511 Custom Computer Programming Services	Factor	2.0	616.8	0.7	11.8	0.813	−7.3	20.5	30.0
	Size Std	12.5	28.0	9.5	$11.0	$31.0	$30.0		
541512 Computer Systems Design Services	Factor	4.3	3,438.4	1.3	24.4	0.859	8.0	27.0	30.0
	Size Std	22.0	41.5	13.0	$21.0	$39.5	$30.0		
541513 Computer Facilities Management Services	Factor	5.8	7,617.4	1.7	59.2	0.866	27.1	32.5	30.0
	Size Std	28.0	41.5	15.5	$41.5	$40.5	$30.0		
541519 Other Computer Related Services	Factor	1.9	268.0	0.5	20.1	0.829	11.6	21.0	30.0
	Size Std	12.0	16.5	9.0	$17.5	$34.0	$30.0		
541611 Administrative Management and General Management Consulting Services.	Factor	1.6	2,532.2	0.5	27.9	0.824	4.8	21.5	16.5
	Size Std	11.0	41.5	9.0	$23.5	$33.0	$16.5		
541612 Human Resources Consulting Services	Factor	2.6	1,154.7	0.7	42.7	0.843	20.8	25.5	16.5
	Size Std	15.0	41.5	10.0	$35.0	$36.5	$16.5		
541613 Marketing Consulting Services	Factor	1.1	95.4	0.4	8.1	0.781	−28.1	14.5	16.5
	Size Std	9.0	10.5	8.0	$8.0	$25.5	$20.0		
541614 Process, Physical Distribution, and Logistics Consulting Services.	Factor	2.0	113.9	0.7	15.3	0.814	−11.2	17.5	16.5
	Size Std	12.5	11.0	10.0	$13.5	$31.0	$20.0		
541618 Other Management Consulting Services	Factor	0.6	17.8	0.2	9.8	0.735	−42.9	13.0	16.5
	Size Std	7.5	8.0	7.5	$9.5	$17.0	$23.0		
541620 Environmental Consulting Services	Factor	1.5	51.8	0.6	8.4	0.773	3.2	13.5	16.5
	Size Std	11.0	9.0	9.5	$8.5	$24.0	$16.5		
541690 Other Scientific and Technical Consulting Services.	Factor	1.2	135.7	0.4	11.6	0.787	−22.9	15.5	16.5
	Size Std	9.5	12.0	8.5	$11.0	$26.5	$20.0		
541720 Research and Development in the Social Sciences and Humanities.	Factor	3.5	208.8	2.4	31.9	0.830	−21.7	24.5	22.0
	Size Std	19.0	14.5	19.0	$26.5	$34.0	$26.5		
541810 Advertising Agencies	Factor	2.9	896.3	0.9	30.1	0.801	−20.8	22.5	16.5
	Size Std	16.0	37.0	11.0	$25.5	$29.0	$20.0		
541820 Public Relations Agencies	Factor	1.3	137.2	0.4	21.6	0.757	5.6	15.0	16.5
	Size Std	10.0	12.0	8.0	$18.5	$21.0	$16.5		
541830 Media Buying Agencies	Factor	8.4	283.3	2.6	35.7	0.838		28.5	16.5
	Size Std	38.5	17.0	20.5	$30.0	$35.5			
541840 Media Representatives	Factor	2.3	79.4	0.8	26.0	0.807		18.5	16.5
	Size Std	14.0	10.0	10.5	$22.0	$30.0			
541850 Outdoor Advertising	Factor	3.3	622.5	2.8	54.8	0.842		30.5	16.5
	Size Std	18.0	28.0	21.5	$41.5	$36.5			
541860 Direct Mail Advertising	Factor	3.8	265.8	1.4	24.4	0.781		19.5	16.5
	Size Std	20.0	16.0	14.0	$21.0	$25.5			
541870 Advertising Material Distribution Services	Factor	3.8	156.6	1.5	41.4	0.839		25.0	16.5
	Size Std	20.0	12.5	14.0	$34.0	$36.0			
541890 Other Services Related to Advertising	Factor	1.8	89.4	0.6	13.1	0.780	−42.3	16.0	16.5
	Size Std	12.0	10.5	9.0	$12.0	$25.0	$23.0		
541910 Marketing Research and Public Opinion Polling	Factor	3.6	339.8	1.3	21.6	0.815	11.4	20.0	16.5
	Size Std	19.5	18.5	13.5	$18.5	$31.5	$16.5		
541921 Photography Studios, Portrait	Factor	0.4	129.9	0.2	28.3	0.727		14.0	8.0
	Size Std	6.5	11.5	7.0	$24.0	$15.5			
541922 Commercial Photography	Factor	0.5	5.4	0.2	7.9	0.674	−50.2	8.0	8.0
	Size Std	6.5	7.5	7.0	$8.0	$6.0	$13.0		
541930 Translation and Interpretation Services	Factor	1.9	218.3	0.6	39.3	0.840	1.3	20.0	8.0
	Size Std	12.0	14.5	9.5	$32.5	$36.0	$8.0		
541940 Veterinary Services	Factor	1.1	106.9	0.3	9.2	0.529	−64.5	9.0	8.0
	Size Std	9.0	11.0	7.5	$9.0	$6.0	$13.0		
541990 All Other Professional, Scientific and Technical Services.	Factor	1.0	194.6	0.3	19.1	0.784	−34.1	17.0	16.5
	Size Std	8.5	14.0	8.0	$17.0	$26.0	$23.0		
551111 Offices of Bank Holding Companies	Factor	10.1	402.8	5.9		0.818		34.0	22.0
	Size Std	41.5	21.0	39.0		$32.0			
551112 Offices of Other Holding Companies	Factor	10.8	2,312.4	13.5		0.848		40.0	22.0
	Size Std	41.5	41.5	41.5		$37.5			
561110 Office Administrative Services	Factor	1.5	25.7	0.6	2.1	0.761	32.7	11.0	8.0
	Size Std	10.5	8.0	9.5	$6.0	$21.5	$8.0		
561210 Facilities Support Services	Factor	13.8	665.1	3.8	25.6	0.841	−5.2	32.5	41.5
	Size Std	41.5	29.5	27.5	$22.0	$36.0	$41.5		
561311 Employment Placement Agencies	Factor	2.0	242.2	0.4	23.7	0.797	−21.8	21.0	30.0
	Size Std	12.5	15.5	8.0	$20.5	$28.0	$34.5		

TABLE 4—SIZE STANDARDS SUPPORTED BY EACH FACTOR FOR EACH INDUSTRY (RECEIPTS)—Continued
[Upper value = calculated factor, lower value = size standard supported]

NAICS code NAICS industry title	Type	Simple average firm size ($ million)	Weighted average firm size ($ million)	Average assets size ($ million)	Four-firm ratio %	Gini coefficient	Federal contract factor (%)	Calculated size standard ($ million)	Current size standard ($ million)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
561312 Executive Search Services	Factor	1.0	61.7	0.2	17.9	0.726		12.0	30.0
	Size Std	8.5	9.5	7.0	$16.0	$15.5			
561320 Temporary Help Services	Factor	9.0	1,130.0	1.7	14.0	0.819	48.5	26.5	30.0
	Size Std	41.0	41.5	15.5	$13.0	$32.0	$30.0		
561330 Professional Employer Organizations	Factor	30.7	5,898.1	4.9	43.6	0.865	80.2	36.5	30.0
	Size Std	41.5	41.5	33.5	$36.0	$40.5	$30.0		
561410 Document Preparation Services	Factor	0.8	74.8	0.3	26.6	0.790	40.9	16.5	16.5
	Size Std	8.0	10.0	7.5	$22.5	$27.0	$16.5		
561421 Telephone Answering Services	Factor	1.5	42.7	0.7	24.0	0.740		14.5	16.5
	Size Std	10.5	9.0	9.5	$20.5	$18.0			
561422 Telemarketing Bureaus and Other Contact Centers.	Factor	6.1	312.0	2.0	21.2	0.827	−19.9	22.5	16.5
	Size Std	29.5	17.5	17.0	$18.5	$33.5	$20.0		
561431 Private Mail Centers	Factor	0.5	15.1	0.2	13.5	0.526		8.5	16.5
	Size Std	6.5	8.0	7.0	$12.5	$6.0			
561439 Other Business Service Centers (including Copy Shops).	Factor	2.1	452.9	0.7	43.0	0.805		23.5	16.5
	Size Std	13.5	22.5	10.0	$35.5	$29.5			
561440 Collection Agencies	Factor	3.1	123.3	1.1	15.2	0.792	43.6	17.0	16.5
	Size Std	17.0	11.5	12.0	$13.5	$27.5	$16.5		
561450 Credit Bureaus	Factor	19.3	824.1	6.7	59.9	0.878	22.4	36.0	16.5
	Size Std	41.5	35.0	41.5	$41.5	$41.5	$16.5		
561491 Repossession Services	Factor	0.8	7.6	0.2	17.1	0.663		9.0	16.5
	Size Std	8.0	7.5	7.0	$15.0	$6.0			
561492 Court Reporting and Stenotype Services	Factor	0.6	35.1	0.2	22.5	0.743	27.3	14.0	16.5
	Size Std	7.0	8.5	7.5	$19.5	$18.5	$16.5		
561499 All Other Business Support Services	Factor	2.3	138.8	1.0	23.7	0.810	−17.6	19.0	16.5
	Size Std	14.0	12.0	11.5	$20.5	$30.5	$20.0		
561510 Travel Agencies	Factor	1.4	303.8	0.5	25.8	0.798	10.4	19.0	22.0
	Size Std	10.5	17.5	8.5	$22.0	$28.5	$22.0		
561520 Tour Operators	Factor	2.0	52.5	0.9	15.4	0.741		13.5	22.0
	Size Std	13.0	9.0	11.0	$14.0	$18.0			
561591 Convention and Visitors Bureaus	Factor	1.7	28.5	0.5	19.3	0.745		13.5	22.0
	Size Std	11.5	8.5	9.0	$17.0	$18.5			
561599 All Other Travel Arrangement and Reservation Services.	Factor	8.6	469.4	3.7	31.9	0.840	67.1	28.5	22.0
	Size Std	39.5	23.0	27.0	$26.5	$36.0	$22.0		
561611 Investigation Services	Factor	1.1	318.4	0.3	36.2	0.810	−27.2	21.5	22.0
	Size Std	9.0	18.0	7.5	$30.0	$30.5	$26.5		
561612 Security Guards and Patrol Services	Factor	3.8	908.2	0.8	35.1	0.845	1.3	25.5	22.0
	Size Std	20.0	37.5	10.5	$29.5	$37.0	$22.0		
561613 Armored Car Services	Factor	22.7	509.9	5.1	89.6	0.871		38.0	22.0
	Size Std	41.5	24.5	35.0	$41.5	$41.5			
561621 Security Systems Services (except Locksmiths)	Factor	2.7	479.5	1.2	23.9	0.797	0.2	20.5	22.0
	Size Std	15.5	23.5	12.5	$20.5	$28.0	$22.0		
561622 Locksmiths	Factor	0.5	5.0	0.2	8.3	0.603		7.0	22.0
	Size Std	6.5	7.5	7.0	$8.5	$6.0			
561710 Exterminating and Pest Control Services	Factor	0.9	328.1	0.3	28.1	0.752	21.5	15.5	12.0
	Size Std	8.5	18.5	7.5	$24.0	$20.0	$12.0		
561720 Janitorial Services	Factor	0.7	201.8	0.2	11.2	0.785	26.6	15.0	19.5
	Size Std	7.5	14.0	7.0	$10.5	$26.0	$19.5		
561730 Landscaping Services	Factor	0.6	168.6	0.2	9.6	0.688	11.3	8.5	8.0
	Size Std	7.0	13.0	7.0	$9.5	$8.5	$8.0		
561740 Carpet and Upholstery Cleaning Services	Factor	0.4	14.3	0.1	9.4	0.673		7.5	6.0
	Size Std	6.5	8.0	7.0	$9.0	$6.0			
561790 Other Services to Buildings and Dwellings	Factor	0.5	13.0	0.2	7.1	0.645	−46.7	8.0	8.0
	Size Std	6.5	8.0	7.0	$7.5	$6.0	$13.0		
561910 Packaging and Labeling Services	Factor	4.0	59.3	1.5	14.0	0.781	−13.8	17.0	12.0
	Size Std	21.0	9.5	14.5	$13.0	$25.5	$15.5		
561920 Convention and Trade Show Organizers	Factor	2.6	287.8	0.9	24.0	0.800	46.7	17.5	12.0
	Size Std	15.5	17.0	11.0	$20.5	$28.5	$12.0		
561990 All Other Support Services	Factor	1.7	119.3	0.8	10.9	0.779	−28.2	14.5	12.0
	Size Std	11.5	11.5	10.5	$10.5	$25.0	$15.5		
562111 Solid Waste Collection	Factor	5.4	3,163.1	3.2	46.6	0.821	38.2	34.0	41.5
	Size Std	26.5	41.5	23.5	$38.5	$32.5	$41.5		
562112 Hazardous Waste Collection	Factor	7.0	129.9	4.1	43.5	0.789	33.3	31.0	41.5
	Size Std	33.0	11.5	29.0	$36.0	$27.0	$41.5		
562119 Other Waste Collection	Factor	2.1	103.4	1.2	41.4	0.779	−26.1	25.0	41.5
	Size Std	13.0	11.0	13.0	$34.0	$25.0	$41.5		
562211 Hazardous Waste Treatment and Disposal	Factor	15.6	569.0	10.4	49.9	0.840	−10.2	39.0	41.5
	Size Std	41.5	26.5	41.5	$41.0	$36.0	$41.5		
562212 Solid Waste Landfill	Factor	7.5	834.7	6.8	64.6	0.845		39.0	41.5
	Size Std	35.0	35.0	41.5	$41.5	$37.0			
562213 Solid Waste Combustors and Incinerators	Factor	56.6	1,040.3	43.5	92.5	0.863		41.0	41.5
	Size Std	41.5	41.5	41.5	$41.5	$40.0			
562219 Other Nonhazardous Waste Treatment and Disposal.	Factor	3.4	29.0	2.8	40.2	0.711	−22.5	24.5	41.5
	Size Std	18.5	8.5	21.5	$33.5	$12.5	$41.5		
562910 Remediation Services	Factor	4.3	128.5	2.0	13.3	0.774	−8.3	18.5	22.0
	Size Std	22.0	11.5	17.0	$12.0	$24.0	$22.0		
562920 Materials Recovery Facilities	Factor	5.2	276.0	2.5	28.8	0.753		21.5	22.0
	Size Std	25.5	16.5	20.0	$24.5	$20.5			
562991 Septic Tank and Related Services	Factor	0.8	16.1	0.4	11.4	0.642	9.2	8.0	8.0
	Size Std	8.0	8.0	8.0	$10.5	$6.0	$8.0		
562998 All Other Miscellaneous Waste Management Services.	Factor	1.7	45.4	0.9	26.2	0.714		14.5	8.0
	Size Std	11.5	9.0	11.0	$22.5	$13.0			

Evaluation of Size Standards for Subindustry Categories or ''Exceptions''

In accordance with SBA's approach to evaluating size standards for subindustry categories (or ''exceptions''), SBA has evaluated the three (3) exceptions covered by this proposed rule using the procedures described in the revised SBA's Methodology. The results of that analysis are discussed in the following subsection.

Exceptions to NAICS 541330: Military and Aerospace Equipment and Military Weapons; Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992; Marine Engineering and Naval Architecture

Currently, NAICS 541330 has four size standards that apply to Federal contracts for different types of engineering services. The $16.5 million size standard is for general engineering services, while the $41.5 million size standard for the three exceptions apply to specialized types of engineering services that the Federal Government procures. These exceptions apply only to Federal contracts for those services. In the prior comprehensive review, 16 commenters addressed SBA's proposal to retain the then current $27.0 million size standard for the exceptions. All believed that the $27.0 million size standard was too low and needed to be increased. Commenters expressed concern that small firms that exceed this size standard would not be able to compete with the midsize and very large firms that exist in this market. Commenters also pointed out that contracts for the exceptions tend to be large already and were trending upwards each year.

SBA agreed with commenters that the size standard for the two engineering ''exceptions'' (Military and Aerospace Equipment and Military Weapons, and Marine Engineering and Naval Architecture) should be increased, and as such, SBA adopted a size standard of $35.5 million for all three of the exceptions.[1] Thereafter, to account for inflation during the period, SBA increased the $35.5 million size standard for the three exceptions to $38.5 Million in 2014 (79 FR 33647, June 12, 2014), and to the current maximum size level of $41.5 in 2019 (84 FR 34261, July 18, 2019).

As noted previously, the data from the Economic Census special tabulation are limited down to the 6-digit NAICS industry level and hence do not provide data to assess economic characteristics at the subindustry level. For example, the Economic Census data for NAICS 541330 are aggregates of both general engineering services and specialized engineering services under the three ''exceptions.'' The lack of relevant data at the subindustry level makes it challenging to determine whether these size standards (''exceptions'') should be revised or left unchanged. Thus, the results based on the Economic Census data may not accurately reflect the characteristics of businesses providing specialized services included under those ''exceptions.''

To determine whether the Agency should propose revising the three exceptions under NAICS 541330, SBA evaluated the data from FPDS–NG and SAM. From FPDS–NG, SBA first identified Product Service Codes (PSCs) that correspond to each specific subindustry activity or ''exception'' under that NAICS code and then identified firms that are active in Federal contracting involving those PSCs. Including the exceptions, SBA identified a total of 1,257 PSCs corresponding to the activity of engineering services. The total average contract dollars obligated under these PSCs was $29.9 billion. From this group, SBA identified a subgroup of 168 PSCs corresponding to the Military and Aerospace Equipment and Military Weapons exception, and 40 PSCs corresponding to the Marine Engineering and Naval Architecture exception. The total average contract dollars obligated under these PSCs was $3.2 billion and $1.9 billion, respectively.

The data for fiscal year 2018 showed numerous firms doing contracts under Military and Aerospace Equipment and Military Weapons and Marine Engineering and Naval Architecture. SBA analyzed those firms' revenue and employment data from SAM and contract dollars from FPDS–NG to evaluate industry and Federal procurement factors. These results, presented in Table 4 of this proposed rule, support a size standard of $39.0 million for the Military and Aerospace Equipment and Military Weapons Exception and $41.5 million for the Marine Engineering and Naval Architecture. The FPDS–NG showed very few actions involving Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992. However, for purposes of contracts and subcontracts, the National Energy Policy Act of 1992 requires that the applicable size standard must be established for Military and Aerospace Equipment and Military Weapons (106 Stat. 2776, 3133).

Summary of Calculated Size Standards

Of the 91 industries and 3 subindustries (*i.e.* exceptions) reviewed in this proposed rule, the results from analyses of the latest available data on the five primary factors from Table 4, Size Standards Supported by Each Factor for Each Industry (millions of dollars), above, would support increasing size standards for 46 industries, decreasing size standards for 43 industries and 3 subindustries, and maintaining size standards for 6 industries. Table 5, Summary of Calculated Size Standards, summarizes these results by NAICS sector.

TABLE 5—SUMMARY OF CALCULATED SIZE STANDARDS

Sector	Sector name	Number of size standards reviewed	Number of size standards increased	Number of size standards decreased	Number of size standards maintained
54	Professional, Scientific and Technical Services	48	27	18	3
55	Manag6ment of Companies and Enterprises	2	2	0	0
56	Administrative and Support and Waste Management and Remediation Services.	44	17	24	3
Total		94	46	42	6

[1] As required by law, SBA also adopted the $35.5 million size standard for the third ''exception'' to NAICS 541330 (Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992). Section 3021(b)(1) of Public Law 102–486, the National Energy Policy Act of 1992 (106 Stat. 2776, 3133) states that ''for purposes of contracts and subcontracts requiring engineering services (awarded under this Act) the applicable size standard shall be that established for Military and Aerospace Equipment and Military Weapons.''

Evaluation of SBA Loan Data

Before proposing or deciding on an industry's size standard revision, SBA also considers the impact of size standards revisions on SBA's loan programs. Accordingly, SBA examined its internal 7(a) and 504 loan data for fiscal years 2016–2018 to assess whether the calculated size standards in Table 4 (above) need further adjustments to ensure credit opportunities for small businesses through those programs. For the industries reviewed in this proposed rule, the data shows that it is mostly businesses much smaller than the current or proposed size standards that receive SBA's 7(a) and 504 loans. For example, for industries covered by this proposed rule, more than 98.8% of 7(a) and 504 loans in fiscal years 2016–2018 went to businesses below the current or calculated size standards.

Proposed Changes to Size Standards

Based on the analytical results in Table 4 and considerations of the impacts of calculated size standards in terms of access by currently small businesses to SBA's loans, as discussed above, of a total of 94 industries or subindustries (exceptions) with receipts-based size standards in Sectors 54, 55, and 56 that are covered by this proposed rule, and considering the current situation due to the COVID–19 related national emergency and its impacts on small businesses and the overall economy, SBA proposes to increase size standards for 46 industries, and retain the current size standards for the remaining 48 industries or subindustries in those sectors.

Special Considerations

On March 13, 2020, the ongoing Coronavirus Disease 2019 (COVID–19) was declared a pandemic of enough severity and magnitude to warrant an emergency declaration for all states, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) was signed on March 27, 2020, to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. Section 1102 of the Act temporarily permits SBA to guarantee 100% of 7(a) loans under a new program titled the Paycheck Protection Program (PPP). Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP. The PPP and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by COVID–19. On April 24, 2020, additional funding for the CARES Act, including for the PPP, was provided. The Paycheck Protection Program and Health Care Enhancement Act, Public Law 116–139 (April 24, 2020).

The Agency is following closely the development of the pandemic and the economic situation and recovery. The consequence of the initial response of the public to the COVID–19 pandemic as well as the different measures taken by the Government to contain it (*e.g.,* stay at homestay-at-home orders, social distancing, etc.) have resulted in the present economic decline. A variety of economic indicators such as the Gross Domestic Product (GDP) and the unemployment rate shows that this recession is significantly worse than any other recession since World War II. The GDP decreased nearly 5%, and the personal consumption in goods and services decreased 6.9% in the first quarter of 2020. The Bureau of Economic Analysis (BEA) third estimate for the second quarter of 2020 shows that the GDP decreased 31.4%, and the personal consumption in goods and services decreased 33.2%; In August 2020, personal income decreased 2.7%, after having decreased by a lower percentage in June (1.2%) and slightly increased in July 2020 (0.5%). In September 2020, the unemployment rate declined to 7.9% from August 2020, when the unemployment rate was 8.4%. After reaching 14.7% in April 2020, the unemployment rate has been decreasing from May to September 2020, but still it is greater than in February 2020 when it was 3.5%. For the month of September 2020, non-farm payroll increased 661,000 from August 2020, but the decrease in employment since February 2020 is about 10.5 million. Specifically, for the sectors evaluated in this proposed rule, more recent data in September 2020 shows that the unemployment rate for professional and technical services was 5.0%; management, administrative, and waste services was 10.0%; and administrative and support services was 10.2%. In September 2019, the unemployment rates for these sectors were 2.5%, 4.7% and 4.9%, respectively.[2] The latest Federal Reserve Board's Monetary Policy Report shows that in general the most impacted firms in these sectors are the small businesses.[3]

Accordingly, in view of the above impacts on small businesses from the COVID–19 pandemic and Federal Government efforts to provide relief to small businesses and support to the overall economy, SBA proposes to adopt increases to size standards for 46 industries and retain the current size standards for 48 industries or subindustries for a vast majority of which analytical results suggested their size standards could be lowered.

The proposed size standards are presented in Table 6, Proposed Size Standards Revisions. Also presented in Table 6 are current and calculated size standards for comparison.

TABLE 6—PROPOSED SIZE STANDARDS REVISIONS

NAICS code	NAICS industry title	Calculated size standard ($ million)	Proposed size standard ($ million)	Current size standard ($ million)
541110	Offices of Lawyers	$13.5	$13.5	$12.0
541191	Title Abstract and Settlement Offices	17.0	17.0	12.0

[2] Bureau of Labor Statistics, Table A–31, Unemployed persons by industry, class of worker, and sex. See *https://www.bls.gov/cps/cpsaat26.htm.*

[3] Board of Governors of the Federal Reserve System (June 2020), Monetary Policy Report, p. 24 (see *https://www.federalreserve.gov/monetarypolicy/files/20200612_mprfullreport.pdf*) and U.S. Census Bureau, see *https://portal.census.gov/pulse/data.* The latter is a recent survey created by the Census Bureau to provide high-frequency, detailed information on participation in small business-specific initiatives such as the PPP.

TABLE 6—PROPOSED SIZE STANDARDS REVISIONS—Continued

NAICS code	NAICS industry title	Calculated size standard ($ million)	Proposed size standard ($ million)	Current size standard ($ million)
541199	All Other Legal Services	18.0	18.0	12.0
541211	Offices of Certified Public Accountants	23.5	23.5	22.0
541213	Tax Preparation Services	12.0	22.0	22.0
541214	Payroll Services	34.5	34.5	22.0
541219	Other Accounting Services	17.5	22.0	22.0
541310	Architectural Services	11.0	11.0	8.0
541320	Landscape Architectural Services	6.5	8.0	8.0
541330	Engineering Services	22.5	22.5	16.5
541340	Drafting Services	7.0	8.0	8.0
541350	Building Inspection Services	10.0	10.0	8.0
541360	Geophysical Surveying and Mapping Services	25.0	25.0	16.5
541370	Surveying and Mapping (except Geophysical) Services	14.0	16.5	16.5
541380	Testing Laboratories	16.5	16.5	16.5
541410	Interior Design Services	6.5	8.0	8.0
541420	Industrial Design Services	15.0	15.0	8.0
541430	Graphic Design Services	7.5	8.0	8.0
541490	Other Specialized Design Services	12.0	12.0	8.0
541511	Custom Computer Programming Services	20.5	30.0	30.0
541512	Computer Systems Design Services	27.0	30.0	30.0
541513	Computer Facilities Management Services	32.5	32.5	30.0
541519	Other Computer Related Services	21.0	30.0	30.0
541611	Administrative Management and General Management Consulting Services.	21.5	21.5	16.5
541612	Human Resources Consulting Services	25.5	25.5	16.5
541613	Marketing Consulting Services	14.5	16.5	16.5
541614	Process, Physical Distribution, and Logistics Consulting Services	17.5	17.5	16.5
541618	Other Management Consulting Services	13.0	16.5	16.5
541620	Environmental Consulting Services	13.5	16.5	16.5
541690	Other Scientific and Technical Consulting Services	15.5	16.5	16.5
541720	Research and Development in the Social Sciences and Humanities	24.5	24.5	22.0
541810	Advertising Agencies	22.5	22.5	16.5
541820	Public Relations Agencies	15.0	16.5	16.5
541830	Media Buying Agencies	28.5	28.5	16.5
541840	Media Representatives	18.5	18.5	16.5
541850	Outdoor Advertising	30.5	30.5	16.5
541860	Direct Mail Advertising	19.5	19.5	16.5
541870	Advertising Material Distribution Services	25.0	25.0	16.5
541890	Other Services Related to Advertising	16.0	16.5	16.5
541910	Marketing Research and Public Opinion Polling	20.0	20.0	16.5
541921	Photography Studios, Portrait	14.0	14.0	8.0
541922	Commercial Photography	8.0	8.0	8.0
541930	Translation and Interpretation Services	20.0	20.0	8.0
541940	Veterinary Services	9.0	9.0	8.0
541990	All Other Professional, Scientific and Technical Services	17.0	17.0	16.5
551111	Offices of Bank Holding Companies	34.0	34.0	22.0
551112	Offices of Other Holding Companies	40.0	40.0	22.0
561110	Office Administrative Services	11.0	11.0	8.0
561210	Facilities Support Services	32.5	41.5	41.5
561311	Employment Placement Agencies	21.0	30.0	30.0
561312	Executive Search Services	12.0	30.0	30.0
561320	Temporary Help Services	26.5	30.0	30.0
561330	Professional Employer Organizations	36.5	36.5	30.0
561410	Document Preparation Services	16.5	16.5	16.5
561421	Telephone Answering Services	14.5	16.5	16.5
561422	Telemarketing Bureaus and Other Contact Centers	22.5	22.5	16.5
561431	Private Mail Centers	8.5	16.5	16.5
561439	Other Business Service Centers (including Copy Shops)	23.5	23.5	16.5
561440	Collection Agencies	17.0	17.0	16.5
561450	Credit Bureaus	36.0	36.0	16.5
561491	Repossession Services	9.0	16.5	16.5
561492	Court Reporting and Stenotype Services	14.0	16.5	16.5
561499	All Other Business Support Services	19.0	19.0	16.5
561510	Travel Agencies	19.0	22.0	22.0
561520	Tour Operators	13.5	22.0	22.0
561591	Convention and Visitors Bureaus	13.5	22.0	22.0
561599	All Other Travel Arrangement and Reservation Services	28.5	28.5	22.0
561611	Investigation Services	21.5	22.0	22.0
561612	Security Guards and Patrol Services	25.5	25.5	22.0
561613	Armored Car Services	38.0	38.0	22.0
561621	Security Systems Services (except Locksmiths)	20.5	22.0	22.0

TABLE 6—PROPOSED SIZE STANDARDS REVISIONS—Continued

NAICS code	NAICS industry title	Calculated size standard ($ million)	Proposed size standard ($ million)	Current size standard ($ million)
561622	Locksmiths	7.0	22.0	22.0
561710	Exterminating and Pest Control Services	15.5	15.5	12.0
561720	Janitorial Services	15.0	19.5	19.5
561730	Landscaping Services	8.5	8.5	8.0
561740	Carpet and Upholstery Cleaning Services	7.5	7.5	6.0
561790	Other Services to Buildings and Dwellings	8.0	8.0	8.0
561910	Packaging and Labeling Services	17.0	17.0	12.0
561920	Convention and Trade Show Organizers	17.5	17.5	12.0
561990	All Other Support Services	14.5	14.5	12.0
562111	Solid Waste Collection	34.0	41.5	41.5
562112	Hazardous Waste Collection	31.0	41.5	41.5
562119	Other Waste Collection	25.0	41.5	41.5
562211	Hazardous Waste Treatment and Disposal	39.0	41.5	41.5
562212	Solid Waste Landfill	39.0	41.5	41.5
562213	Solid Waste Combustors and Incinerators	41.0	41.5	41.5
562219	Other Nonhazardous Waste Treatment and Disposal	24.5	41.5	41.5
562910	Remediation Services	18.5	22.0	22.0
562920	Materials Recovery Facilities	21.5	22.0	22.0
562991	Septic Tank and Related Services	8.0	8.0	8.0
562998	All Other Miscellaneous Waste Management Services	14.5	14.5	8.0

Table 7, Summary of Proposed Size Standards Revisions by Sector, below, summarizes the proposed changes to size standards by NAICS sector.

TABLE 7—SUMMARY OF PROPOSED SIZE STANDARDS REVISIONS BY SECTOR

Sector	Sector name	Number of size standards reviewed	Number of size standards increased	Number of size standards decreased	Number of size standards maintained
54	Professional, Scientific and Technical Services	48	27	0	21
55	Management of Companies and Enterprises	2	2	0	0
56	Administrative and Support, Waste Management and Remediation Services.	44	17	0	27
Total		94	46	0	48

Evaluation of Dominance in Field of Operation

SBA has determined that for the industries it has evaluated in this proposed rule, no individual firm at or below the proposed size standard would be large enough to dominate its field of operation. At the proposed size standards levels, if adopted, the small business share of total industry receipts among those industries would be, on average, 0.4 percent, varying from 0.005% to 4.8%. These market shares effectively preclude a firm at or below the proposed size standards from exerting control on any of the industries.

Alternatives Considered

By law, SBA is required to develop numerical size standards for establishing eligibility for Federal small business assistance programs and to review every five years all size standards and make necessary adjustments to reflect the current industry structure and Federal market conditions. Other than varying the levels of size standards by industry and changing the measures of size standards (*e.g.,* using annual receipts vs. the number of employees), no practical alternatives exist to the systems of numerical size standards.

The proposal is to increase size standards where the data suggested increases are warranted, and to retain, in response to COVID–19 emergency and resultant economic impacts on small businesses, all current size standards where the data suggested lowering is appropriate.

Nonetheless, SBA considered two other alternatives. Alternative Option One was to propose changes exactly as suggested by the analytical results. In other words, option one would entail increasing size standards for 46 industries, decreasing them for 42 industries, and retaining them at their current levels for 6 industries. Alternative Option Two was to retain all current size standards.

Alternative Option One would cause a substantial number of currently small businesses to lose their small business status and hence to lose their access to Federal small business assistance, especially small business set-aside contracts and SBA's financial assistance in some cases. During the first 5-year review of size standards, some commenters had expressed concerns about the SBA's policy of not lowering size standards based on the analytical results.

As part of option one, SBA also considered increasing 46 size standards as suggested by the analytical results and mitigating the impact of the decreases to size standards by adjusting the calculated sizes considering the impact on small business access to Federal contracting and loans. However, in the present situation with the global COVID–19 pandemic resulting in high levels of risk and dramatic reductions in economic activity of unprecedented nature, SBA presents the impacts of adopting the analytical results without

adjustment in Alternative Option One and proposes to retain all size standards for which the evaluation of principal factors suggested reductions, and to adopt only the increases suggested by the evaluation. SBA will adopt this approach temporarily and may reevaluate this approach as the economic situation evolves.

Under option two, given the current COVID–19 pandemic, SBA considered retaining the current level of all size standards even though the current analysis may suggest changing them. SBA considers that the option of retaining all size standards at this moment provides the opportunity to reassess the economic situation once the economic recovery starts. Under this option, as the current situation develops, SBA will be able to assess new data available on economic indicators, federal procurement, and SBA loans before adopting changes to size standards. However, SBA is not adopting option two because the Regulatory Impact Analysis shows that retaining all size standards at their current levels is more onerous for the small businesses than the option of adopting 46 increases and retaining 48 size standards. SBA may reevaluate this approach as the current economic situation evolves.

Request for Comments

SBA invites public comments on this proposed rule, especially on the following issues:

1. SBA seeks feedback on whether SBA's proposal to increase 46 size standards and retain 48 size standards is appropriate given the results from the latest available industry and Federal contracting data of each industry and subindustry (exception) reviewed in this proposed rule, along with ongoing uncertainty and dramatic contraction in economic activity due to the global COVID–19 pandemic. SBA also seeks suggestions, along with supporting facts and analysis, for alternative standards, if they would be more appropriate than the proposed size standards.

2. SBA also seeks comments on whether SBA should not lower any size standards in view of the COVID–19 pandemic and its adverse impacts on small businesses as well as on the overall economic situation when analytical results suggest some size standards could be lowered. SBA believes that lowering size standards under the current economic environment would run counter to what Congress and the Federal Government are doing to aid and provide relief to the nation's small businesses impacted by the COVID–19 pandemic.

3. Given the uncertainty produced by the global COVID–19 pandemic and the economic consequences, SBA would like to receive comments from the public on the possibility of lowering size standards while mitigating the consequences of the lower standards, instead of not lowering any size standards at all.

4. In calculating the overall industry size standard, SBA has assigned equal weight to each of the five primary factors in all industries and subindustries covered by this proposed rule. SBA seeks feedback on whether it should assign equal weight to each factor or on whether it should give more weight to one or more factors for certain industries or subindustries. Recommendations to weigh some factors differently than others should include suggested weights for each factor along with supporting facts and analysis.

5. Finally, SBA seeks comments on data sources it used to examine industry and Federal market conditions, as well as suggestions on relevant alternative data sources that the Agency should evaluate in reviewing or modifying size standards for industries covered by this proposed rule.

Public comments on the above issues are very valuable to SBA for validating its proposed size standards revisions in this proposed rule. Commenters addressing size standards for a specific industry or a group of industries should include relevant data and/or other information supporting their comments. If comments relate to the application of size standards for Federal procurement programs, SBA suggests that commenters provide information on the size of contracts in their industries, the size of businesses that can undertake the contracts, start-up costs, equipment and other asset requirements, the amount of subcontracting, other direct and indirect costs associated with the contracts, the use of mandatory sources of supply for products and services, and the degree to which contractors can mark up those costs.

Compliance With Executive Orders 12866 and 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), Executive Orders 13563, 12988, and 13132, and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for purposes of Executive Order 12866. Accordingly, in the next section SBA provides a Regulatory Impact Analysis of this proposed rule, including (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action and the alternatives considered. However, this proposed rule is not a ''major rule'' under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis

1. What is the need for this regulatory action?

Under the Small Business Act (Act) (15 U.S.C. 632(a)), SBA's Administrator is responsible for establishing small business size definitions (or ''size standards'') and ensuring that such definitions vary from industry to industry to reflect differences among various industries. The Jobs Act requires SBA to review every 5 years all size standards and make necessary adjustments to reflect current industry and Federal market conditions. This proposed rule is part of the second 5-year review of size standards in accordance with the Jobs Act. The first 5-year review of size standards was completed in early 2016. Such periodic reviews of size standards provide SBA with an opportunity to incorporate ongoing changes to industry structure and Federal market environment into size standards and to evaluate the impacts of prior revisions to size standards on small businesses. This also provides SBA with an opportunity to seek and incorporate public input to the size standards review and analysis. SBA believes that proposed size standards revisions for industries being reviewed in this proposed rule will make size standards more reflective of the current economic characteristics of businesses in those industries and the latest trends in Federal marketplace.

SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development and counseling, and disaster assistance programs. To determine the actual intended beneficiaries of these programs, SBA establishes numerical size standards by industry to identify businesses that are deemed small.

The proposed revisions to the existing size standards for 94 industries or subindustries in NAICS Sectors 54, 55, 56 are consistent with SBA's statutory mandates to help small businesses grow and create jobs and to review and adjust size standards every five years. This regulatory action promotes the Administration's goals and objectives as well as meets the SBA's statutory

responsibility. One of SBA's goals in support of promoting the Administration's objectives is to help small businesses succeed through fair and equitable access to capital and credit, Federal Government contracts and purchases, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries are able to access Federal small business programs that are designed to assist them to become competitive and create jobs.

2. What are the potential benefits and costs of this regulatory action?

OMB directs agencies to establish an appropriate baseline to evaluate any benefits, costs, or transfer impacts of regulatory actions and alternative approaches considered. The baseline should represent the agency's best assessment of what the world would look like absent the regulatory action. For a new regulatory action promulgating modifications to an existing regulation (such as modifying the existing size standards), a baseline assuming no change to the regulation (*i.e.,* making no changes to current size standards) generally provides an appropriate benchmark for evaluating benefits, costs, or transfer impacts of proposed regulatory changes and their alternatives.

Proposed Changes to Size Standards

Based on the results from analyses of latest industry and Federal contracting data, as well as consideration of the impact of size standards changes on small businesses and significant adverse impacts of the COVID–19 emergency on small businesses and the overall economic activity, of the total of 94 industries in Sectors 54, 55, and 56 that have receipts-based size standards, SBA proposes to increase size standards for 46 industries and maintain current size standards for the remaining 48 industries (including exceptions).

The Baseline

For purposes of this regulatory action, the baseline represents maintaining the ''status quo,'' *i.e.,* making no changes to the current size standards. Using the number of small businesses and levels of benefits (such as set-aside contracts, SBA's loans, disaster assistance, etc.) they receive under the current size standards as a baseline, one can examine the potential benefits, costs and transfer impacts of proposed changes to size standards on small businesses and on the overall economy.

Based on the 2012 Economic Census (the latest available), of a total of about 1,096,800 businesses in industries in Sectors 54, 55, and 56, 97.9% are considered small under the current size standards. That percentage varies from 65.3 percent% in Sector 55 to 98.4 percent% in Sector 54. Based on the data from FPDS–NG for fiscal years 2016–2018, about 39,844 unique firms in those industries received at least one Federal contract during that period, of which 82.8 percent% were small under the current size standards. A total of $134.1 billion in average annual contract dollars were awarded to businesses in those industries during the period of evaluation, and 32.8% of the dollars awarded went to small businesses. For these sectors, providing contract dollars to small business through set-asides is quite important. From the total small business contract dollars awarded during the period considered, 71.2% were awarded through various small business set-aside programs and 28.8% were awarded through non-set set-aside contracts. Based on the SBA's internal data on its loan programs for fiscal years 2016–2018, small businesses in those industries received, on an annual basis, a total of 9,664 7(a) and 504 loans in that period, totaling about $2.9 billion, of which 86.3% was issued through the 7(a) program and 13.7% was issued through the 504/CDC program. During fiscal years 2016–2018, small businesses in those industries also received 585 loans through the SBA's Economic Injury Disaster Loan (EIDL) program, totaling about $36.2 million on an annual basis. Table 8, Baseline for All Industries, below, provides these baseline results by sector.

TABLE 8—BASELINE FOR ALL INDUSTRIES

	Sector 54	Sector 55	Sector 56	Total
Baseline All Industries (current size standards)	48	2	44	94
Total firms (Economic Census)	760,701	7,544	328,522	1,096,767
Total small firms under current size standards (Economic Census)	748,170	4,926	320,672	1,073,769
Small firms as % of total firms	98.3	65.3	97.6	97.9
Total contract dollars ($ million) (FPDS–NG FY2016–2018)	$96,050.0	$0.18	$38,089.1	$134,139.3
Total small business contract dollars under current standards ($ million) (FPDS–NG FY2016–2018)	$34,208.0	$0.0	$9,816.8	$44,025.0
Small business dollars as % of total dollars (FPDS–NG FY2016–2018)	35.6%	0.6%	25.8%	32.8%
Total No. of unique firms getting contracts (FPDS–NG FY2016–2018)	26,673	3	15,709	39,844
Total No. of unique small firms getting small business contracts (FPDS–NG FY2016–2018)	21,318	1	13,349	32,996
Small business firms as % of total firms	79.9%	33.3%	85.0%	82.8%
No. of 7(a) and 504/CDC loans (FY 2016–2018)	6,415	64	3,185	9,664
Amount of 7(a) and 504 loans ($ million) (FY 2016–2018)	$2,056.8	$41.9	$796.0	$2,894.7
No. of EIDL loans (FY 2016–2018)	406	1	178	585
Amount of EIDL loans ($ million) (FY 2016–2018)	$25.2	$0.0	$11.0	$36.2

Increases to Size Standards

As stated above, of 94 receipts-based size standards in Sectors 54, 55, and 56 that are reviewed in this proposed rule, based on the results from analyses of latest industry and Federal market data as well as impacts of size standards changes on small businesses, SBA proposes to increase 46 size standards. Below are descriptions of the benefits, costs and transfer impacts of these proposed increases to size standards.

Benefits of Increases to Size Standards

The most significant benefit to businesses from proposed increases to size standards is gaining eligibility for Federal small business assistance programs or retaining that eligibility for a longer period. These include SBA's business loan programs, EIDL program, and Federal procurement programs intended for small businesses. Federal procurement programs provide targeted, set-aside opportunities for small businesses under SBA's various

business development and contracting programs. These include the 8(a)/BD (Business Development) Program, the Small Disadvantaged Businesses (SDB) Program, the Historically Underutilized Business Zones (HUBZone) Program, the Women-Owned Small Businesses (WOSB) Program, the Economically Disadvantaged Women-Owned Small Businesses (EDWOSB) Program, and the Service-Disabled Veteran-Owned Small Businesses (SDVOSB) Program.

Besides set-aside contracting and financial assistance discussed above, small businesses also benefit through reduced fees, less paperwork, and fewer compliance requirements that are available to small businesses through the Federal Government. However, SBA has no data to estimate the number of small businesses receiving such benefits.

Based on the 2012 Economic Census (latest available), SBA estimates that in 46 industries in NAICS Sectors 54, 55, and 56 for which it has proposed to increase size standards, about 2,600 firms (see Table 9, below), not small under the current size standards, will become small under the proposed size standards increases and therefore become eligible for these programs. That represents about 0.4% of all firms classified as small under the current size standards in industries for which SBA has proposed increasing size standards. If adopted, proposed size standards would result in an increase to the small business share of total receipts in those industries from 34.7% to 37.0%.

With more businesses qualifying as small under the proposed increases to size standards, Federal agencies will have a larger pool of small businesses from which to draw for their small business procurement programs. Growing small businesses that are close to exceeding the current size standards will be able to retain their small business status for a longer period under the higher size standards, thereby enabling them to continue to benefit from the small business programs.

Based on the FPDS–NG data for fiscal years 2016–2018, SBA estimates that about 464 firms that are active in Federal contracting in those industries would gain small business status under the proposed size standards. Based on the same data, SBA estimates that those newly-qualified small businesses under the proposed increases to size standards, if adopted, could receive Federal small business contracts totaling about $752.6 million annually. That represents a 4.0% increase to small business dollars from the sector baseline.

The added competition from more businesses qualifying as small can result in lower prices to the Government for procurements set-aside or reserved for small businesses, but SBA cannot quantify this impact. Costs could be higher when full and open contracts are awarded to HUBZone businesses that receive price evaluation preferences. However, with agencies likely setting aside more contracts for small businesses in response to the availability of a larger pool of small businesses under the proposed increases to size standards, HUBZone firms might actually end up getting more set-aside contracts and fewer full and open contracts, thereby resulting in some cost savings to agencies. While SBA cannot estimate such costs savings as it is impossible to determine the number and value of unrestricted contracts to be otherwise awarded to HUBZone firms will be awarded as set-asides, such cost savings are likely to be relatively small as only a small fraction of full and open contracts are awarded to HUBZone businesses.

Under SBA's 7(a) and 504 loan programs, based on the data for fiscal years 2016–2018, SBA estimates up to about 26 SBA 7(a) and 504 loans totaling about $10.6 million could be made to these newly-qualified small businesses in those industries under the proposed size standards. That represents a 0.4% increase to the loan amount compared to the Group baseline.

Newly-qualified small businesses will also benefit from the SBA's EIDL program. Since the benefit provided through this program is contingent on the occurrence and severity of a disaster in the future, SBA cannot make a meaningful estimate of this impact. However, based on the historical trends of the EIDL data, SBA estimates that, on an annual basis, the newly-defined small businesses under the proposed increases to size standards, if adopted, could receive three (3) EIDL loans, totaling about $0.15 million. Additionally, the newly-defined small businesses would also benefit through reduced fees, less paperwork, and fewer compliance requirements that are available to small businesses through the Federal Government, but SBA has no data to quantify this impact. Table 9, Impacts of Proposed Increases to Size Standards, provides these results by NAICS sector.

TABLE 9—IMPACTS OF PROPOSED INCREASES TO SIZE STANDARDS

	Sector 54	Sector 55	Sector 56	Total
No. of industries with proposed increases to size standards	27	2	17	46
Total current small businesses in industries with Proposed increases to size standards (Economic Census 2012)	462,890	4,926	176,504	644,321
Additional firms qualifying as small under proposed standards (2012 Economic Census)	1,345	527	710	2,582
Percentage of additional firms qualifying as small relative to current small businesses in industries with proposed increases to size standards	0.3%	10.7%	0.4%	0.4%
No. of current unique small firms getting small business contracts in industries with proposed increases to size standards (FPDS–NG FY2016–2018) [1]	13,151	1	4,180	16,732
Additional small business firms getting small business status (FPDS–NG FY2016–2018)	412	0	99	464
% increase to small businesses relative to current unique small firms getting small business contracts in industries with proposed increases to size standards (FPDS–NG FY2016–2018) [1]	3.1%	0%	2.4%	2.8%
Total small business contract dollars under current standards in industries with proposed increases to size standards ($ million) (FPDS–NG FY2016–2018)	16,182.3	0.0	2,851.0	19,033.0
Estimated small business dollars available to newly-qualified small firms (Using avg dollars obligated to SBs) ($ million) FPDS–NG FY 2016–2018) [2]	651.4	0.0	101.2	752.6

TABLE 9—IMPACTS OF PROPOSED INCREASES TO SIZE STANDARDS—Continued

	Sector 54	Sector 55	Sector 56	Total
% increase to small business dollars relative to total small business contract dollars under current standards in industries with proposed increases to size standards	4.0%	0.0	3.5%	4.0%
Total no. of 7(a) and 504 loans to small business in industries with proposed increases to size standards (FY 2016–2018)	3,795	64	1,680	5,539
Total amount of 7(a) and 504 loans to small businesses in industries with proposed increases to size standards ($ million) (FY 2016–2018)	$1,402.3	$41.9	$390.7	$1,834.9
Estimated no. of 7(a) and 504 loans to newly-qualified small firms	12	7	7	26
Estimated 7(a) and 504 loan amount to newly-qualified small firms ($ million)	$4.4	$4.6	$1.6	$10.6
% increase to 7(a) and 504 loan amount relative to the total amount of 7(a) and 504 loans in industries with proposed increases to size standards	0.2%	10.9%	0.4%	0.6%
Total no. of EIDL loans to small businesses in industries with proposed increases to size standards (FY 2016–2018)	247	1	92	340
Total amount of EIDL loans to small businesses in industries with proposed increases to size standards ($ million) (FY 2016–2018)	$17.0	$0.0	$5.3	$22.3
Estimated no. of EIDL loans to newly-qualified small firms	1	1	1	3
Estimated EIDL loan amount to newly-qualified small firms ($ million)	$0.07	$0.02	$0.06	0.15
% increase to EIDL loan amount relative to the total amount of EIDL loans in industries with proposed increases to size standards	0.4%	100.0%	1.1%	0.7%

[1] Total impact represents total unique number of firms impacted to avoid double counting as some firms are participating in more than one industry.

[2] Additional dollars are calculated multiplying average small business dollars obligated per DUNS times change in number of firms. Numbers of firms are calculated using the SBA current size standard, not the contracting officer's size designation.

Costs of Increases to Size Standards

Besides having to register in SAM to be able to participate in Federal contracting and update the SAM profile annually, small businesses incur no direct costs to gain or retain their small business status as a result of increases to size standards. All businesses willing to do business with the Federal Government must register in SAM and update their SAM profiles annually, regardless of their size status. SBA believes that a vast majority of businesses that are willing to participate in Federal contracting are already registered in SAM and update their SAM profiles annually. More importantly, this proposed rule does not establish the new size standards for the very first time; rather it intends to modify the existing size standards in accordance with a statutory requirement and the latest data and other relevant factors.

To the extent that the newly-qualified small businesses could become active in Federal procurement, the proposed increases to size standards, if adopted, may entail some additional administrative costs to the Government as a result of more businesses qualifying as small for Federal small business programs. For example, there will be more firms seeking SBA's loans, more firms eligible for enrollment in the Dynamic Small Business Search (DSBS) database or in *certify.sba.gov,* more firms seeking certification as 8(a)/BD or HUBZone firms or qualifying for small business, SDB, WOSB, EDWOSB, and SDVOSB status, and more firms applying for SBA's 8(a)/BD and all small business mentor-protégé programs. With an expanded pool of small businesses, it is likely that Federal agencies would set-aside more contracts for small businesses under the proposed increases to size standards. One may surmise that this might result in a higher number of small business size protests and additional processing costs to agencies. However, the SBA's historical data on size protests shows that the number of size protests decreased following the increases to receipts-based size standards as part of the first 5-year review of size standards. Specifically, on an annual basis, the number of size protests fell from about 600 during fiscal years 2011–2013 (review of most receipts-based size standards was completed by the end of FY 2013), as compared to about 500 during fiscal years 2014–2016 when size standards increases were in effect. That represents a 17% decline. Among those newly-defined small businesses seeking SBA's loans, there could be some additional costs associated with verification of their small business status. However, small business lenders have an option of using the tangible net worth and net income-based alternative size standard instead of using the industry-based size standards to establish eligibility for SBA's loans. For these reasons, SBA believes that these added administrative costs will be minor because necessary mechanisms are already in place to handle these added requirements.

Additionally, some Federal contracts may possibly have higher costs. With a greater number of businesses defined as small due to the proposed increases to size standards, Federal agencies may choose to set-aside more contracts for competition among small businesses only instead of using a full and open competition. The movement of contracts from unrestricted competition to small business set-aside contracts might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers under the proposed size standards. However, the additional costs associated with fewer bidders are expected to be minor since, by law, procurements may be set-aside for small businesses under the 8(a)/BD, SDB, HUBZone, WOSB, EDWOSB, or SDVOSB programs only if awards are expected to be made at fair and reasonable prices.

Costs may also be higher when full and open contracts are awarded to HUBZone businesses that receive price evaluation preferences. However, with agencies likely setting aside more contracts for small businesses in response to the availability of a larger pool of small businesses under the proposed increases to size standards, HUBZone firms might actually end up getting fewer full and open contracts, thereby resulting in some cost savings to agencies. However, such cost savings are likely to be minimal as only a small fraction of unrestricted contracts are awarded to HUBZone businesses.

Transfer Impacts of Increases to Size Standards

The proposed increases to size standards, if adopted, may result in some redistribution of Federal contracts between the newly-qualified small businesses and large businesses and between the newly-qualified small businesses and small businesses under the current standards. However, it would have no impact on the overall economic activity since total Federal contract dollars available for businesses to compete for will not change with changes to size standards. While SBA cannot quantify with certainty the actual outcome of the gains and losses from the redistribution contracts among different groups of businesses, it can identify several probable impacts in qualitative terms. With the availability of a larger pool of small businesses under the proposed increases to size standards, some unrestricted Federal contracts that would otherwise be awarded to large businesses may be set-aside for small businesses. As a result, large businesses may lose some Federal contracting opportunities. Similarly, some small businesses under the current size standards may obtain fewer set-aside contracts due to the increased competition from larger businesses qualifying as small under the proposed increases to size standards. This impact may be offset by a greater number of procurements being set-aside for all small businesses. With larger businesses qualifying as small under the higher size standards, smaller small businesses could face some disadvantage in competing for set-aside contracts against their larger counterparts. However, SBA cannot quantify these impacts.

3. What alternatives have been considered?

Under OMB Circular A–4, SBA is required to consider regulatory alternatives to the proposed changes in the proposed rule. In this section, SBA describes and analyzes two such alternatives to the proposed rule. Alternative Option One to the proposed rule, a more stringent alternative to the proposed rule, would propose adopting size standards based solely on the analytical results. In other words, the size standards of 46 industries for which the analytical results suggest raising size standards would be raised. However, the size standards of 42 industries or subindustries for which the analytical results suggest lowering size standards would be lowered. For the 6 remaining industries or subindustries, size standards would be maintained at their current levels. Alternative Option Two would propose retaining all size standards for all industries, given the uncertainty generated by the ongoing COVID–19 pandemic. Below, SBA discusses and presents the net impacts of each option.

Alternative Option One: Consider Adopting All Calculated Size Standards

As discussed at the beginning of this section in this proposed rule, Alternative Option One would cause a substantial number of currently small businesses to lose their small business status and hence to lose their access to Federal small business assistance, especially small business set-aside contracts and SBA's financial assistance in some cases. These consequences could be mitigated. For example, in response to the 2008 Financial Crisis and economic conditions that followed, SBA adopted a general policy in the first 5-year comprehensive size standards review to not lower any size standard (except to exclude one or more dominant firms) even when the analytical results suggested the size standard should be lowered. Currently, because of the economic challenges presented by the COVID–19 pandemic and the measures taken to protect public health, SBA has decided to propose the same general policy of not lowering size standards in the ongoing second 5-year comprehensive size standards review as well.

The primary benefit of adopting this alternative is that SBA's procurement, management, technical and financial assistance resources would be targeted to the most appropriate beneficiaries of such programs according to the analytical results. Adopting the size standards suggested by the analytical results would also promote consistency with analytical results in SBA's exercise of its authority to determine size standards. SBA seeks public comment on the impact of adopting the size standard as suggested by the analytical results.

As explained in the Size Standards Methodology White Paper, in addition to adopting all results of the primary analysis, SBA evaluates other relevant factors as needed such as the impact of the reductions or increases of size standards on the distribution of contracts awarded to small businesses, and may adopt different results with the intention of mitigating potential negative impacts.

We have discussed already the benefits and costs of increasing 46 size standards. Below we discuss the benefits and costs of decreasing 42 size standards.

Benefits of Decreases to Size Standards

The most significant benefit to businesses from decreases to size standards when SBA's analysis suggests such decreases is to ensure that size standards are more reflective of latest industry structure and Federal market trends and that Federal small business assistance is more effectively targeted to its intended beneficiaries. These include SBA's loan programs, EIDL program, and Federal procurement programs intended for small businesses. Federal procurement programs provide targeted, set-aside opportunities for small businesses under SBA's business development programs, such as small business, 8(a)/BD, HUBZone, WOSB, EDWOSB, and SDVOSB programs. The adoption of smaller size standards when the results support them diminishes the risk of awarding contracts to firms that are not small anymore.

Decreasing size standards may reduce the administrative costs of the Government, because the risk of awarding contracts to other than small businesses may diminish when the size standards reflect better the structure of the market. The risks of providing SBA's loans to firms that are not needing them the most, or allowing firms that are not eligible for small business set-asides or to participate on the SBA procurement programs will provide for a better chance for smaller firms to grow and benefit from the opportunities available on the Federal market, and strengthen the small business industrial base for the Federal Government.

Costs of Decreases to Size Standards

With fewer businesses qualifying as small under the decreases to size standards, Federal agencies will have a smaller pool of small businesses from which to draw for their small business procurement programs. For example, in Option One, during fiscal years 2016–2018, agencies awarded, on an annual basis, about $24,762 million in small business contracts in those 42 industries for which this Option considered decreasing size standards. Table 10, Impacts of Decreases to Size Standards Under Alternative Option Option One, below shows that lowering size standards in 42 industries and subindustries would reduce Federal contract dollars awarded to small businesses by $1,027 million or about 4.1 percent % relative to the baseline level. Because of the importance of these sectors for the Federal procurement, SBA may adopt mitigating measures to reduce the negative impact under the assumptions of Option One. SBA could adopt one or more of the

following three actions: 1. To accept decreases in size standards as suggested by the analytical results, 2. to decrease size standards by a smaller amount than the calculated threshold, and 3. to retain the size standards at their current levels.

Nevertheless, since Federal agencies are still required to meet the statutory small business contracting goal of 23 percent %, actual impacts on the overall set-aside activity is likely to be smaller as agencies are likely to award more set-aside contracts to small businesses that continue to remain small under the reduced size standards.

With fewer businesses qualifying as small, the decreased competition can also result in higher prices to the Government for procurements set-aside or reserved for small businesses, but SBA cannot quantify this impact. However, SBA estimates an almost null impact or non-significant reduction in dollars obligated to small businesses, if mitigation measures are adopted. Decreases to size standards would have a very minor impact on small businesses applying for SBA's 7(a) and 504 loans because a vast majority of such loans are issued to businesses that are far below the reduced size standards. For example, based on the loan data for fiscal years 2016–2018, SBA estimates that about 11 of SBA's 7(a) and 504 loans with total amounts of $2.8 million could not be made to those small businesses that would lose eligibility under the reduced size standards (before mitigation). That represents about 0.3% decrease of the loan amounts compared to the baseline. Table 10, below, shows these results by sector. However, the actual impact could be much less as businesses losing small business eligibility under the decreases to industry-based size standards could still qualify for SBA's loans under the tangible net worth and net income-based alternative size standard.

Businesses losing small business status would also be impacted in terms of access to loans through the SBA's EIDL program. However, SBA expects such impact to be minimal as only a small number of businesses in those industries received such loans during fiscal years 2016–2018. Additionally, all those businesses were below the reduced size standards. Since this program is contingent on the occurrence and severity of a disaster in the future, SBA cannot make a meaningful estimate of this impact.

Small businesses becoming other than small if size standards were decreased might lose benefits through reduced fees, less paperwork, and fewer compliance requirements that are available to small businesses through the Federal Government, but SBA has no data to quantify this impact. However, if agencies determine that SBA's size standards do not adequately serve such purposes, they can establish a different size standard with an approval from SBA if they are required to use SBA's size standards for their programs.

TABLE 10—IMPACTS OF DECREASES TO SIZE STANDARDS UNDER ALTERNATIVE OPTION ONE

	Sector 54	Sector 55	Sector 56	Total
No. of industries for which SBA considered decreasing size standards (2012 Economic Census)	18	0	24	42
Total current small businesses in industries for which SBA considered decreasing size standards (EC 2012)	276,751	0	125,106	401,857
Estimated no. of firms losing small status for which SBA considered decreasing size standards (2012 Economic Census)	676	0	375	1,051
% of Firms losing small status relative to current small businesses in industries for which SBA considered decreasing size standards	0.2%	0	0.3%	0.3%
No. of current unique small firms getting small business contracts in industries for which SBA considered decreasing size standards (FPDS–NG FY 2016–2018) [1]	10,016	0	8,885	18,280
Estimated number of small business firms that would have lost small business status in the decreases that SBA considered	291	0	145	397
% decrease to small business firms relative to current unique small firms getting small business contracts in industries for which SBA considered decreasing size standards (FPDS–NG FY 2016–2018) [1]	2.9%	0	1.6%	2.2%
Total small business contract dollars under current size standards in industries for which SBA considered decreasing size standards ($ million) (FPDS–NG FY 2016–2018)	$17,914.2	0	$6,847.8	$24,762.0
Estimated small business dollars not available to firms losing small business status (Using avg dollars obligated to SBs) ($ million) [2] (FPDS–NG FY 2016–2018)	$824.7	0	$201.8	$1,026.6
% decrease to small business dollars relative to total small business contract dollars under current size standards in industries for which SBA considered decreasing size standards	4.6%	0	2.9%	4.1%
Total no. of 7(a) and 504 loans to small businesses in industries for which SBA considered decreasing size standards (FY 2016–2018)	2,519	0	1,230	3,749
Total amount of 7(a) and 504 loans to small businesses in industries for which SBA considered decreasing size standards ($ million) (FY 2016–2018)	$617.4	0	$335.2	$952.6
Estimated no. of 7(a) and 504 loans not available to firms that would have lost small business status	−7	0	−4	−11
Estimated 7(a) and 504 loan amount not available to firms that would have lost small status ($ million)	−$1.7	.....	−$1.1	−$2.8
% decrease to 7(a) and 504 loan amount relative to the total amount of 7(a) and 504 loans in industries for which SBA considered decreasing size standards	−0.3%	0	−0.3%	−0.3%
Total no. of EIDL loans to small businesses in industries for which SBA considered decreasing size standards (FY 2016–2018)	151	0	71	222
Total amount of EIDL loans to small businesses in industries for which SBA considered decreasing size standards ($ million) (FY 2016–2018)	$7.4	0	$4.8	$12.3

TABLE 10—IMPACTS OF DECREASES TO SIZE STANDARDS UNDER ALTERNATIVE OPTION ONE—Continued

	Sector 54	Sector 55	Sector 56	Total
Estimated no. of EIDL loans not available to firms that would have lost small business status	−1	0	−1	−2
Estimated EIDL loan amount not available to firms that would have lost small business status ($ million)	−$0.05	0	−$0.07	−$0.12
% decrease to EIDL loan amount relative to the baseline	−0.7%	0	−1.4%	−1.0%

[1] Total impact represents total unique industries impacted to avoid double counting as some industries have large firms gaining small business status and small firms extending small business status.
[2] Additional dollars are calculated multiplying average small business dollars obligated per DUNS times change in number of firms.

Transfer Impacts of Decreases to Size Standards

If the size standards were decreased under Alternative Option One, it may result in a redistribution of Federal contracts between small businesses losing their small business status and large businesses and between small businesses losing their small business status and small businesses remaining small under the reduced size standards. However, as under the proposed increases to size standards, it would have no impact on the overall economic activity since the total Federal contract dollars available for businesses to compete for will stay the same. While SBA cannot estimate with certainty the actual outcome of the gains and losses among different groups of businesses from contract redistribution resulting from decreases to size standards, it can identify several probable impacts. With a smaller pool of small businesses under the decreases to size standards, some set-aside Federal contracts to be otherwise awarded to small businesses may be competed on an unrestricted basis. As a result, large businesses may have more Federal contracting opportunities. However, because agencies are still required by law to award 23% of dollars to small businesses, SBA expects the movement of set-aside contracts to unrestricted competition to be limited. For the same reason, small businesses remaining small under the reduced size standards are likely to obtain more set-aside contracts due to the reduced competition from fewer businesses qualifying as small under the decreases to size standards. With some larger small businesses losing small business status under the decreases to size standards, smaller small businesses would likely become more competitive in obtaining set-aside contracts. However, SBA cannot quantify these impacts.

Net Impact of Alternative Option One

To estimate the net impacts of Alternative Option One, SBA followed the same methodology used to evaluate the impacts of the proposed size standards (see Table 9 above). However, under Alternative Option One, SBA used the calculated size standards instead of the proposed ones to determine the impacts of changes to current thresholds. The impact of the increases of size standards were already shown in Table 9 above. Table 10 (above) and Table 11, Net Impacts of Size Standards Changes under Alternative Option One, below, present the impact of the decreases of size standards and the net impact of adopting the calculated results under Alternative Option One, respectively.

Based on the 2012 Economic Census, SBA estimates that in 88 industries in NAICS Sectors 54, 55, and 56 for which the analytical results suggested to change size standards, about 1,530 firms (see Table 11, below), would become small under the Option One. That represents about 0.1% of all firms classified as small under the current size standards.

Based on the FPDS–NG data for fiscal years 2016–2018, SBA estimates that about 67 active firms in Federal contracting in those industries would lose small business status under Alternative Option One, most of them from Sector 56. This represents a decrease of about 0.2% of the total number of small businesses participating in Federal contracting under the current size standards. Based on the same data, SBA estimates that about $274.0 million of Federal procurement dollars would not be available to firms losing their small status. This represents a decrease of 0.6% from the Group's baseline. A large amount of the losses are accounted for by Sector 54.

Based on the SBA's loan data for fiscal years 2016–2018, the total number of 7(a) and 504 loans may increase by about 15 loans, and the loan amounts by about $7.8 million. This represents a 0.3% increase of the loan amounts relative to the Group baseline.

Firms' participation under the SBA's EIDL program will be affected as well. Since the benefit provided through this program is contingent on the occurrence and severity of a disaster in the future, SBA cannot make a meaningful estimate of this impact. However, based on the historical trends of the EIDL data, SBA estimates that the total number of EIDL loans may increase by about 1 loan, and the loan amount by about $.03 million. This represents a 0.1% increase of the loan amounts relative to the Group baseline. Table 11, below, provides these results by NAICS sector.

TABLE 11—NET IMPACTS OF SIZE STANDARDS CHANGES UNDER ALTERNATIVE OPTION ONE

	Sector 54	Sector 55	Sector 56	Total
No. of industries with proposed changes to size standards	45	2	41	88
Total no. of small business under the current size standards (2012 Economic Census)	739,641	4,926	301,609	1,046,177
Additional firms qualifying as small under proposed size standards (2012 Economic Census)	670	527	334	1,531
% of additional firms qualifying as small relative to total current small businesses	0.1%	10.7%	0.1%	0.1%
No. of current unique small firms getting small business contracts (FPDS–NG FY 2016–2018) [1]	20,601	1	12,384	31,395

TABLE 11—NET IMPACTS OF SIZE STANDARDS CHANGES UNDER ALTERNATIVE OPTION ONE—Continued

	Sector 54	Sector 55	Sector 56	Total
Additional small firms getting small business status (FPDS–NG FY 2016–2018)	48	0	−75	−67
% increase to small firms relative to current unique small firms getting small business contracts (FPDS–NG FY 2016–2018) [1]	0.2%	0.0%	−0.6%	−0.2%
Total small business small business contract dollars under current size standards ($ million) (FPDS–NG FY 2016–2018)	34,096.4	0.0	9,700	43,795
Estimated small business dollars available to newly-qualified small firms ($ million) FPDS–NG FY 2016–2018) [2]	−173.3	0	−101	−274.0
% increase to dollars relative to total small business contract dollars under current size standards	−0.5%	0.0%	−1.0%	−0.6%
Total no. of 7(a) and 504 loans to small businesses (FY 2016–2018)	6,415	64	3,185	9,664
Total amount of 7(a) and 504 loans to small businesses (FY 2016–2018)	$2,056.8	$41.9	$796.0	$2,894.7
Estimated no. of additional 7(a) and 504 loans to newly-qualified small firms	5	7	3	15
Estimated additional 7(a) and 504 loan amount to newly-qualified small firms ($ million)	$2.7	$4.6	$0.5	$7.8
% increase to 7(a) and 504 loan amount relative to the total amount of 7(a) and 504 loans to small businesses	0.1%	10.9%	0.1%	0.3%
Total no. of EIDL loans to small businesses (FY 2016–2018)	406	1	178	585
Total amount of EIDL loans to small businesses (FY 2016–2018)	$25.2	$0.0	$11.0	$36.2
Estimated no. of additional EIDL loans to newly-qualified small firms	0	1	0	1
Estimated additional EIDL loan amount to newly-qualified small firms ($ million)	$0.02	$0.02	−$0.01	$0.03
% increase to EIDL loan amount relative to the total amount of EIDL loans to small businesses	0.1%	100.0%	−0.12%	0.1%

[1] Total impact represents total unique industries impacted to avoid double counting as some industries have large firms gaining small business status and small firms extending small business status.

[2] Additional dollars are calculated multiplying average small business dollars obligated per DUNS times change in number of firms.

Alternative Option Two: To Retain All Current Size Standards

Under this option, given the current COVID–19 pandemic, as discussed elsewhere, SBA considered retaining the current levels of all size standards even though the analytical results may suggest changing them. SBA considers that the option of retaining all size standards at this moment provides the opportunity to reassess the economic situation once the economic recovery starts. Under this option, as the current situation develops, SBA will be able to assess new data available on economic indicators, federal procurement, and SBA loans as well. SBA estimates a net impact of zero for this option, when compared to the baseline. However, if we compare the proposal of increasing 46 size standards and retaining 48 with this alternative approach, the benefits for small businesses of adopting the proposal will not be attained, so SBA is not proposing the Alternative Option Two.

Executive Order 13771

SBA has determined, subject to the approval of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB), that this proposed rule is not subject to the requirements of E.O. 13771 because most of the proposed rule's impacts are income transfers between small and other than small businesses. According to the E.O. 13771 guidance in OMB M–17–21, dated April 5, 2017 (''E.O. 13771 Guidance''), ''transfers'' are not covered by E.O. 13771. The E.O. 13771 guidance also states that ''in some cases, [transfer rules] may impose requirements apart from transfers, or transfers may distort markets causing inefficiencies. In those cases, the actions would need to be offset to the extent they impose more than de minimis costs.'' SBA estimates that this rulemaking would impose only de minimis costs on small businesses and would result in negligible compliance costs. Thus, SBA has determined that this rulemaking is exempt from the requirements of E.O. 13771. Details on the estimated costs of this proposed rule can be found in the Regulatory Impact Analysis above.

Initial Regulatory Flexibility Analysis

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities.

This proposed rule, if adopted, may have a significant impact on a substantial number of small businesses in the industries covered by this proposed rule. As described above, this proposed rule may affect small businesses seeking Federal contracts, loans under SBA's 7(a), 504 and EIDL Programs, and assistance under other Federal small business programs.

Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) of this proposed rule addressing the following questions: (1) What is the need for and objective of the rule?; (2) What is SBA's description and estimate of the number of small businesses to which the rule will apply?; (3) What are the projected reporting, record keeping, and other compliance requirements of the rule?; (4) What are the relevant Federal rules that may duplicate, overlap, or conflict with the rule?; and (5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small businesses?

1. What is the need for and objective of the rule?

Changes in industry structure, technological changes, productivity growth, mergers and acquisitions, and updated industry definitions have changed the structure of many the industries covered by this proposed rule. Such changes can be enough to support revisions to current size standards for some industries. Based on the analysis of the latest data available, SBA believes that the revised standards in this proposed rule more appropriately reflect the size of businesses that need Federal assistance. The 2010 Jobs Act also requires SBA to review all size standards and make necessary adjustments to reflect market conditions.

2. What is SBA's description and estimate of the number of small businesses to which the rule will apply?

Based on data from the 2012 Economic Census, SBA estimates that there are about 1.05 million small firms covered by this rulemaking under industries with proposed changes to size standards. If the proposed rule is adopted in its present form, SBA estimates that an additional 1,530 businesses will be defined as small.

3. What are the projected reporting, record keeping and other compliance requirements of the rule?

The proposed size standard changes impose no additional reporting or record keeping requirements on small businesses. However, qualifying for Federal procurement and a number of other programs requires that businesses register in SAM and self-certify that they are small at least once annually. Therefore, businesses opting to participate in those programs must comply with SAM requirements. Changes in small business size standards do not result in additional costs associated with SAM registration or certification. Changing size standards alters the access to SBA's programs that assist small businesses but does not impose a regulatory burden because they neither regulate nor control business behavior.

4. What are the relevant Federal rules that may duplicate, overlap or conflict with the rule?

Under section 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(c), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute to do otherwise. In 1995, SBA published in the **Federal Register** a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988 (November 24, 1995)). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). The Regulatory Flexibility Act authorizes an Agency to establish an alternative small business definition, after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3)).

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

By law, SBA is required to develop numerical size standards for establishing eligibility for Federal small business assistance programs. Other than varying size standards by industry and changing the size measures, no practical alternative exists to the systems of numerical size standards.

However, SBA considered two alternatives to its proposal to increase 46 size standards and maintain 48 size standards at their current levels. The first alternative SBA considered was adopting size standards based solely on the analytical results. In other words, the size standards of 46 industries for which the analytical results suggest raising size standards would be raised. However, the size standards of 42 industries for which the analytical results suggest lowering size standards would be lowered. This would cause a significant number of small businesses to lose their small business status, particularly in sectors 54 and 56 (please see table 10). Under the second alternative, in view of the COVID–19 pandemic, SBA considered retaining all size standards at the current levels, even though the analytical results may suggest increasing 46 size standards and decreasing 42. Retaining all size standards at their current levels would be more onerous for small businesses than the option of adopting 46 increases and retaining the rest of the size standards.

Executive Order 13563

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. A description of the need for this regulatory action and benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, is included above in the Regulatory Impact Analysis under Executive Order 12866. Additionally, Executive Order 13563, section 6, calls for retrospective analyses of existing rules.

The review of size standards in the industries covered by this proposed rule is consistent with section 6 of Executive Order 13563 and the 2010 Jobs Act, which requires SBA to review all size standards and make necessary adjustments to reflect market conditions. Specifically, the 2010 Jobs Act requires SBA to review at least one-third of all size standards during every 18-month period from the date of its enactment (September 27, 2010) and to review all size standards not less frequently than once every 5 years, thereafter. SBA had already launched a comprehensive review of size standards in 2007. In accordance with the Jobs Act, SBA completed the comprehensive review of the small business size standard for each industry, except those for agricultural enterprises previously set by Congress, and made appropriate adjustments to size standards for a number of industries to reflect current Federal and industry market conditions. The first comprehensive review was completed in 2015. Prior to 2007, the last time SBA conducted a comprehensive review of all size standards was during the late 1970s and early 1980s.

SBA issued a White Paper entitled ''Size Standards Methodology'' and published a notice in the April 11, 2019, edition of the **Federal Register** (84 FR 14587) to advise the public that the document is available for public review and comments. The ''Size Standards Methodology'' White Paper explains how SBA establishes, reviews, and modifies its receipts-based and employee-based small business size standards. SBA gave appropriate consideration to all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies in developing size standards for those industries covered by this proposed rule.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this proposed rule will not have substantial, direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this proposed rule

will not impose any new reporting or record keeping requirements.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, SBA proposes to amend 13 CFR part 121 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. In § 121.201, amend the table by:
■ a. Revising the heading to Sector 56.
■ b. Revising entries ''541110,'' ''541191,'' ''541199,'' ''541211,'' ''541214,'' ''541310,'' ''541330,'' ''541350,'' ''541360,'' ''541420,'' ''541490,'' ''541513,'' ''541611,'' ''541612,'' ''541614,'' ''541720,'' ''541810,'' ''541830,'' ''541840,'' ''541850,'' ''541860,'' ''541870,'' ''541910,'' ''541921,'' ''541930,'' ''541940,'' ''541990,'' ''551111,'' ''551112,'' ''561110,'' ''561330,'' ''561422,'' ''561439,'' ''561440,'' ''561450,'' ''561499,'' ''561599,'' ''561612,'' ''561613,'' ''561710,'' ''561730,'' ''561740,'' ''561910,'' ''561920,'' ''561990,'' and ''562998'' to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
*	* * * * *	*	*
	Sector 54—Professional, Scientific and Technical Services **Subsector 541—Professional, Scientific and Technical Services**		
541110	Offices of Lawyers	$13.5	
541191	Title Abstract and Settlement Offices	17.0	
541199	All Other Legal Services	18.0	
541211	Offices of Certified Public Accountants	23.5	
*	* * * * *	*	*
541214	Payroll Services	34.5	
*	* * * * *	*	*
541310	Architectural Services	11.0	
*	* * * * *	*	*
541330	Engineering Services	22.5	
*	* * * * *	*	*
541350	Building Inspection Services	10.0	
541360	Geophysical Surveying and Mapping Services	25.0	
*	* * * * *	*	*
541420	Industrial Design Services	15.0	
*	* * * * *	*	*
541490	Other Specialized Design Services	12.0	
*	* * * * *	*	*
541513	Computer Facilities Management Services	32.5	
*	* * * * *	*	*
541611	Administrative Management and General Management Consulting Services	21.5	
541612	Human Resources Consulting Services	25.5	
*	* * * * *	*	*
541614	Process, Physical Distribution, and Logistics Consulting Services	17.5	
*	* * * * *	*	*
541720	Research and Development in the Social Sciences and Humanities	24.5	
541810	Advertising Agencies [10]	[10] 22.5	
*	* * * * *	*	*
541830	Media Buying Agencies	28.5	
541840	Media Representatives	18.5	
541850	Outdoor Advertising	30.5	
541860	Direct Mail Advertising	19.5	
541870	Advertising Material Distribution Services	25.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
*	* * * * *	*	*
541910	Marketing Research and Public Opinion Polling	20.0	
541921	Photography Studios, Portrait	14.0	
*	* * * * *	*	*
541930	Translation and Interpretation Services	20.0	
541940	Veterinary Services	9.0	
541990	All Other Professional, Scientific and Technical Services	17.0	
	Sector 55—Management of Companies and Enterprises		
	Subsector 551—Management of Companies and Enterprises		
551111	Offices of Bank Holding Companies	34.0	
551112	Offices of Other Holding Companies	40.0	
	Sector 56—Administrative and Support and Waste Management and Remediation Services		
	Subsector 561—Administrative and Support Services		
561110	Office Administrative Services	11.0	
*	* * * * *	*	*
561330	Professional Employer Organizations	36.5	
*	* * * * *	*	*
561422	Telemarketing Bureaus and Other Contact Centers	22.5	
*	* * * * *	*	*
561439	Other Business Service Centers (including Copy Shops)	23.5	
561440	Collection Agencies	17.0	
561450	Credit Bureaus	36.0	
*	* * * * *	*	*
561499	All Other Business Support Services	19.0	
*	* * * * *	*	*
561599	All Other Travel Arrangement and Reservation Services	28.5	
*	* * * * *	*	*
561612	Security Guards and Patrol Services	25.5	
561613	Armored Car Services	38.0	
*	* * * * *	*	*
561710	Exterminating and Pest Control Services	15.5	
*	* * * * *	*	*
561730	Landscaping Services	8.5	
561740	Carpet and Upholstery Cleaning Services	7.5	
*	* * * * *	*	*
561910	Packaging and Labeling Services	17.0	
561920	Convention and Trade Show Organizers [10]	[10] 17.5	
561990	All Other Support Services	14.5	
	Subsector 562—Waste Management and Remediation Services		
*	* * * * *	*	*
562998	All Other Miscellaneous Waste Management Services	14.5	
*	* * * * *	*	*

Footnotes

* * * * * * *

[10] *NAICS codes 488510 (excluding the exception), 531210, 541810, 561510, 561520 and 561920*—As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.

* * * * * * *

Jovita Carranza,

Administrator.

[FR Doc. 2020–24903 Filed 11–12–20; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1025; Project Identifier MCAI–2020–00757–E]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd. & Co KG (Type Certificate Previously Held by BMW Rolls-Royce GmbH and BMW Rolls-Royce Aero Engines) Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Rolls-Royce Deutschland Ltd. & Co KG (RRD) BR700–715A1–30, BR700–715B1–30, and BR700–715C1–30 model turbofan engines. This proposed AD was prompted by reports of HPT stage 1 blades failing in service due to sulphidation and subsequent crack initiation. This proposed AD would require removal and replacement of the HPT stage 1 blade and HPT stage 1 blade damper. 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 service information identified in this NPRM, contact Rolls-Royce Deutschland Ltd. & Co KG, Eschenweg 11, 15827 Blankenfelde-Mahlow, Germany; phone: +49 (0) 33 708 6 0; website: *https://www.rolls-royce.com/contact-us.aspx.* 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.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1025; 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, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; fax: (781) 238–7199; email: *barbara.caufield@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1025; Project Identifier MCAI–2020–00757–E'' 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 NPRM 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 Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2018–0194, dated September 4, 2018 (referred to after this as ''the MCAI''), to address the unsafe condition on these products. The MCAI states:

> Occurrences have been reported on RRD BR700–715 engines where certain HP turbine stage 1 blades failed in service. Investigation of these events showed that these were caused by sulphidation and subsequent crack initiation, due to contamination of the blade shank passing by the blade damper.
>
> This condition, if not corrected, could lead to further HP turbine stage 1 blade failures, possibly resulting in engine in-flight shut-down and consequent reduced control of the aeroplane.
>
> To address this potential unsafe condition, RRD published the NMSB to provide instructions to replace the affected assembly. For the reasons described above, this [EASA] AD requires determination of the engine configuration and, depending on findings, removal of the engine from service to replace the affected assembly.

You may obtain further information by examining the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1025.

FAA's Determination

This product has been approved by EASA and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified us of the unsafe condition described in the MCAI. The FAA is issuing this NPRM because the agency evaluated all the relevant information provided by EASA and has determined that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Related Service Information under 1 CFR Part 51

The FAA reviewed RRD BR700 Series Alert Non-Modification Service Bulletin (NMSB) SB–BR700–72–A900640, dated August 31, 2018. The Alert NMSB describes procedures for removing and replacing the HPT stage 1 blade and HPT stage 1 blade damper. 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 **ADDRESSES**.

Other Related Service Information

The FAA reviewed RRD Service Bulletin (SB) SB–BR700–72–102005, dated March 20, 2018; RRD NMSB SB–BR700–72–900118, dated June 6, 2017; and RRD SB SB–BR700–72–101671, dated January 29, 2010. RRD SB SB–BR700–72–102005, dated March 20, 2018, introduces a new HPT stage 1 blade damper with a front restrictor that reduces the average airflow into the blade shank cavity, thereby reducing deposition of particles in the cavity. RRD NMSB SB–BR700–72–900118, dated June 6, 2017, describes procedures for recording of the serial numbers of the cleaned, crack tested, and examined HPT stage 1 blades. RRD SB SB–BR700–72–101671, dated January 29, 2010, introduces a redesigned HPT stage 1 blade that improves robustness and stress characteristics.

Proposed AD Requirements in this NPRM

This proposed AD would require removal and replacement of the HPT stage 1 blade and HPT stage 1 blade damper.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 222 engines installed on airplanes of U.S. registry. The agency estimates that the service life of both the HPT stage 1 blade and HPT stage 1 blade damper are 5.5 years. Based on this life estimate, the agency is providing an estimated annual cost to replace these parts.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Annualized cost on U.S. operators
Replace HPT stage 1 blade and HPT stage 1 blade damper.	20 work-hours × $85 per hour = $1,700	$692,000	$693,700	$28,000,524

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

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) Would not affect intrastate aviation in Alaska, and

(3) Would 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:

Rolls-Royce Deutschland Ltd. & Co KG (Type Certificate previously held by BMW Rolls-Royce GmbH and BMW Rolls-Royce Aero Engines): Docket No. FAA–2020–1025; Project Identifier MCAI–2020–00757–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 28, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Rolls-Royce Deutschland Ltd. & Co KG (Type Certificate previously held by BMW Rolls-Royce GmbH and BMW Rolls-Royce Aero Engines) BR700–715A1–30, BR700–715B1–30, and BR700–715C1–30 model turbofan engines with high-pressure turbine (HPT) stage 1 blade, part number (P/N) BRH17133, BRH19984, BRH20011, BRH20237, BRH20351, FW35594, FW45914, FW64379, or FW75735, and with HPT stage 1 blade damper, P/N BRH10943, BRH20353, or FW45770, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by reports of HPT stage 1 blades failing in service due to sulphidation and subsequent crack initiation. The FAA is issuing this AD to prevent failure of the HPT stage 1 blade. The unsafe condition, if not addressed, could result in the release of the HPT stage 1 blade, failure of the engine, in-flight shutdown, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

(1) For affected engines that have not operated exclusively under the Hawaiian Flight Mission:

(i) Before exceeding 10,000 flight cycles (FCs) since the first installation of an affected HPT stage 1 blade, or within 50 FCs after the effective date of this AD, whichever occurs later, remove the affected HPT stage 1 blade and the affected HPT stage 1 blade damper from service and replace with parts eligible for installation using the Accomplishment Instructions, paragraph 3.R. to T., of RRD Alert Non-Modification Service Bulletin (NMSB) SB–BR700–72–A900640, dated August 31, 2018 (''NMSB SB–BR700–72–A900640'').

(ii) If an HPT stage 1 blade has been cleaned and examined before the effective date of this AD using RRD NMSB SB–BR700–72–900118, dated June 6, 2017, within 1,500 FCs from the last cleaning and examination, or within 10 FCs after the effective date of this AD, whichever occurs later, remove the affected HPT stage 1 blade and affected HPT stage 1 blade damper from service and replace with parts eligible for installation using Accomplishment Instructions, paragraph 3.R. to T., of RRD NMSB SB–BR700–72–A900640.

(2) For affected engines operated exclusively under the Hawaiian Flight Mission:

(i) At the next change of the flight mission after the effective date of this AD, replace the affected HPT stage 1 blade and affected HPT stage 1 blade damper in accordance with paragraphs (g)(1)(i) and (ii) of this AD.

(ii) [Reserved]

(h) Installation Prohibition

After the effective date of this AD, do not install any HPT stage 1 blade, P/N BRH17133, BRH19984, BRH20011, BRH20237, BRH20351, FW35594, FW45914, FW64379, or FW75735, with any HPT stage 1 blade damper, P/N BRH10943, BRH20353, or FW45770, in any engine.

(i) Definitions

(1) For the purpose of this AD, ''parts eligible for installation'' are an HPT stage 1 blade, P/N FW75735, installed with HPT stage 1 blade damper, P/N KH82098.

(2) For the purpose of this AD, the ''Hawaiian Flight Mission'' are flights operated by Hawaiian Airlines.

(j) Alternative Methods of Compliance (AMOCs)

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

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

(k) Related Information

(1) For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; fax: (781) 238–7199; email: *barbara.caufield@faa.gov.*

(2) Refer to European Aviation Safety Agency (EASA) AD 2018–0194, dated September 4, 2018, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–1025.

(3) For service information identified in this AD, contact Rolls-Royce Deutschland Ltd. & Co KG, Eschenweg 11, 15827 Blankenfelde-Mahlow, Germany; phone: +49 (0) 33 708 6 0; website: *https://www.rolls-royce.com/contact-us.aspx.* You may view this referenced 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.

Issued on November 6, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–25014 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0942; Airspace Docket No. 20–AWP–12]

RIN 2120–AA66

Proposed Amendment of Class D and E Airspace; Palmdale, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Class E airspace, designated as an extension to a Class D or Class E surface area, at Palmdale USAF Plant 42 Airport. This action also proposes to modify the Class E airspace, extending upward from 700 feet above the surface. Additionally, this action proposes to revoke the Class E airspace, extending upward from 1,200 feet above the surface. Further, this action proposes to remove the Palmdale VORTAC from the Class E4 and the Class E5 legal descriptions. Also, this action proposes to remove the Lancaster, Gen. William J. Fox Airfield, CA, from the Class E5 legal description. Lastly, this action proposes several administrative corrections to the airspace legal descriptions. This action would ensure the safety and management of instrument flight rules (IFR) operations at the airport.

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, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1–800–647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–0942; Airspace Docket No. 20–AWP–12, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would

amend the Class D and Class E airspace at Palmdale USAF Plant 42 Airport, Palmdale, CA, to support IFR operations at the airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–0942; Airspace Docket No. 20–AWP–12''. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations Part 71 by modifying the Class E airspace, designated as an extension to a Class D or Class E surface area, at Palmdale USAF Plant 42 Airport, Palmdale, CA. The Class E extension east of the airport is not required and it should be removed. However, to properly contain IFR aircraft descending below 1,000 feet above the surface on the RNAV (GPS) RWY 07 approach, a new Class E extension should be added west of the airport. The new Class E extension to the Class D airspace area would be described as follows: That airspace extending upward from the surface within 1 mile each side of the 270° bearing from the airport, extending from the 4.3-mile radius to 7.5 miles west of Palmdale USAF Plant 42 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.

This action also proposes to modify the Class E airspace, extending upward from 700 feet above the surface. This airspace area is not properly sized to contain IFR departures until reaching 1,200 feet above the surface, and IFR arrivals descending below 1,500 feet above the surface. The area would be described as follows: That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the airport, and within 6.1 miles each side of the 080° bearing from the airport, extending from the 6.8-mile radius to 12.9 miles east of the airport, and within 4 miles north and 8 miles south of the 086° bearing from the airport, extending from the airport to 14.3 miles east of the airport, and within 2 miles each side of the 274° bearing from the airport, extending from the 6.8-mile radius to 13.4 miles west of Palmdale USAF Plant 42 Airport.

Additionally, this action proposes to remove the Class E airspace, extending upward from 1,200 feet above the surface. This airspace area is wholly contained with the Los Angeles en route airspace area and duplication is not necessary.

Further, this action proposes to remove the Palmdale VORTAC from the Class E4 and the Class E5 legal descriptions. The navigational aid is not needed to describe the airspace. Additionally, removal of the navigational aid allows the airspace to be defined from a single reference point, simplifying how the airspace is described.

Also, this action proposes to remove the Lancaster, Gen. William J. Fox Airfield, CA, from the Class E5 legal description. The airport is not needed to describe the airspace. Additionally, removal of the airport allows the airspace to be defined from a single reference point, simplifying how the airspace is described.

Lastly, this action proposes several administrative corrections to the airspace legal descriptions. The airport name in the Class D, Class E4, and Class E5 text header's second line is incorrect. The airport name should be updated to ''Palmdale USAF Plant 42 Airport, CA.'' The last sentence of the Class D and Class E4 airspace descriptions contain outdated verbiage. The term Airport/Facility Directory'' should be updated to ''Chart Supplement.''

Class D, E4, and E5 airspace designations are published in paragraphs 5000, 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 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 5000. Class D Airspace.

* * * * *

AWP CA D Palmdale, CA [Amended]

Palmdale USAF Plant 42 Airport, CA
(Lat. 34°37′46″ N., long. 118°05′04″ W.)

That airspace extending upward from the surface to and including 5,000 feet MSL within a 4.3-mile radius of Palmdale USAF Plant 42 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 time will thereafter be continuously published in the Chart Supplement.

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

* * * * *

AWP CA E4 Palmdale, CA [Amended]

Palmdale USAF Plant 42 Airport, CA
(Lat. 34°37′46″ N., long. 118°05′04″ W.)

That airspace extending upward from the surface within 1 mile each side of the 270° bearing from the airport, extending from the 4.3-mile radius to 7.5 miles west of Palmdale USAF Plant 42 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 6005. Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AWP CA E5 Palmdale, CA [Amended]

Palmdale USAF Plant 42 Airport, CA
(Lat. 34°37′46″ N, long. 118°05′04″ W)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the airport, and within 6.1 miles each side of the 080° bearing from the airport, extending from the 6.8-mile radius to 12.9 miles east of the airport, and within 4 miles north and 8 miles south of the 086° bearing from the airport, extending from the airport to 14.3 miles east of the airport, and within 2 miles each side of the 274° bearing from the airport, extending from the 6.8-mile radius to 13.4 miles west of Palmdale USAF Plant 42 Airport.

Issued in Seattle, Washington, on November 5, 2020.

B.G. Chew,

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

[FR Doc. 2020–25053 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0944; Airspace Docket No. 20–ACE–26]

RIN 2120–AA66

Proposed Amendment of V–67, V–190, and V–429; Establishment of T–312; and Revocation of V–125 and V–335 in the Vicinity of Marion, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking, correction.

SUMMARY: The FAA is correcting the airspace docket number listed in a notice of proposed rulemaking (NPRM) that published in the **Federal Register** of November 5, 2020. That NPRM proposing to amend VHF Omnidirectional Range (VOR) Federal airways V–67, V–190, and V–429; establish Area Navigation (RNAV) route T–312; and remove VOR Federal airways V–125 and V–335 in the vicinity of Marion, IL. This action reflects the correct airspace docket number.

DATES: Comments for the NPRM published on November 5, 2020 (85 FR 70532), continue to be accepted on or before December 21, 2020, to be considered in the formulation of a rule determination.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Background

The FAA published a NPRM for Docket No. FAA–2020–0944 in the **Federal Register** (85 FR 70532; November 5, 2020), for amending VOR Federal airways V–67, V–190, and V–429; establishing RNAV route T–312; and removing VOR Federal airways V–125 and V–335 in the vicinity of Marion, IL. Subsequent to publication, it was determined that the airspace docket number for the NPRM incorrectly listed the FAA regional abbreviation for the geographic area that the airspace action falls within as ''AGL'' instead of ''ACE''. The correct airspace docket number is ''20–ACE–26'' and is reflected in the heading of this correction.

Need for Correction

As published, the NPRM contained an error in the airspace docket number listed in the header, **ADDRESSES**, and Comments Invited sections which is misleading and requires correction. This corrective action is necessary to avoid confusion as to the correct airspace docket number for that rulemaking, Docket No. FAA–2020–0944. The FAA will review and consider comments submitted on or before December 21, 2020, to the incorrect docket, but this action establishes what the correct airspace docket number is for this rulemaking.

Correction to NPRM

Accordingly, pursuant to the authority delegated to me, the airspace docket number reflected in Docket No. 2020–0944, as published in the **Federal Register** of November 5, 2020 (85 FR 70532, FR Doc. 2020–24489), is corrected as follows:

1. In FR Doc. 2020–24489, appearing on page 70532, in the first column, at line 5, correct ''20–AGL–26'' to read ''20–ACE–26.''

2. In FR Doc. 2020–24489, appearing on page 70532, in the first column, at line 46, correct ''20–AGL–26'' to read ''20–ACE–26.''

3. In FR Doc. 2020–24489, appearing on page 70532, in the second column,

at lines 50 and 51, correct ''20–AGL–26'' to read ''20–ACE–26.''

4. In FR Doc. 2020–24489, appearing on page 70532, in the second column, at line 64, correct ''20–AGL–26'' to read ''20–ACE–26.''

Issued in Washington, DC, on November 9, 2020.

George Gonzalez,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2020–25100 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0943; Airspace Docket No. 20–AWP–11]

RIN 2120–AA66

Proposed Amendment of Class D and E Airspace and Establishment of Class E Airspace; Lancaster, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Class E airspace, designated as an extension to a Class D or Class E surface area, at General WM J Fox Airfield Airport. Additionally, this action proposes to establish Class E airspace, extending upward from 700 feet above the surface. Further, this action proposes to remove the Palmdale Airport, Palmdale VORTAC, and the Gen. William J. Fox NDB from the Class E4 legal description. Lastly, this action proposes several administrative corrections to the airspaces' legal descriptions. This action would ensure the safety and management of instrument flight rules (IFR) operations at the airport.

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, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1–800–647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–0943; Airspace Docket No. 20–AWP–11, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend the Class D and Class E airspace at General WM J Fox Airfield Airport, Lancaster, CA, to support IFR operations at the airport.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–0943; Airspace Docket No. 20–AWP–11''. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations Part 71 by modifying the Class E airspace, designated as an extension to a Class D or Class E surface area, at General WM J Fox Airfield Airport, Lancaster, CA. To properly contain IFR aircraft descending below 1,000 feet above the surface, several modifications to this class of airspace are necessary. First, the areas southeast and northwest

of the airport are not required and should be removed. Second, a new area of airspace should be added west of the airport to contain IFR instrument approaches. This airspace area would be described as follows: That airspace extending upward from the surface within 1 mile each side of the 252° bearing from the airport, extending from the 4-mile radius to 8.2 miles west of General WM J Fox Airfield Airport.

Also, this action proposes to establish Class E airspace extending upward from 700 feet above the surface for the airport. This airspace is designed to contain IFR departures to 1,200 feet above the surface, and IFR arrivals descending below 1,500 feet above the surface. The airspace area would be described as follows: That airspace extending upward from 700 feet above the surface within a 4-mile radius of the airport, and within 2 miles each side of the 091° bearing from the airport, extending from the 4-mile radius to 9.4 miles east of the airport, and within 2 miles each side of the 252° bearing from the airport, extending from the 4-mile radius to 16.3 miles west of the airport, and within 3.8 miles each side of the 311° bearing from the airport, extending from the 4-mile radius to 9.6 miles northwest of General WM J Fox Airfield Airport.

Additionally, this action proposes to remove the Palmdale Airport, the Palmdale VORTAC, and the Gen. William J. Fox NDB from the Class E4 legal description. The airport and the navigational aids are not needed to define the airspace. Removal of the airport and navigational aids allows the airspace to be defined from a single reference point which simplifies how the airspace is described.

Lastly, this action proposes several administrative corrections to the airspaces' legal descriptions. The geographic coordinates in the Class D legal description are not correct. In order to match the FAA database, the geographic coordinates should be updated to lat. 34°44′28″ N, long. 118°13′07″ W. The last sentence in the Class D and Class E2 legal descriptions contains the term ''Airport/Facilities Directory'', this term is outdated and should be updated to ''Chart Supplement''. The city name should not appear in the second line of the airspace text headers. This action proposes to remove the city name from the second line of the Class D, Class E2, and Class E4 text headers. The airport name in the second line of the text header does not match the FAA database. This action proposes to update the airport name from ''Gen. William J. Fox Airfield'' to ''General WM J Fox Airfield Airport'' in the Class D, Class E2, and Class E4 text headers.

Class D, E2, E4, and E5 airspace designations are published in paragraphs 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 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 5000. Class D Airspace

* * * * *

AWP CA D Lancaster, CA [Amended]

General WM J Fox Airfield Airport, CA
(Lat. 34°44′28″ N., long. 118°13′07″ W.)

That airspace extending upward from the surface to and including 4,800 feet MSL within a 4-mile radius of General WM J Fox Airfield 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 time will thereafter be continuously published in the Chart Supplement.

Paragraph 6002, Class E Airspace Designated as a Surface Area

* * * * *

AWP CA E2 Lancaster, CA [Amended]

General WM J Fox Airfield Airport, CA
(Lat. 34°44′28″ N., long. 118°13′07″ W.)

That airspace extending upward from the surface within a 4-mile radius of General WM J Fox Airfield 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.

* * * * *

AWP CA E4 Lancaster, CA [Amended]

General WM J Fox Airfield Airport, CA
(Lat. 34°44′28″ N., long. 118°13′07″ W.)

That airspace extending upward from the surface within 1 mile each side of the 252° bearing from the airport, extending from the 4-mile radius to 8.2 miles west of General WM J Fox Airfield Airport.

Paragraph 6005. Class E Airspace Areas Extending Upward from 700 feet or more above the Surface of the Earth.

* * * * *

AWP CA E5 Lancaster, CA [New]

General WM J Fox Airfield Airport, CA
(Lat. 34°44′28″ N., long. 118°13′07″ W.)

That airspace extending upward from 700 feet above the surface within a 4-mile radius of the airport, and within 2 miles each side of the 091° bearing from the airport, extending from the 4-mile radius to 9.4 miles east of the airport, and within 2 miles each side of the 252° bearing from the airport, extending from the 4-mile radius to 16.3 miles west of the airport, and within 3.8 miles each side of the 311° bearing from the

airport, extending from the 4-mile radius to 9.6 miles northwest of General WM J Fox Airfield Airport.

Issued in Seattle, Washington, on November 5, 2020.

B.G. Chew,

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

[FR Doc. 2020–25054 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900–AP90

Consent for Release of VA Medical Records

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Department of Veterans Affairs (VA) is withdrawing a document published in the **Federal Register** on January 19, 2018, proposing to amend its regulations to clarify that a valid consent authorizing VA to release the patient's confidential VA medical records to a health information exchange (HIE) community partner may be established not only by VA's physical possession of the written consent form, but also by the HIE community partner's written (electronic) attestation that the patient has provided such consent.

DATES: The proposed rule published at 83 FR 2762 on January 19, 2018, is withdrawn as of November 13, 2020.

ADDRESSES: The docket for this action is available at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Stephania Griffin, Director, Veterans Health Administration Information Access and Privacy Office, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420; *Stephania.griffin@va.gov,* (704) 245–2492 (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on January 19, 2018, VA proposed to amend its regulations concerning patient consent to release VA medical records. 83 FR 2762. As explained in more detail below, VA is withdrawing the proposal.

Under 38 U.S.C. 7332, VA must keep confidential all records of identity, diagnosis, prognosis, or treatment of a patient or subject in connection with any program or activity carried out by VA related to drug abuse, alcoholism or alcohol abuse, infection with human immunodeficiency virus, or sickle cell anemia, and must obtain patients' written consent before VA may disclose such protected information unless authorized by the statute. Although section 7332 does not explicitly require that the written consent be physically in VA's possession at the time of the disclosure, VA had interpreted the statute to require such possession, and, therefore, applied the corresponding regulation 38 CFR 1.475 consistent with that interpretation. VA had reexamined that statutory interpretation in light of contemporary health care industry standards, and published the proposed rule, at 83 FR 2762, to revise § 1.475 to permit VA to release section 7332-protected medical records to eligible community partners, even if VA does not physically have the patient's written consent, provided that specified criteria are met.

VA explained in the proposed rule that it has entered into an agreement to participate in a health information exchange (HIE) to help facilitate the transfer of information between different organizations. An HIE is the electronic transfer of health information among organizations according to nationally recognized standards. The organizations that participate (HIE community partners) range from community health care providers and health plans to governmental agencies providing benefits, such as the Social Security Administration (SSA).

After the proposed rule was published, on June 6, 2018, the President signed into law the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 (hereafter referred to as the MISSION Act), Public Law 115–182, 132 Stat. 1395. Section 132 of the MISSION Act amended section 7332(b)(2)(H) to authorize disclosure of 7332-protected records, with or without the written consent of the patient or subject of the record, to a non-VA entity (including private entities and other Federal agencies) for purposes of providing health care, including hospital care, medical services and extended care services, to patients or performing other health care-related activities or functions. These amendments to section 7332 provide VA with greater flexibility to share records and authorize VA to implement an opt-out model for the purposes of providing health care, and on December 13, 2019, we published a separate proposed rule to implement these recent amendments. See 84 FR 68065.

As a result of the amendments to section 7332 made by section 132 of the MISSION Act and the rulemaking published December 13, 2019, at 84 FR 68065, we have determined the rulemaking published January 19, 2018, at 83 FR 2762, is no longer necessary. However, we note that the amendments to section 7332 did not provide VA with the authority to make disclosures for other purposes such as exchanging information with other governmental agencies providing benefits. To ensure that withdrawal of the rulemaking published January 19, 2018, at 83 FR 2762, would not affect disclosures for other purposes, VA identified that SSA is the only other government agency with which VA exchanges confidential VA medical records for purposes of providing benefits. VA discussed with SSA whether the rulemaking published January 19, 2018, at 83 FR 2762, was still needed for VA to exchange information with SSA to provide benefits, and SSA determined it was no longer needed for that purpose. SSA further indicated they have no plans to send VA attestations of valid authorizations via HIE without also sending the authorization form as a PDF or other digital image, and that they are developing a software solution to review non-digitally created authorizations for validity in order to provide the attestation along with a digital image of the form to VA via HIE. Therefore, the proposed rule published January 19, 2018, at 83 FR 2762, is no longer necessary. Accordingly, VA is withdrawing this proposal.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, Department of Veterans Affairs, approved this document on November 2, 2020, for publication.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2020–24673 Filed 11–12–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 201106–0294]

RIN 0648–BJ98

Fisheries of the Northeastern United States; Golden Tilefish Fishery; 2021 and Projected 2022 Specifications and Emergency Action

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes specifications for the 2021 commercial golden tilefish fishery and projected specifications for 2022. This action also proposes to implement emergency measures for the golden tilefish fishery at the request of the Mid-Atlantic Fishery Management Council. The proposed action is intended to establish allowable harvest levels and other management measures to prevent overfishing while allowing optimum yield, consistent with the Magnuson-Stevens Fishery Conservation and Management Act and the Tilefish Fishery Management Plan. The proposed emergency measures would allow a limited one-time carryover of up to 5 percent of unharvested fishing quota from the 2020 fishing year into the 2021 fishing year. This action also informs the public of the proposed specifications and emergency measures and provides opportunity for public comment.

DATES: Comments must be received by November 30, 2020.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2020–0113, by either of the following method:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0113,*

2. Click the ''Comment Now!'' icon, complete the required fields, and

3. Enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). If you are unable to submit your comment through *www.regulations.gov,* contact Douglas Potts, Fishery Policy Analyst, *douglas.potts@noaa.gov.*

Copies of the Supplemental Information Report (SIR) prepared for this action, and other supporting documents for these proposed specifications, are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Dover, Suite 201, DE 19901. These documents are also accessible via the internet at *http://www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Douglas Potts, Fishery Policy Analyst, (978) 281–9341.

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic Fishery Management Council manages the golden tilefish fishery under the Tilefish Fishery Management Plan (FMP), which outlines the Council's process for establishing annual specifications. The FMP requires the Council to recommend acceptable biological catch (ABC), annual catch limit (ACL), annual catch target (ACT), total allowable landings (TAL), and other management measures, for up to 3 years at a time. The directed fishery is managed under an individual fishing quota (IFQ) program, with small amounts of non-IFQ catch allowed under an incidental permit. The Council's Scientific and Statistical Committee (SSC) provides an ABC recommendation to the Council to derive these catch limits. The Council makes recommendations to NMFS that cannot exceed the recommendation of its SSC. The Council's recommendations must include supporting documentation concerning the environmental, economic, and social impacts of the recommendations. NMFS is responsible for reviewing these recommendations to ensure that they achieve the FMP objectives and are consistent with all applicable laws. Following this review, NMFS publishes the final specifications in the **Federal Register**.

A 2017 stock assessment update found the tilefish stock is not overfished or experiencing overfishing. Based on this report and recommendations made by the Council's SSC, the Council voted in April 2020 to recommend quota specifications for the golden tilefish fishery for fishing years 2021 and 2022. A summary of the Council's recommended specifications is shown below in Table 1. A management track stock assessment is scheduled to be completed in 2021 that could inform a new specifications action to replace the projected 2022 specifications included in this action. At the April 2020 meeting, the Council also voted to request that NMFS implement emergency measures, under the authority provided in section 305(c) of the Magnuson-Stevens Act, for a one-time carryover of up to 5 percent of unharvested IFQ allocation from the 2020 fishing year into the 2021 fishing year. This request was intended to mitigate the severe negative impacts to the tilefish fishery (*e.g.,* market conditions) as a result of COVID–19.

The tilefish IFQ program does not normally allow any carryover of unharvested allocation from one fishing year into the next. The Council's request for emergency measures is discussed in more detail below.

Proposed Specifications

The Council's recommendations are consistent with the SSC's recommended ABCs, and represent a status quo ABC compared to 2020. The proposed initial IFQ TAL of 1,554,259 lb (705 mt) is also status quo compared to 2020. However, the incidental TAL of 70,548 lb (32 mt) is a 1 mt reduction from 2020 to account for updated discard information. The proposed incidental sector typically lands less than half of its allocated quota each year, so this reduction is unlikely to have a significant impact.

TABLE 1—SUMMARY OF RECOMMENDED GOLDEN TILEFISH SPECIFICATIONS

	2020		2021		Projected 2022	
	million lb	mt	million lb	mt	million lb	mt
ABC	1.636	742	1.636	742	1.636	742

TABLE 1—SUMMARY OF RECOMMENDED GOLDEN TILEFISH SPECIFICATIONS—Continued

	2020		2021		Projected 2022	
	million lb	mt	million lb	mt	million lb	mt
ACL	1.636	742	1.636	742	1.636	742
IFQ ACT	1.554	705	1.554	705	1.554	705
Incidental ACT	0.082	37	0.082	37	0.082	37
IFQ TAL	1.554	705	1.554	705	1.554	705
Incidental TAL	0.073	33	0.070	32	0.070	32

The Council recommended an ABC equal to the ACL. Under the FMP, 95 percent of the ACL is allocated for the IFQ fishery, and the remaining 5 percent is allocated for the incidental fishery. This results in the ACT for each. The TAL for each of these sectors of the fishery is derived by deducting anticipated discards of tilefish from the ACT.

The golden tilefish industry strongly supports consistency in annual harvest quotas, and has operated under a constant landings strategy since 2001. Continuing this strategy, the Council opted to recommend the same quota for the 2021 and 2022, with the understanding that the specifications will be reviewed next year and the 2022 specifications may be changed based on the results of the planned 2021 stock assessment. We are proposing the 2021 specifications along with the projected specifications 2022 so the public is aware. We will publish a notice in the **Federal Register** to confirm the projected specifications or announce any necessary changes to the specifications for 2022. The Council did not recommend changes to other regulations for this fishery. We propose, based on this recommendation, that all other management measures in the golden tilefish fishery will remain unchanged for the 2021–2022 fishing years. The incidental trip limit will stay 500 lb (226.8 kg) (live weight), or 50 percent of the weight of all fish being landed, whichever is less, and the recreational catch limit will remain eight fish per angler per trip. Annual IFQ allocations will be issued to individual quota shareholders in advance of the November 1 start of the fishing year.

Emergency Action

After approving the proposed 2021–2022 specifications, the Council approved the following motion at its April 2020 meeting, which requests that NMFS take emergency action to allow carryover of 5 percent of unused IFQ quota from fishing year 2020 to 2021.

Move that given the COVID–19 national emergency, to request the service to consider an emergency action to allow a 5% rollover of unused IFQ 2020 quota allocation for the golden tilefish fishing year November 1, 2020, thru October 31, 2021.

The tilefish IFQ program does not normally allow any carryover of unharvested allocation from one fishing year into the next. Unforeseen changes in the market for seafood resulting from the COVID–19 pandemic, particularly the loss of restaurant sales due to local closure orders, have substantially reduced demand for golden tilefish. A review of golden tilefish IFQ landings from November 1, 2019, through June 30, 2020, shows that landings were approximately 18.5-percent below the same date in 2018 and 2019. Because of this unprecedented impact on the fishery, we are proposing to grant this one-time carry over under our emergency rulemaking authority specified in section 305(c) of the Magnuson-Stevens Act.

We are interpreting this request to mean each IFQ quota shareholder could carry over all 2020 IFQ quota pounds that are not used to land tilefish before the end of the fishing year, up to a maximum amount of 5 percent of their initial 2020 IFQ quota pounds. Final IFQ accounting is normally completed in December or January, after all landings data has been submitted and undergone normal reviews for quality control and quality assurance. Following that accounting, IFQ quota shareholders that land less than 95 percent of their initial 2020 quota pounds would be eligible for the full 5-percent carryover. Those that land between 95 and 100 percent of their initial 2020 quota pounds could carryover the amount they were under. Revised 2020 allocation permits indicating the amount of any carryover would be issued to IFQ quota shareholders. Although carryover IFQ pounds would be added to accounts after the start of the November 1, 2020, start of the fishing year, the effective date would be retroactive to November 1.

If every IFQ quota shareholder were to receive the maximum 5-percent carryover it would result in a maximum potential IFQ TAL for 2021 of 1.631 million lb (740 mt), compared to the 1.554-million lb (705-mt) TAL proposed above. However, it is expected that actual carryover would end up being less because not all quota shareholders will carry over the full 5-percent allowance. Any increase in the 2021 IFQ TAL would reflect 2020 IFQ TAL that was not harvested. Thus, total landings for 2020 and 2021 would remain at or below the combined IFQ TAL for the 2 years. In addition, the Council's SSC takes a precautionary approach when setting ABC recommendations incorporating a substantial buffer between the ABC recommendation and the level of harvest thought to result in overfishing. The ABC recommendation for 2018–2020 of 742 mt was 300 mt below the average overfishing limit for those years. The 35 mt maximum possible carryover is relatively small by comparison. These factors minimize any potential risk that allowing this one-time carryover could result in overfishing.

NMFS's policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS's policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone. NMFS has preliminarily determined, subject to public comment on this proposed rule, that allowing the carryover of

unharvested tilefish IFQ quota pounds as described above meets the three criteria for emergency action for the reasons outlined below.

The emergency results from recent, unforeseen events or recently discovered circumstances. On March 13, 2020, a national emergency was declared in response to the global spread of a novel coronavirus (SARS-CoV–2), and the outbreaks of the disease caused by this virus, COVID–19. Days earlier, state governors across the Greater Atlantic region had begun declaring states of emergency in recognition of the growing impacts and risks of COVID–19. The tilefish industry began to experience impacts from the COVID–19 pandemic in March 2020. These impacts were unforeseen during the development of management measures for the 2020 fishing year that began on November 1, 2019.

The emergency presents serious conservation or management problems in the fishery. When state governors across the Greater Atlantic region declared states of emergency it became exceedingly difficult for members of the tilefish industry to complete fishing trips and sell their catch to federally permitted tilefish dealers. Even after some tilefish dealer activity resumed, the ability of tilefish IFQ quota holders to harvest their quota remained very limited, and it is expected that a number of fishermen will be unable to harvest their full quota for this fishing year. This emergency action would help prevent additional economic losses to industry participants, shoreside businesses, and fishing communities, and help offset lost fishing opportunities during the 2020 fishing year.

Although the Council has the authority to develop a management action to authorize carryover, an emergency action can be developed and implemented by NMFS more swiftly than a Council action that is subject to requirements not applicable to the Secretary. If the normal Council process is used to implement carryover provisions, it would take substantially longer for those provisions to be implemented and could prevent vessels from harvesting carryover at an opportune time in the upcoming fishing year. It is not possible to implement these changes for the start of the 2021 fishing year through rulemaking following the normal Council process because of time required for the Council to develop a FMP amendment or framework adjustment. If implemented through emergency action, it may be possible for any carryover to be authorized early in the tilefish fishing year, which may be advantageous to some fishermen. While considering the Council's request, we are also taking into account the importance of any carryover quota being available for the full year to allow tilefish permit holders to plan their operations to be able to use additional quota when it is most beneficial to them. Section 305(c) of the Magnuson-Stevens Act specifies that emergency regulations may only remain in effect for 180 days from the date of publication and may be extended for one additional period of not more than 186 days. Including the Council's request in this proposed rule also allows the opportunity to accept public comment on the emergency measures, which is not usually available for an emergency action.

Classification

NMFS is issuing this rule pursuant to sections and 304(b)(1)(A) and 305(c) of the Magnuson Stevens Act, which provide specific authority and procedure for implementing this action. Section 304(b) authorizes NMFS to implement regulations implementing a fishery management plan or plan amendment. Section 305(c) authorizes NMFS to implement regulations at the request of the Council to address an emergency in the fishery. The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tilefish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This proposed rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows.

For Regulatory Flexibility Act (RFA) purposes only, NMFS defines a small business in the commercial fishing industry as a firm with total annual receipts (gross revenues) not in excess of $11.0 million.

The proposed action consists of a slight decrease to the incidental quota to account for updated discard data, status quo initial individual fishing quota (IFQ) allocation, and one-time carryover of a small amount of unharvested IFQ allocation from 2020 into 2021 fishing year. The measures proposed in this action apply to vessels that hold a Federal permit for golden tilefish, including the 10 entities currently (2019) holding golden tilefish IFQ allocations.

For the purposes of the RFA analysis, the ownership entities (or firms), not the individual vessels, are considered to be the regulated entities. Ownership entities are defined as those entities or firms with common ownership personnel as listed on the permit application. Because of this, some vessels with golden tilefish permits may be considered to be part of the same firm because they may have the same owners.

According to the ownership database, 176 affiliate firms landed golden tilefish during the 2016–2018 period, with 172 of those business affiliates categorized as small business and 4 categorized as large business. The 3-year average (2016–2018) combined gross receipts (all species combined) for all small entities was $148,189,557 and the average golden tilefish receipts was $4,583,593; this indicates that golden tilefish revenues contributed approximately 3.09 percent of the total gross receipts for these small entities. The four firms that were categorized as large entities had combined gross receipts of $77,944,741 and average golden tilefish receipts of $740. As such, golden tilefish receipts as a proportion of gross receipts is <0.01 percent.

The golden tilefish fleet landed between 96 and 99 percent of the quota in the most recent two years of the current multi-year specifications cycle (2018 and 2019). The average ex-vessel price per pound of golden tilefish reported by processors was $3.81 in 2019, slightly higher than the $3.31 per pound in 2018. The total ex-vessel value of the 2019 harvest was approximately $5.4 million, slightly higher than $4.9 million in 2019. Because the 2021–2022 IFQ quota under the proposed action is identical to the quota implemented in the past few years, it is not expected that its implementation will affect the way the fishery operates or adversely impact future fishing landings compared to recent years.

The incidental fishery does not catch its quota each year, so a small decrease (2,205 pounds (1 mt) or 3.1-percent lower than 2020) is not expected to have any impact on that sector of the fishery. The small amount of carryover that would be allowed under this action represents under harvest in the 2020 fishing year. Any resulting increase in revenue in 2021 is likely offset by a corresponding decrease in revenue in 2020. The amount of additional tilefish

IFQ quota pounds any single quota shareholder might receive is not expected to be large enough to affect the way the fishery operates. Therefore, this action is not expected to have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

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

Dated: November 6, 2020.

Samuel D. Rauch III,

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

[FR Doc. 2020–25042 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 85, No. 220
Friday, November 13, 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

Office of the Under Secretary for Economic Affairs

Advisory Committee on Data for Evidence Building; Meeting

AGENCY: Office of the Under Secretary for Economic Affairs, U.S. Department of Commerce.

ACTION: Notice of public meetings.

SUMMARY: The Office of the Under Secretary for Economic Affairs is providing notice of three upcoming meetings of the Advisory Committee on Data for Evidence Building (ACDEB). These will constitute the second, third, and fourth meeting of the Committee in support of its charge to review, analyze, and make recommendations on how to promote the use of Federal data for evidence building purposes. At the conclusion of the Committee's first and second year, it will submit to the Director of the Office of Management and Budget, Executive Office of the President, an annual report on the activities and findings of the Committee. This report will also be made available to the public.

DATES: November 20, 2020; December 18, 2020; January 22, 2021. The meetings will begin at approximately 9:00 a.m. and adjourn at approximately 12:00 p.m. (EST).

ADDRESSES: Those interested in attending the Committee's public meetings are requested to RSVP to *Evidence@bea.gov* one week prior to each meeting. Agendas, background material, and meeting links will be accessible 24 hours prior to each meeting at *www.bea.gov/evidence.*

Members of the public who wish to submit written input for the Committee's consideration are welcomed to do so via email to *Evidence@bea.gov.* Additional opportunities for public input will be forthcoming.

The safety and well-being of the public, committee members, and our staff is our top priority. In light of current travel restrictions and social-distancing guidelines resulting from the COVID–19 outbreak, this meeting will be held virtually.

FOR FURTHER INFORMATION CONTACT: Gianna Marrone, Program Analyst, U.S. Department of Commerce, 4600 Silver Hill Road (BE–64), Suitland, MD 20746; phone (301) 278–9282; email *Evidence@bea.gov.*

SUPPLEMENTARY INFORMATION: The Foundations for Evidence-Based Policymaking Act (Pub. L. 115–435, Evidence Act 101(a)(2) (5 U.S.C. 315 (a)), establishes the Committee and its charge, and specifies that the Chief Statistician of the United States shall serve as the Chair and other members shall be appointed by the Director of the Office of Management and Budget (OMB). The Act prescribes a membership balance plan that includes: One agency Chief Information Officer; one agency Chief Privacy Officer; one agency Chief Performance Officer; three members who are agency Chief Data Officers; three members who are agency Evaluation Officers; and three members who are agency Statistical Officials who are members of the Interagency Council for Statistical Policy established under section 3504(e)(8) of title 44. Additionally, at least 10 members are to be representative of state and local governments and nongovernmental stakeholders with expertise in government data policy, privacy, technology, transparency policy, evaluation and research methodologies, and other relevant subjects.

Committee members serve for a term of two (2) years. Following a public solicitation and review of nominations, the Director of OMB appointed members per this balance plan and information on the membership can be found at *www.bea.gov/evidence.* Any member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of that term.

The ACDEB is interested in the public's input on the issues it will consider, and requests that interested parties submit statements to the ACDEB via email to *Evidence@bea.gov.* Please use the subject line ''ACDEB Meeting Public Comment.'' All statements will be provided to the members for their consideration and will become part of the Committee's records. Additional opportunities for public input will be forthcoming as the Committee's work progresses.

ACDEB Committee meetings are open, and the public is invited to attend and observe. Those planning to attend are asked to RSVP to *Evidence@bea.gov.* The call-in number, access code, and meeting link will be posted 24 hours prior to each meeting on *www.bea.gov/evidence.* The meetings are accessible to people with disabilities. Requests for foreign language interpretation or other auxiliary aids should be directed to Gianna Marrone at *Evidence@bea.gov* two weeks prior to each meeting.

Pursuant to 41 CFR 102–3.150(b), this **Federal Register** notice for this meeting is being published fewer than 15 calendar days prior to the meeting as exceptional circumstances exist. It is imperative that the meeting be held on November 20, 2020 to accommodate the scheduling priorities of the key participants, who must maintain a strict schedule of meetings in order to complete the Commission's mission. Notice of the meeting is also posted on the ACDEB website at *https://www.bea.gov/evidence.*

Dated: November 9, 2020.

Gianna Marrone,

Alternate Designated Federal Official, U.S. Department of Commerce.

[FR Doc. 2020–25147 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–MN–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–67–2020]

Foreign-Trade Zone (FTZ) 26—Atlanta, Georgia; Notification of Proposed Production Activity; Ricoh Electronics, Inc. (Toner Products, Thermal Paper and Thermal Film), Lawrenceville and Buford, Georgia

Ricoh Electronics, Inc. (Ricoh) submitted a notification of proposed production activity to the FTZ Board for its facilities in Lawrenceville and Buford, Georgia. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on November 2, 2020.

Ricoh already has authority to produce copiers, printers, toner cartridges, related toner products, thermal paper and thermal film products within Subzone 26H. The current request would add foreign-status materials to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the specific foreign-status materials/components described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Ricoh from customs duty payments on the foreign-status materials used in export production. On its domestic sales, for the foreign-status materials noted below, Ricoh would be able to choose the duty rates during customs entry procedures that apply to copiers, printers, toner cartridges, related toner products, thermal paper and thermal film (duty rate ranges between duty-free and 5.8%). Ricoh would be able to avoid duty on foreign-status materials which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The materials sourced from abroad include titanium dioxide mixture (titanium dioxide, methyltrimethoxy silane, and trifluoropropyltrimethoxysilane), silica mixture (silica is over 91% of mixture), polycarbonate/acrylonitrile butadiene styrene resin, and calcium oxide mixture (calcium oxide is over 85% of mixture) (duty rate ranges between 5% and 6%). The request indicates that certain materials are subject to duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is December 23, 2020.

A copy of the notification will be available for public inspection in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: November 9, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–25138 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–301–803]

Citric Acid and Certain Citrate Salts From Colombia: Final Results of Antidumping Duty Administrative Review; 2018–2019

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

SUMMARY: On August 10, 2020, the Department of Commerce (Commerce) published the preliminary results of the administrative review of the antidumping duty (AD) order on citric acid and certain citrate salts (citric acid) from Colombia. The review covers one mandatory respondent, Sucroal S.A. (Sucroal). The period of review (POR) is January 8, 2018 through June 30, 2019. For the final results of this review, we continue to find that Sucroal sold subject merchandise at less than normal value during the POR.

DATES: Applicable November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Bharat Phuyal, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Ave. NW, Washington, DC 20230; telephone: (202) 482–3992.

SUPPLEMENTARY INFORMATION:

Background

On August 10, 2020, Commerce published the *Preliminary Results* of the administrative review of the AD order on citric acid from Colombia.[1] The administrative review covers one producer/exporter of the subject merchandise, Sucroal. We gave interested parties an opportunity to comment on the *Preliminary Results.* We received no comments. Hence, these final results are unchanged from the *Preliminary Results.*

Scope of the Order

The merchandise covered by this order includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend.

Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and, if included in a mixture or blend, 3824.99.9295 of the HTSUS. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.99.9295 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive. For a full description of the scope of the order, *see* the Preliminary Decision Memorandum.

Final Results of the Administrative Review

As a result of this administrative review, we determine that the following weighted-average dumping margin exists for the POR:

Producer/exporter	Estimated weighted-average dumping margin (percent)
Sucroal S.A	4.59

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.212(b), Commerce has determined, 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 review. For Sucroal, because its weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce has calculated importer-specific AD assessment rates. We calculated importer- (or customer-) specific *ad valorem* AD assessment rates by dividing the total amount of dumping calculated for the importer's examined sales by the total entered value of the same sales for that importer, in accordance with 19 CFR 351.212(b)(1).

For entries of subject merchandise during the POR produced by Sucroal for which it did not know its merchandise

[1] *See Citric Acid and Certain Citrate Salts from Colombia: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019,* 85 FR 51012 (August 19, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company involved in the transaction. We intend to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of this administrative review for all shipments of citric acid from Colombia entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Sucroal will be equal to the dumping margin established in the final results of this review; (2) for merchandise exported by producers and/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 for the most recently-completed segment of this proceeding in which the producer and/or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of the proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 28.48 percent, the all-others rate established in the original investigation.[2] 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 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.

[2] *See Citric Acid and Certain Citrate Sales from Belgium, Colombia and Thailand: Antidumping Duty Orders,* 83 FR 35214 (July 25, 2018) (*Order*).

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return 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 to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(5).

Dated: November 5, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–25045 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–805]

Carbon and Alloy Seamless Standard, Line and Pressure Pipe (Under 4.5 Inches) From Romania: Rescission of Antidumping Duty Administrative Review; 2019–2020

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

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty order on carbon and alloy seamless standard, line and pressure pipe (under 4.5 inches) (small diameter seamless pipe) from Romania for the period August 1, 2019, through July 31, 2020.

DATES: Applicable November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Katherine Johnson or Samantha Kinney, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4929 or 202–482–2285 respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 6, 2020, based on a timely request for review of four companies by United States Steel Corporation (the petitioner),[1] Commerce published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on small diameter seamless pipe from Romania covering the period August 1, 2019, through July 31, 2020.[2]

On October 28, 2020, the petitioner withdrew its request for administrative review of the four companies in its Request for Review: ArcelorMittal Tubular Products Roman S.A., SC TMK-Artrom S.A.,[3] Kurvers Piping Italy S.R.L., and Silcotub S.A.[4] No other interested parties requested an administrative review.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request within 90 days of the date of publication of the notice of initiation of the requested review. Because the petitioner's request for administrative review of ArcelorMittal Tubular Products Roman S.A., SC TMK-Artrom S.A., Kurvers Piping Italy S.R.L., and Silcotub S.A. was withdrawn within 90 days of the date of publication of the *Initiation Notice,* and no other interested party requested a review of these or any other companies, Commerce is rescinding this review in accordance with 19 CFR 351.213(d)(1), in its entirety.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries at a rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period August 1, 2019, through July 31, 2020, in accordance with 19 CFR

[1] *See* the Petitioner's Letter, ''Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4½ Inches) from Romania: Request for Administrative Review,'' dated August 31, 2020 (Request for Review).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 63081 (October 6, 2020) (*Initiation Notice*).

[3] The withdrawal of request for administration review listed this company as SC TMK-Artom S.A. However, the correct spelling of the company name is SC TMK-Artrom S.A.

[4] *See* Petitioner's Letter, ''Carbon and Alloy Seamless Standard Line, and Pressure Pipe (Under 4½ Inches) from Romania: Withdrawal of Request for Administrative Review of Antidumping Duty Order,'' dated October 28, 2020.

351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice in the **Federal Register**.

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 review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: November 9, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–25157 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–833]

Large Diameter Welded Pipe From the Republic of Turkey: Rescission of 2018–2020 Antidumping Duty Administrative Review

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

SUMMARY: The U.S. Department of Commerce (Commerce) is rescinding its administrative review of the antidumping duty (AD) order on large diameter welded carbon and alloy steel line and structural pipe (welded line pipe and welded structural pipe) from the Republic of Turkey (Turkey) for the period of review (POR) August 27, 2018, through April 30, 2020.

DATES: Applicable November 12, 2020.

FOR FURTHER INFORMATION CONTACT: William Miller, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3906.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 2020, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the AD order on welded line pipe and welded structural pipe from Turkey for the POR.[1] Commerce received a timely request from American Cast Iron Pipe Company, Berg Steel Pipe Corp., Berg Spiral Pipe Corp., Dura-Bond Industries, Stupp Corporation and Welspun Global Trade LLC, individually and as members of the American Line Pipe Producers Association; Greens Bayou Pipe Mill, LP; JS W Steel (USA) Inc.; Skyline Steel; and Trinity Products LLC (collectively, the petitioners), in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), to conduct an administrative review of this AD order for 16 companies.[2] Commerce received no other requests for administrative review.

On July 10, 2020, Commerce published in the **Federal Register** a notice of initiation with respect to these companies.[3] On October 7, 2020, the petitioners timely withdrew their request for an administrative review for all 16 companies.[4]

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party or parties that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. The petitioners withdrew their request for review by the 90-day deadline, and no other party requested an administrative review of this order. Therefore, we are rescinding the administrative review of the AD order on welded line pipe and welded structural pipe from Turkey covering the POR in its entirety.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Because Commerce is rescinding this administrative review in its entirety, the entries to which this administrative review pertained shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as the only 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 review period. Failure to comply with this requirement may result in the presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(d)(4).

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[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 85 FR 25394 (May 1, 2020).

[2] *See* Petitioners' Letter, ''Large Diameter Welded Pipe from Turkey: Request for Administrative Review,'' dated June 1, 2019.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 41540 (July 10, 2020).

[4] *See* Petitioners' Letter, ''Large Diameter Welded Pipe from the Republic of Turkey: Withdrawal of Request for Administrative Review,'' dated October 7, 2020.

Dated: October 30, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–25046 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–022, C–570–023]

Certain Uncoated Paper From the People's Republic of China: Affirmative Preliminary Determinations of Circumvention of the Antidumping and Countervailing Duty Orders for Uncoated Paper Rolls

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that imports of certain uncoated paper rolls from the People's Republic of China (China) are circumventing the antidumping duty (AD) and countervailing duty (CVD) orders on certain uncoated paper from China. As a result, imports of certain uncoated paper rolls from China on or after October 10, 2019 from certain companies will be subject to suspension of liquidation. For all remaining companies, imports of certain uncoated paper rolls from China on or after November 6, 2020 will be subject to suspension of liquidation. Commerce is also imposing a certification requirement. We invite interested parties to comment on these preliminary determinations.

DATES: Applicable November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Emily Halle, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0176.

SUPPLEMENTARY INFORMATION:

Background

On October 10, 2019, Commerce initiated an anti-circumvention inquiry to determine whether imports of certain uncoated paper rolls, that are further processed into uncoated paper sheets in the United States,[1] are circumventing the *Orders* on certain uncoated paper from China.[2] Commerce issued questionnaires soliciting data on the quantity and value of exports of uncoated paper to various companies. We received responses to these questionnaires from all parties except two, Central National Asia Limited (CNAL) and Kingdecor (Zhejiang) Co., Ltd. (Kingdecor).

Subsequently, Commerce selected six companies and required them to respond to a full questionnaire relating to their export activity with respect to uncoated paper (mandatory respondents).[3] We received no-shipment responses from three of these companies, *i.e.,* Asia Symbol,[4] Gold Huasheng,[5] and Marubeni,[6] while the remaining three, *i.e.,* Shandong Sun Paper Industry Joint Stock Co Ltd (Shandong Sun Paper), Sun Paper (Hong Kong) Co., Limited, (Sun Paper HK), and Sunpack Paper Products Company (Sunpack), did not respond. For a complete description of the events that followed the initiation of this inquiry, *see* the Preliminary Decision Memorandum.[7]

Scope of the Orders

The merchandise subject to these *Orders* includes uncoated paper in sheet form; weighing at least 40 grams per square meter but not more than 150 grams per square meter; that either is a white paper with a GE brightness level of 85 or higher or is a colored paper; whether or not surface-decorated, printed (except as described below), embossed, perforated, or punched; irrespective of the smoothness of the surface; and irrespective of dimensions (Certain Uncoated Paper).

Certain Uncoated Paper includes (a) uncoated free sheet paper that meets this scope definition; (b) uncoated ground wood paper produced from bleached chemi-thermo-mechanical pulp (BCTMP) that meets this scope definition; and (c) any other uncoated paper that meets this scope definition regardless of the type of pulp used to produce the paper.

Specifically excluded from the scope of these *Orders* are (1) paper printed with final content of printed text or graphics and (2) lined paper products, typically school supplies, composed of paper that incorporates straight horizontal and/or vertical lines that would make the paper unsuitable for copying or printing purposes. For purposes of this scope definition, paper shall be considered ''printed with final content'' where at least one side of the sheet has printed text and/or graphics that cover at least five percent of the surface area of the entire sheet.

On September 1, 2017, Commerce determined that imports of uncoated paper with a GE brightness of 83 +/− 1% (83 Bright paper), otherwise meeting the description of in-scope merchandise, constitute merchandise ''altered in form or appearance in minor respects'' from in-scope merchandise that are subject to these *Orders*.[8]

Imports of the subject merchandise are provided for under Harmonized Tariff Schedule of the United States (HTSUS) categories 4802.56.1000, 4802.56.2000, 4802.56.3000, 4802.56.4000, 4802.56.6000, 4802.56.7020, 4802.56.7040, 4802.57.1000, 4802.57.2000, 4802.57.3000, and 4802.57.4000. Some imports of subject merchandise may also be classified under 4802.62.1000, 4802.62.2000, 4802.62.3000, 4802.62.5000, 4802.62.6020, 4802.62.6040, 4802.69.1000, 4802.69.2000, 4802.69.3000, 4811.90.8050 and 4811.90.9080. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

Merchandise Subject to the Anti-Circumvention Inquiries

These anti-circumvention inquiries cover certain uncoated paper rolls that are commonly, but not exclusively, known as ''sheeter rolls,'' from China

[1] *See Certain Uncoated Paper Products from Australia, Brazil, the People's Republic of China, and Indonesia: Initiation of Anti-Circumvention Inquiry of Antidumping and Countervailing Duty Orders,* 84 FR 55915 (October 18, 2019) (*Initiation Notice*).

[2] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Amended Final Affirmative Antidumping Determinations for Brazil and Indonesia and Antidumping Duty Orders,* 81 FR 11174 (March 3, 2016); *see also Certain Uncoated Paper from Indonesia and the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 81 FR 11187 (March 3, 2016) (collectively, *Orders*).

[3] *See* Memorandum, ''Respondent Selection,'' dated May 18, 2020.

[4] Asia Symbol includes the following companies: Greenpoint Global Trading (Macao) Commercial Offshore Ltd. (Greenpoint)/Asia Symbol (Guangdong) Paper Co., Ltd./Asia Symbol (Shandong) Pulp and Paper Co., Ltd.

[5] Gold Huasheng Paper Co., Ltd Inc. (Gold Huasheng) also includes its affiliated parties Gold East Paper Co., Ltd., Hainan Jinhai Pulp and Paper Company, and Ningbo Zhonghua Paper Co, Ltd.

[6] Marubeni (China) Corporation, Ltd. (Marubeni) also includes its affiliates Marubeni America Corporation and Marubeni (Shanghai) Corporation, Ltd.

[7] *See* Memorandum, ''Preliminary Decision Memorandum for Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Uncoated Paper from the People's Republic of China: Uncoated Paper Rolls,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[8] *See Certain Uncoated Paper from Australia, Brazil, the People's Republic of China, Indonesia, and Portugal: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders,* 82 FR 41610 (September 1, 2017).

that are further processed in the United States into individual sheets of uncoated paper that would be subject to the *Orders* (*i.e.,* paper that weighs at least 40 grams per square meter but not more than 150 grams per square meter; and that either is a white paper with a GE brightness level of 83 +/−1% or higher or is a colored paper (as defined above)), except as noted below. The uncoated paper rolls covered by these inquiries are converted into sheets of uncoated paper using specialized cutting machinery prior to printing, and are typically, but not exclusively, between 52 and 103 inches wide and 50 inches in diameter. For clarity, we herein refer to ''subject-paper rolls'' when referencing the certain uncoated paper rolls that may be converted into subject merchandise. Subject-paper rolls are classified under HTSUS category 4802.55.[9]

Certain importers of the subject-paper rolls that are not converted into subject merchandise may certify that the rolls are not further processed into subject merchandise covered by the scope of the *Orders.* Failure to comply with the requisite certification requirement may result in the merchandise being found subject to antidumping and countervailing duties.

Methodology

Commerce made this preliminary finding of circumvention in accordance with section 781(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.225(g). We relied on information placed on the record by the petitioners.[10] Further, because certain interested parties did not cooperate to the best of their abilities in responding to Commerce's requests for information, we have based our preliminary determinations on the facts available, with adverse inferences, pursuant to sections 776(a) and (b) of the Act, as necessary.[11]

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. 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.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content. A list of the topics discussed in the Preliminary Decision Memorandum is attached at the Appendix to this notice.

Affirmative Preliminary Determinations of Circumvention

Based on our analysis, as detailed in the Preliminary Decision Memorandum, we preliminarily find, pursuant to section 781(a) of the Act, that all imports from China of uncoated paper rolls that meet the description of inquiry merchandise above (*i.e.,* subject-paper rolls), regardless of producer, exporter, or importer, constitute further-processed merchandise that is circumventing, and should be included within, the scope of the *Orders.*

We also preliminarily determine that Asia Symbol, Gold Huasheng, and Marubeni did not export subject-paper rolls from China to the United States during the period of inquiry.[12]

To administer this affirmative circumvention determination, Commerce is requiring that importers of certain paper rolls from China that otherwise match the physical description of subject-paper rolls and that are not further processed into uncoated paper sheets subject to the *Orders* certify that the merchandise will not be further processed into subject uncoated paper sheets. Importers of such merchandise will be required to certify and maintain their certifications and supporting documentation to provide to CBP and/or Commerce upon request.[13] Properly certified entries are not subject to antidumping or countervailing duties under the *Orders.* Exemption from antidumping and countervailing duties under the *Orders* is permitted only if the certification and documentation requirements specified in Appendix II and III are met.

Entries of subject-paper rolls produced and/or exported by the non-responsive companies (*i.e.,* CNAL, Kingdecor, Sunpack, Sun Paper HK, and Shandong Sun Paper) are not eligible for certification.

Suspension of Liquidation

In accordance with 19 CFR 351.225(l)(2), for entries of subject-paper rolls that were produced and/or exported by CNAL, Kingdecor, Shandong Sun Paper, Sun Paper HK, and Sunpack (collectively, the non-responsive companies), Commerce will instruct U.S. Customs and Border Protection (CBP) to suspend liquidation of subject-paper rolls (as defined in the ''Merchandise Subject to the Anti-Circumvention Inquiry'' section above) from China that are entered, or withdrawn from warehouse, for consumption on or after October 10, 2019, the date of initiation of this anti-circumvention inquiry.[14] For all other entries of subject-paper rolls, Commerce will instruct CBP to suspend liquidation of the subject-paper rolls from China that are entered, or withdrawn from warehouse, for consumption on or after the signature date of these preliminary determinations, November 6, 2020.[15]

CBP shall require cash deposits in accordance with those rates prevailing at the time of entry, unless the importer can certify to CBP that the subject-paper rolls will not be further processed into uncoated paper sheets subject to the *Orders* in the United States.[16] In that latter instance, no cash deposit rate will be required. Subject-paper rolls meeting the physical characteristics described above, which are produced and/or exported by the non-responsive companies (*i.e.,* CNAL, Kingdecor, Shandong Sun Paper, Sun Paper HK, and Sunpack), will not be eligible for certification.

Public Comment

Interested parties may submit case briefs to Commerce 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 no later than seven days after the time limit for filing case briefs. Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of

[9] *See Initiation Notice,* 84 FR at 55917.

[10] The petitioners are Domtar Corporation, Packaging Corporation of America, North Pacific Paper Company, Finch Paper LLC, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[11] *See* Preliminary Decision Memorandum at Section VII.B.

[12] The period for these inquiries examines the time period starting in the month the initiations of the underlying *Orders* was published, and ending four years later, *i.e.,* February 1, 2015, through February 28, 2019.

[13] The importer certification is provided at Appendix III.

[14] *See* Preliminary Decision Memorandum at ''Use of Facts Available with an Adverse Inference'' section; *see also Anti-circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order,* 63 FR 18364, 18366 (April 15, 1998), unchanged in *Anti-Circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 63 FR 54672, 54675–6 (October 13, 1998).

[15] *See* Preliminary Decision Memorandum at ''Use of Facts Available with an Adverse Inference'' section.

[16] *See* Appendix II for the certification requirements and Appendix III for the importer certification.

the issue; (2) a brief summary of the argument; and (3) a table of authorities.[17] Case and rebuttal briefs should be filed electronically via ACCESS.[18]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice.[19] 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.[20]

Notification to the ITC

Consistent with section 781(e) of the Act, Commerce is notifying the ITC of these affirmative preliminary determinations to include the merchandise subject to these inquiries within the AD and CVD orders on uncoated paper from China. Pursuant to section 781(e) of the Act, the ITC may request consultations concerning Commerce's proposed inclusion in the *Orders* of the inquiry merchandise. These consultations must be concluded within 15 days after the date of the request. If, after consultations, the ITC believes that a significant injury issue is presented by the proposed inclusion, it will have 60 days to provide written advice to Commerce.

Notification to Interested Parties

This notice is published in accordance with section 781(a) of the Act and 19 CFR 351.225(g).

Dated: November 6, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Orders
IV. Merchandise Subject to the Anti-Circumvention Inquiries
V. Period of Anti-Circumvention Inquiries
VI. Statutory Framework
VII. Use of Facts Available with An Adverse Inference
VIII. Anti-Circumvention Analysis
IX. Country-Wide Determination
X. Certification Requirement
XI. Recommendation

Appendix II—Certification Requirements

If an importer imports subject-paper rolls from China and claims that the subject-paper rolls will not be further processed into uncoated paper sheets covered by the *Orders,* the importer is required to complete and maintain the importer certification attached hereto at Appendix III and all supporting documentation. Where the importer uses a broker to facilitate the entry process, it should obtain the entry summary number from the broker. Agents of the importer, such as brokers, however, are not permitted to make this certification on behalf of the importer.

All importers of subject-paper rolls from China are eligible for the certification process detailed below. However, entries of subject-paper rolls produced and/or exported by Central National Asia Limited, Kingdecor (Zhejiang) Co., Ltd., Shandong Sun Paper Industry Joint Stock Co Ltd, Sun Paper (Hong Kong) Co., Limited, and Sunpack Paper Products Company, are ineligible for certification.

For entries of subject-paper rolls from China entered, or withdrawn from warehouse, for consumption on or after the date this preliminary determination was signed for which the importer claims that the rolls will not be further processed into uncoated paper subject to the orders, the importer is required to meet the certification and documentation requirements detailed in the certifications in order for no suspension of liquidation and no cash deposit to be required for such entries. Among other requirements detailed below, importers are required to maintain a copy of any certifications, as well as sufficient documentation supporting the certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, mill certificates, production records, invoices, *etc.*) for the later of: (1) A period of five years from the date of entry; or (2) a period of three years after the conclusion of any litigation in the United States courts regarding such entries.

For all such shipments and/or entries on or after the date these preliminary determinations were signed, through 14 days after the publication of these preliminary determinations in the **Federal Register**, for which certifications are required, importers should complete the required certifications no later than 14 days after the date of publication in the **Federal Register**.

Accordingly, where appropriate, the relevant bullet in the certification should be edited to reflect that the certification was completed within the time frame specified above. For example, the bullet in the importer certification that reads: ''This certification was completed at or prior to the time of Entry Summary,'' could be edited as follows: ''The imports referenced herein entered on {insert date}. This certification was completed on mm/dd/yyyy, within 14 days of the publication date of the **Federal Register** notice of the preliminary determinations of circumvention.''

For all shipments and/or entries made later than the 14th day after the publication in the **Federal Register** for which certifications are required, importers should complete the required certification at or prior to the date of Entry Summary.

Appendix III—Importer Certification

I hereby certify that:

(A) My name is {IMPORTING COMPANY OFFICIAL'S NAME} and I am an official of {NAME OF IMPORTING COMPANY}, located at {ADDRESS OF IMPORTING COMPANY}.

(B) I have direct personal knowledge of the facts regarding the importation into the Customs territory of the United States of subject-paper rolls produced in the People's Republic of China (China) that entered under entry summary number(s), identified below, and which are covered by this certification. Subject-paper rolls are defined as certain uncoated paper rolls commonly, but not exclusively, known as ''sheeter rolls,'' (rolls with paper that weigh at least 40 grams per square meter but not more than 150 grams per square meter; and paper that either is a white paper with a GE brightness level of 83 +/− 1% or higher or is a colored paper) that may be converted into subject merchandise. The uncoated paper rolls are typically, but not exclusively, between 52 and 103 inches wide and 50 inches in diameter. Subject-paper rolls are classified under HTSUS category 4802.55. ''Direct personal knowledge'' refers to facts the certifying party is expected to have in its own records. For example, the importer should have direct personal knowledge of the importation of the product (*e.g.,* the name of the exporter) in its records.

(C) *If the importer is acting on behalf of the first U.S. customer, complete this paragraph, if not put ''NA'' at the end of this paragraph:* The imported subject-paper rolls covered by this certification were imported by {NAME OF IMPORTING COMPANY} on behalf of {NAME OF U.S. CUSTOMER}, located at {ADDRESS OF U.S. CUSTOMER}.

(D) The imported subject-paper rolls covered by this certification were shipped to {NAME OF PARTY TO WHOM MERCHANDISE WAS FIRST SHIPPED IN THE UNITED STATES}, located at {ADDRESS OF SHIPMENT}.

(E) Select appropriate statement below:

___I have direct personal knowledge of the facts regarding the end-use of the imported product because my company is the end-user of the imported product covered by this certification and I certify that the imported subject-paper rolls will not be used to produce subject merchandise. ''Direct personal knowledge'' includes information contained within my company's books and records.

___I have personal knowledge of the facts regarding the end-use of the imported product because my company is not the end-user of the imported product covered by this certification. However, I have been able to contact the end-user of the imported product

[17] *See* 19 CFR 351.309(c)(2) and (d)(2).

[18] *See* 19 CFR 351.303.

[19] *See* 19 CFR 351.310(c).

[20] *Id.*

and confirm that it will not use this product to produce subject merchandise. The end-user of the imported product is {COMPANY NAME}. ''Personal knowledge'' includes facts obtained from another party (*e.g.,* correspondence received by the importer from the end-user of the product).

(F) The imported subject-paper rolls covered by this certification will not be further processed into uncoated paper sheets in the United States. (*Note:* For certifications related to entries made on or after November 6, 2020, and through 14 days after the publication of the Preliminary Determination, the importer should replace ''will not be further processed'' with ''were not further processed'' in the certification, as necessary).

(G) This certification applies to the following entries (repeat this block as many times as necessary):

Entry Summary #:
Entry Summary Line Item #:
Foreign Seller:
Foreign Seller's Address:
Foreign Seller's Invoice #:
Foreign Seller's Invoice Line Item #:
Producer:
Producer's Address:

(H) I understand that {NAME OF IMPORTING COMPANY} is required to maintain a copy of this certification and sufficient documentation supporting this certification (*i.e.,* documents maintained in the normal course of business, or documents obtained by the certifying party, for example, mill certificates, production records, invoices, *etc.*) for the later of: (1) A period of five years from the date of entry; or (2) a period of three years after the conclusion of any litigation in the United States courts regarding such entries.

(I) I understand that {NAME OF IMPORTING COMPANY} is required to provide this certification and supporting records to U.S. Customs and Border Protection (CBP) and/or the Department of Commerce (Commerce), upon request by the respective agency.

(J) I understand that the claims made herein, and the substantiating documentation, are subject to verification by CBP and/or Commerce.

(K) I understand that failure to maintain the required certifications, and/or failure to substantiate the claims made herein, and/or failure to allow CBP and/or Commerce to verify the claims made herein, may result in a *de facto* determination that all entries to which this certification applies are within the scope of the antidumping/countervailing duty orders on certain uncoated paper from China. I understand that such finding will result in:

(i) suspension of liquidation of all unliquidated entries (and entries for which liquidation has not become final) for which these requirements were not met;

(ii) the requirement that the importer post applicable antidumping duty and/or countervailing duty cash deposits (as appropriate) equal to the rates determined by Commerce; and

(iii) the revocation of {NAME OF IMPORTING COMPANY}'s privilege to certify future imports of subject-paper rolls from China as not being imported for purposes of further processing into the United States into uncoated paper sheets.

(L) I understand that agents of the importer, such as brokers, are not permitted to make this certification. Where a broker or other party was used to facilitate the entry process, {NAME OF IMPORTING COMPANY} obtained the entry summary number and date of entry summary from that party.

(M) This certification was completed at or prior to the date of entry summary.

(N) I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. government.

Signature
{NAME OF COMPANY OFFICIAL}
{TITLE}

[FR Doc. 2020–25159 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–068]

Forged Steel Fittings From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2018

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

SUMMARY: The Department of Commerce (Commerce) is conducting an administrative review of the countervailing duty (CVD) order on forged steel fittings from the People's Republic of China (China) for the period of review March 14, 2018 through December 31, 2018. Commerce preliminarily determines that countervailable subsidies are being provided to Both-Well (Taizhou) Steel Fittings, Co., Ltd. (Both-Well), the sole producer/exporter of forged steel fittings from China subject to this review.

DATES: Applicable November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Katherine Johnson or Janae Martin, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–0238, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 17, 2020, Commerce published the notice of initiation of an administrative review of the CVD order on forged steel fittings from China.[1] On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days, thereby extending the deadline for the preliminary results of this review until July 21, 2020.[2] On July 21, 2020, Commerce again tolled all deadlines in administrative reviews by 60 days.[3] Accordingly, the deadline for the preliminary results in this administrative review was postponed to November 19, 2020.[4]

For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[5] A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix I 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,* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Order

The merchandise covered by the order is forged steel fittings. For a complete description of the scope of the order, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a government financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[6] For a full description of the

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 3014 (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] *Id.* at 2.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results: Administrative Review of the Countervailing Duty Order on Forged Steel Fittings from the People's Republic of China; 2018,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E)

Continued

methodology underlying our preliminary conclusions, *see* the accompanying Preliminary Decision Memorandum.

As explained in the Preliminary Decision Memorandum, Commerce relied on adverse facts available because the Government of China did not act to the best of its ability in responding to Commerce's requests for information, and consequently, we have drawn an adverse inference, where appropriate, in selecting from among the facts otherwise available.[7] For further information, *see* ''Use of Facts Otherwise Available and Adverse Inferences'' in the Preliminary Decision Memorandum.

Rate for Non-Selected Companies Under Review

There are 35 companies for which a review was requested and not rescinded, and which were not selected as mandatory respondents or found to be cross-owned with a mandatory respondent. For these companies, because the rate calculated for Both-Well was above *de minimis* and not based entirely on facts available, we applied Both-Well's subsidy rate to the non-selected companies. This methodology to establish the subsidy rate for non-selected companies is consistent with our practice and with section 705(c)(5)(A) of the Act, which governs the determination of an ''all-others'' rate in an investigation and which we rely on for guidance here. For a list of the non-selected companies, *see* Appendix II to this notice.

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated a countervailable subsidy rate for Both-Well, the sole mandatory respondent in this review. We preliminarily determine that the following subsidy rate exists for Both-Well and the non-selected companies under review:

Company	Subsidy rate (percent)
Both-Well (Taizhou) Steel Fittings, Co., Ltd	25.90
Non-Selected Companies Under Review[8]	25.90

Assessment Rate

In accordance with 19 CFR 351.221(b)(4)(i), we preliminarily assigned subsidy rates in the amounts shown above for the producer/exporters shown above. Upon completion of the administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries covered by this review. We intend to issue instructions directly to CBP 15 days after publication of the final results of this review.

Cash Deposit Rate

Pursuant to section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amount indicated for Both-Well with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit instructions, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.[9] Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs) within seven days after the time limit for filing case briefs.[10] Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs. Parties who submit arguments are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[11]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must do so within 30 days of publication of these preliminary results by submitting a written request to the Assistant Secretary for Enforcement and Compliance using Enforcement and Compliance's ACCESS system.[12] 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 will inform parties of the scheduled date of the hearing which will be held at a time and date to be determined.[13] Issues addressed during the hearing will be limited to those raised in the briefs.[14] Parties should confirm the date and time of the hearing two days before the scheduled date.

Parties are reminded that all briefs and hearing requests must be filed electronically using ACCESS and received successfully in their entirety by 5 p.m. Eastern Time on the due date. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[15]

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, Commerce intends to issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days after publication of these preliminary results.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: November 5, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Diversification of China's Economy
V. Subsidies Valuation
VI. Benchmarks and Discount Rates
VII. Use of Facts Otherwise Available and Adverse Inferences
VIII. Analysis of Programs
IX. Conclusion

Appendix II—List of Non-Selected Companies

1. Apco Pipe Fittings Co., Ltd.
2. Cixi Baicheng Hardware Tools, Ltd.
3. Dalian Guangming Pipe Fittings Co., Ltd.
4. Eaton Hydraulics (Luzhou) Co., Ltd.
5. Eaton Hydraulics (Ningbo) Co., Ltd.
6. Feiting Hi-Tech Piping Zhejiang Co., Ltd
7. Hebei Haiyuan Pipe Fittings Co., Ltd.
8. Hebei Xinyue High Pressure Flange And Pipe Fitting Co., Ltd.
9. Jiangsu Forged Pipe Fittings Co., Ltd.

of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] *See* sections 776(a) and (b) of the Act.

[8] *See* Appendix III.

[9] *See* 19 CFR 224(b).

[10] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[11] *See* 19 CFR 351.309(c)(2) and 351.309(d)(2).

[12] *See* 19 CFR 351.310(c).

[13] *See* 19 CFR 351.310.

[14] *See* 19 CFR 351.310(c).

[15] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements); *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

10. Jiangsu Haida Pipe Fittings Group Co., Ltd.
11. Jiangyin Tianning Metal Pipe Fitting Co., Ltd.
12. Jiangyin Yangzi Fitting Co., Ltd.
13. Jinan Mech Piping Technology Co., Ltd.
14. Jining Dingguan Precision Parts Manufacturing Co., Ltd.
15. Lianfa Stainless Steel Pipes & Valves (Qingyun) Co., Ltd.
16. Luzhou City Chengrun Mechanics Co., Ltd.
17. Ningbo HongTe Industrial Co., Ltd.
18. Ningbo Long Teng Metal Manufacturing Co., Ltd.
19. Ningbo Save Technology Co., Ltd.
20. Ningbo Zhongan Forging Co., Ltd.
21. Q.C. Witness International Co., Ltd.
22. Qingdao Bestflow Industrial Co., Ltd.
23. Shanghai Lon Au Stainless Steel Materials Co., Ltd.
24. Shanghai Longnai High Pressure Pipe Fittings Co., Ltd.
25. Shanghai Tongyang Pipe Fittings Co., Ltd.
26. Shanghai Yochoic Pipefittings Co., Ltd.
27. Witness International Co., Ltd.
28. Xin Yi International Trade Co., Limited
29. Yancheng Boyue Tube Co., Ltd.
30. Yancheng Haohui Pipe Fittings Co., Ltd.
31. Yancheng Jiuwei Pipe Fittings Co., Ltd.
32. Yancheng Manda Pipe Industry Co., Ltd.
33. Yingkou Guangming Pipeline Industry Co., Ltd.
34. Yingkou Liaohe Machinery & Pipe Fittings Co., Ltd.
35. Yuyao Wanlei Pipe Fitting Manufacturing Co., Ltd.

[FR Doc. 2020–25044 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA550]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 73 Workshop for South Atlantic Red Snapper.

SUMMARY: The SEDAR 73 assessment of the South Atlantic stock of red snapper will consist of a data scoping webinar, a workshop, and a series of assessment webinars. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 73 Workshop will be held via webinar December 1–4, 2020, from 9 a.m. until 1 p.m. EST each day. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice. Additional SEDAR 73 workshops and webinar dates and times will publish in a subsequent issue in the **Federal Register**.

ADDRESSES: The SEDAR 73 Workshop will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/8276412559853299724.*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4373; email: *Kathleen.howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the workshop are as follows:

- Review any ongoing data issues for continuity data sources
- Review and discuss new data sources
- Begin discussion on modelling issues and decisions

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: November 9, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–25124 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA636]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Advisory Panel via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Monday, November 30, 2020 at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/3897935157494920717.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Advisory Panel will discuss draft alternatives and draft environmental impacts analysis from the Groundfish Plan Development Team for 2021 US/CA total allowable catches (TACs) for U.S./Canada Eastern Georges Bank (GB) cod, Eastern GB haddock, and GB yellowtail flounder; 2021–23 specifications for half of the groundfish stocks; and white hake rebuilding; and receive an update on a preliminary analysis of a universal sector exemption for redfish, pollock, and haddock. They will make recommendations to the Groundfish Committee for final action on specifications and a white hake rebuilding plan, as appropriate. Other business will be discussed as necessary

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: November 9, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–25128 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA611

Atlantic Highly Migratory Species; Advisory Panel

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

ACTION: Notice; solicitation of nominations.

SUMMARY: NMFS solicits nominations for the Atlantic Highly Migratory Species (HMS) Advisory Panel (AP). NMFS consults with and considers the comments and views of the HMS AP when preparing and implementing Fishery Management Plans (FMPs) or FMP amendments for Atlantic tunas, swordfish, sharks, and billfish. Nominations are being sought to fill approximately one-third (10) of the seats on the HMS AP for 3-year appointments. Individuals with definable interests in the recreational and commercial fishing and related industries, environmental community, academia, and non-governmental organizations are considered for membership on the HMS AP.

DATES: Nominations must be received on or before December 14, 2020.

ADDRESSES: You may submit nominations and requests for the Advisory Panel Statement of Organization, Practices, and Procedures by email to *HMSAP.Nominations@noaa.gov.* Include in the subject line the following identifier: ''HMS AP Nominations.''

FOR FURTHER INFORMATION CONTACT: Peter Cooper at (301) 427–8503.

SUPPLEMENTARY INFORMATION:

Introduction

The Magnuson-Stevens Fishery Conservation and Management Act requires the establishment of an AP for each FMP for Atlantic HMS, *i.e.,* tunas, swordfish, billfish, and sharks. 16 U.S.C. 1854(g)(1)(A)–(B). Since the inception of the AP in 1998, NMFS has consulted with and considered the comments and views of AP members when preparing and implementing Atlantic HMS FMPs or FMP amendments.

Procedures and Guidelines

A. Nomination Procedures for Appointments to the Advisory Panel

Nomination packages should include:

1. The name of the nominee and a description of his/her interest in HMS or HMS fisheries, or in particular species of sharks, swordfish, tunas, or billfish;

2. Contact information, including mailing address, phone, and email of the nominee;

3. A statement of background and/or qualifications;

4. A written commitment that the nominee shall actively participate in good faith, and consistent with ethics obligations, in the meetings and tasks of the HMS AP; and

5. A list of outreach resources that the nominee has at his/her disposal to communicate qualifications for HMS AP membership.

Qualification for membership includes one or more of the following: (1) Experience in HMS recreational fisheries; (2) experience in HMS commercial fisheries; (3) experience in fishery-related industries (*e.g.,* marinas, bait and tackle shops); (4) experience in the scientific community working with HMS; and/or (5) representation of a private, non-governmental, regional, national, or international organization representing marine fisheries, or environmental, governmental, or academic interests dealing with HMS.

Tenure for the HMS AP

Member tenure will be for 3 years, with approximately one-third of the members' terms expiring on December 31 of each year. Nominations are sought for terms beginning January 2021 and expiring December 2023.

B. Participants

Nominations for the HMS AP will be accepted to allow representation from commercial and recreational fishing interests, academic/scientific interests, and the environmental/non-governmental organization community, who are knowledgeable about Atlantic HMS and/or Atlantic HMS fisheries. Current representation on the HMS AP, as shown in Table 1, consists of 12 members representing commercial interests, 12 members representing recreational interests, 4 members representing environmental interests, 4 academic representatives, and the International Commission for the Conservation of Atlantic Tunas (ICCAT) Advisory Committee Chairperson. NMFS seeks to fill 5 commercial, 3 recreational, 1 academic, and 1 environmental organization vacancies for terms starting in 2021. NMFS will seek to fill vacancies based primarily on maintaining the current representation from each of the sectors. NMFS also considers species expertise and

representation from the fishing regions (Northeast, Mid-Atlantic, Southeast, Gulf of Mexico, and Caribbean) to ensure the diversity and balance of the AP. Table 1 includes the current representation on the HMS AP by sector, region, and species with terms that are expiring identified in bold. It is not meant to indicate that NMFS will only consider persons who have expertise in the species or fishing regions that are listed. Rather, NMFS will aim toward having as diverse and balanced an AP as possible. The intent is to have a group that, as a whole, reflects an appropriate and equitable balance and mix of interests given the responsibilities of the HMS AP.

Table 1 -- Current Representation on the HMS AP by Sector, Region, and Species

Sector	Fishing Region	Species	Date Appointed	Date Term Expires	Member Status
Academic	**All**	**Swordfish/Tuna**	**1/1/2018**	**12/31/2020**	**Expiring**
Academic	All	Tuna	1/1/2019	12/31/2021	Active
Academic	Gulf of Mexico/Southeast	Shark	1/1/2019	12/31/2021	Active
Academic	Southeast	Swordfish/HMS	1/1/2019	12/31/2021	Active
Commercial	Mid-Atlantic	HMS/Shark	1/1/2020	12/31/2022	Active
Commercial	Mid-Atlantic	Swordfish/Tuna	1/1/2020	12/31/2022	Active
Commercial	Gulf of Mexico	Shark	1/1/2020	12/31/2022	Active
Commercial	**Southeast**	**Shark**	**1/1/2018**	**12/31/2020**	**Expiring**
Commercial	**Northeast**	**Tuna**	**1/1/2018**	**12/31/2020**	**Expiring**
Commercial	**Gulf of Mexico/Southeast**	**Swordfish/Tuna**	**1/1/2018**	**12/31/2020**	**Expiring**
Commercial	**Northeast**	**Tuna**	**1/1/2018**	**12/31/2020**	**Expiring**
Commercial	**Northeast**	**Tuna**	**1/1/2018**	**12/31/2020**	**Expiring**
Commercial	NE/SE/GOM	HMS/Tuna	1/1/2019	12/31/2021	Active
Commercial	Southeast	Shark	1/1/2019	12/31/2021	Active
Commercial	Southeast	Swordfish/Tuna	1/1/2019	12/31/2021	Active
Commercial	Northeast	Swordfish/Tuna	1/1/2019	12/31/2021	Active
Environmental	All	Tuna	1/1/2020	12/31/2022	Active
Environmental	All	HMS	1/1/2020	12/31/2022	Active
Environmental	**All**	**Shark**	**1/1/2018**	**12/31/2020**	**Expiring**
Environmental	Caribbean	HMS	1/1/2019	12/31/2021	Active
Recreational	Northeast	HMS	1/1/2020	12/31/2022	Active
Recreational	Northeast	Tuna/Sharks	1/1/2020	12/31/2022	Active
Recreational	Mid-Atlantic	HMS	1/1/2020	12/31/2022	Active
Recreational	Southeast	Billfish	1/1/2020	12/31/2022	Active
Recreational	Gulf of Mexico	HMS	1/1/2020	12/31/2022	Active
Recreational	**All**	**Billfish**	**1/1/2018**	**12/31/2020**	**Expiring**
Recreational	**Mid-Atlantic**	**Shark**	**1/1/2018**	**12/31/2020**	**Expiring**
Recreational	**Mid-Atlantic**	**Tuna/Billfish**	**1/1/2018**	**12/31/2020**	**Expiring**
Recreational	Northeast	Tuna/Shark	1/1/2019	12/31/2021	Active
Recreational	GOM/SE	HMS	1/1/2019	12/31/2021	Active
Recreational	Mid-Atlantic	HMS	1/1/2019	12/31/2021	Active
Recreational	Southeast	Billfish/HMS	1/1/2019	12/31/2021	Active

Note: Terms that are expiring or for whom current members are stepping down are identified in bold and marked as "Expiring".

Five additional members on the HMS AP include one member representing each of the following Councils: New England Fishery Management Council, the Mid-Atlantic Fishery Management Council, the South Atlantic Fishery Management Council, the Gulf of Mexico Fishery Management Council, and the Caribbean Fishery Management Council. The HMS AP also includes 22 ex-officio participants: 20 representatives of the coastal states and two representatives of the interstate commissions (the Atlantic States Marine Fisheries Commission and the Gulf States Marine Fisheries Commission).

NMFS will provide the necessary administrative support, including technical assistance, for the HMS AP. However, NMFS will not compensate participants with monetary support of any kind. Depending on availability of funds, members may be reimbursed for travel costs related to the HMS AP meetings.

C. Meeting Schedule

Meetings of the HMS AP will be held as frequently as necessary but are routinely held twice each year. In recent years, meetings have been held once in the spring, and once in the fall. The meetings may be held in conjunction with public hearings.

Dated: November 9, 2020.

Jennifer M. Wallace,

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

[FR Doc. 2020–25148 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE:

National Oceanic and Atmospheric Administration

[RTID 0648–XA621]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a two-day webinar meeting to consider actions affecting the Gulf of Mexico fisheries in the exclusive economic zone (EEZ).

DATES: The webinar will convene Monday, November 30 through Tuesday, December 1, 2020; 9 a.m. until 5:30 p.m. EST.

ADDRESSES: The meeting will take place via webinar; you may access the log-on information at *www.gulfcouncil.org.*

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Dr. Carrie Simmons, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Agenda

Monday, November 30, 2020; 9 a.m.—5:30 p.m.

The meeting will begin with Migratory Species Committee reviewing Highly Migratory Species (HMS) Amendment 14 to establish a new framework for the establishment of acceptable biological catch and annual catch limits for Atlantic Shark fisheries. Sustainable Fisheries Committee will receive an update on Aquaculture Opportunity areas; review Final Action Amendment Reef Fish 48/Red Drum 5: Status Determination Criteria and Optimum Yield for Reef Fish and Red Drum and discuss the treatment of dead discards by the Southeast Fisheries Science Center (SEFSC) in stock assessments. The Shrimp Committee will discuss pilot program to evaluate use of vessel navigation system to measure shrimping efforts and receive a Shrimp Advisory Panel meeting report.

Following lunch, the Reef Fish Committee will convene to review Reef Fish Landings, Draft Framework Action: Modification of the Gulf of Mexico Lane Snapper Annual Catch Limit, and, Draft Framework Action: Modification of the Vermilion Snapper and Gray Triggerfish Catch Levels. The Committee will receive a presentation on the Great Red Snapper Count; and, review the revised draft framework action to adjust State Recreational Red Snapper Catch Limits.

Tuesday, December 1, 2020; 9 a.m.—5:30 p.m.

The Ecosystem Committee will receive an update on Gulf of Mexico Fishery Ecosystem Plan and Southeast Regional efforts to build a foundation for the Fishery Ecosystem Plan.

Full Council will convene mid-morning (10:15 a.m.) with a Call to Order, Announcements, and Introductions; Adoption of Agenda and Approval of Minutes. The Council will hold public comment testimony beginning at approximately 10:30 a.m. until 2:30 p.m. for Final Action Amendment Reef Fish 48/Red Drum 5: Status Determination Criteria and Optimum Yield for Reef Fish and Red Drum, and open testimony on other fishery issues or concerns. There will be a one-hour lunch break from 12:30 p.m. to 1:30 p.m. Public comment may begin earlier than 10:30 a.m. EDT but will not conclude before that time. Persons wishing to give public testimony must follow the instructions on the Council website before the start of the public comment period at 10:30 a.m. EST.

Following public comment, the Council will receive committee reports from Sustainable Fisheries, Shrimp, Migratory Species, Reef Fish and Ecosystem Committees. The Council will then discuss any Other Business items.

—Meeting Adjourns

The meeting will be broadcast via webinar. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the Council meeting on the calendar.

The timing and order in which agenda items are addressed may change as required to effectively address the issue, and the latest version along with other meeting materials will be posted on the website as they become available.

Although other non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meeting. Actions will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

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

Dated: November 9, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–25126 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA587]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 71 South Atlantic Gag Grouper Assessment Webinar II.

SUMMARY: The SEDAR 71 assessment of the South Atlantic stock of gag grouper will consist of a data webinar and a series assessment webinars.

DATES: The SEDAR 71 Gag Grouper Assessment Webinar II has been scheduled for Monday, November 30, 2020, from 9 a.m. to 12 p.m. EDT.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/7780769211057330703.*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405. *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone (843) 571–4371; email: *Kathleen.Howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management

Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the SEDAR 71 Gag Grouper Assessment Webinar II are as follows:

- Discuss any data issues that may have arisen
- Discuss modeling issues as needed

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: November 9, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–25125 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA635]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting via webinar.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Monday, November 30, 2020 at 12:45 p.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/6828171028913385741.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Committee will discuss draft alternatives and draft environmental impacts analysis from the Groundfish Plan Development Team for 2021 US/CA total allowable catches (TACs) for U.S./Canada Eastern Georges Bank (GB) cod, Eastern GB haddock, and GB yellowtail flounder; 2021–2023 specifications for half of the groundfish stocks; and white hake rebuilding; and receive an update on a preliminary analysis of a universal sector exemption for redfish, pollock, and haddock. The Committee will consider work of the Groundfish Plan Development Team and recommendations from the Groundfish Advisory Panel and make recommendations to the Council for final action on specifications and a white hake rebuilding plan, as appropriate. They will receive a brief update on the party/charter limited entry ''strawman'' project and discuss other business as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: November 9, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–25127 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA637]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council, NEFMC) will hold a three-day meeting to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Due to federal and state travel restrictions and updated guidance from the Centers for Disease Control and Prevention related to COVID–19, this meeting will be conducted entirely by webinar.

DATES: The webinar meeting will be held on Tuesday, Wednesday, and Thursday, December 1, December 2, and December 3, 2020, beginning at 9 a.m. each day.

ADDRESSES: All meeting participants and interested parties can register to join the webinar at *https://attendee.gotowebinar.com/register/3991858738902876943.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465–0492; *www.nefmc.org.*

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492, ext. 113.

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, December 1, 2020

After introductions and brief announcements, the Council will receive reports on recent activities from its Chairman and Executive Director, NMFS's Greater Atlantic Regional Fisheries Office (GARFO) Regional Administrator, liaisons from the Northeast Fisheries Science Center (NEFSC) and Mid-Atlantic Fishery Management Council, staff from the Atlantic States Marine Fisheries Commission (ASMFC), and representatives from NOAA General Counsel, NOAA's Office of Law Enforcement, the U.S. Coast Guard, and the Advisory Committee to the U.S. Section of the International Commission for the Conservation of Atlantic Tunas (ICCAT). Next, the Council will continue the discussion it initiated during its October 27, 2020 meeting regarding 2021 priorities for ecosystem-based fishery management (EBFM). During the October meeting, the Council approved 2021 work priorities for all of its committees and associated responsibilities except for EBFM. The Council will discuss EBFM priorities in more detail during this December meeting and decide whether to reaffirm or alter its current path for EBFM, including its approach for outreach efforts and management strategy evaluation.

Following the lunch break, members of the public will have the opportunity to speak during an open comment period on issues that relate to Council business but are not included on the published agenda for this meeting. The Council asks the public to limit remarks to 3–5 minutes. These comments will be received through the webinar. A guide for how to publicly comment through the webinar is available on the Council website at *https://s3.amazonaws.com/nefmc.org/NEFMC-meeting-remote-participation_generic.pdf.* Next, the Council will receive a brief Atlantic Herring Report with an update on: (1) Framework Adjustment 7 to the Atlantic Herring Fishery Management Plan (FMP), which is being developed to protect spawning herring on Georges Bank; and (2) other herring-related actions as needed. After that, the Council will receive a presentation on the three-year review of the Standardized Bycatch Reporting Methodology and have an opportunity to discuss the report and ask questions. Then, the Council will receive a final report from the Northeast Regional Ocean Council (NROC) and the Responsible Offshore Development Alliance (RODA) on their collaborative effort to update commercial fisheries data on the Northeast Ocean Data Portal. The Council will close out the day with a Habitat Committee Report. Here, the Council will: (1) Review and approve completed Habitat Policies for Aquaculture and Submarine Cables; (2) receive updates on offshore energy and habitat-related work; and (3) receive an update from NOAA Fisheries on regional aquaculture activities and recent developments related to the announcement for Federal Aquaculture Opportunity Areas. The Council is expected to discuss and potentially offer feedback on all of these issues. After this discussion, the Council will adjourn for the day.

Wednesday, December 2, 2020

The Council will begin the day with a report from the Northeast Fisheries Science Center on the peer reviewed Fall 2020 Management Track Stock Assessments for Atlantic sea scallops and 13 Northeast multispecies stocks, which include large-mesh groundfish stocks and small-mesh whiting/hake stocks. The Scientific and Statistical Committee (SSC) then will present its recommendations for overfishing limits (OFLs) and acceptable biological catches (ABCs) for: (1) The 2021 scallop fishing year, along with default specifications for fishing year 2022; and (2) northern and southern red hake, northern and southern silver hake, and offshore hake for the 2021–23 fishing years. The Council's Scallop Committee will provide the next report, which will cover (1) an overview of 2020 scallop survey results; and (2) a progress report on Framework Adjustment 33 to the Atlantic Sea Scallop FMP, which contains 2021 fishery specifications, 2020 default specifications, and other measures.

Following the lunch break, the Council will take up the Small-Mesh Multispecies (Whiting) Committee Report. First, the Council will receive a presentation on the Annual Monitoring Report containing catch accounting information or the 2019 fishing year. Second, the Council will initiate an action to set small-mesh multispecies specification for the 2021–23 fishing years. The Council will take final action on these specifications during its January 2021 meeting. The Council then will hear Part 2 of the SSC report, which will cover: (1) OFL and ABC recommendations for nine groundfish stocks for fishing years 2021–23; and (2) recommendations for white hake rebuilding. The Groundfish Committee will report next on Framework Adjustment 61 to the Northeast Multispecies FMP. The Council is expected to take final action on this framework in two steps. First, during this December meeting, the Council will take final action on measures to: (1) Set 2021 total allowable catches for shared U.S./Canada stocks on Georges Bank; (2) set 2021–23 specifications for roughly half of the U.S. groundfish stocks; and (3) identify white hake rebuilding provisions. In addition, the Council will discuss the potential inclusion of a universal exemption for groundfish sectors that would allow fishing for redfish, haddock, and pollock by sector boats under certain provisions. Final action on this particular Framework 61 item will take place during the Council's January meeting. At the conclusion of the groundfish discussion, the Council will adjourn for the day.

Thursday, December 3, 2020

The Council will begin the day with a briefing from NOAA General Council on the final rule addressing disclosure of financial interests and voting recusal regulations for Regional Fishery Management Councils. Next, the Council will take up the Spiny Dogfish report. Spiny dogfish is managed jointly by the New England and Mid-Atlantic Fishery Management Councils with the Mid-Atlantic Council having the administrative lead. The New England Council will review 2021–22

specifications proposed by the Mid-Atlantic Council, discuss the recommendations, and consider whether to adopt the specifications and/or identify/propose alternatives. Following the conclusion of the dogfish discussion, the Skate Committee Report will be next. The Council will consider approving a scoping document to expand the range of possible measures in Amendment 5 to the Northeast Skate Complex FMP. This amendment is being developed to consider establishing limited access in the skate wing and/or bait fisheries and other measures that may prevent the triggering of incidental skate possession limits, improve the precision and accuracy of catch data, and better define skate fishery participants. Finally, the Council will receive a report from the Northeast Fisheries Science Center and NOAA's Greater Atlantic Regional Fisheries Office on North Atlantic right whales. This report will be given in three parts, starting with a NEFSC update on the preliminary 2019 population estimate for right whales. Next, GARFO will brief the Council on the status of the Atlantic Large Whale Take Reduction Plan Draft Environmental Impact Statement (DEIS) and proposed rule. The Council will have an opportunity to ask questions and offer comments. GARFO also will provide an update on the Draft North Atlantic Right Whale Batched Biological Opinion (BiOp) covering 10 fisheries. The Council also may comment on the BiOp. In addition, the Council will receive a brief overview on the 2020 Ropeless Consortium Annual Meeting from one of its members. The Council then will close out the meeting with other business.

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is being conducted entirely by webinar. Requests for auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: November 9, 2020.

Diane M. DeJames-Daly,

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

[FR Doc. 2020–25129 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–T–2020–0035]

Secondary Trademark Infringement Liability in the E-Commerce Setting

AGENCY: Patent and Trademark Office, Department of Commerce.

ACTION: Request for comments.

SUMMARY: On January 24, 2020, the Department of Homeland Security (DHS) released its Report to the President of the United States titled ''Combating Trafficking in Counterfeit and Pirated Goods'' (DHS Report). The report responded to the April 3, 2019, Presidential Memorandum titled ''Memorandum on Combating Trafficking in Counterfeit and Pirated Goods'' (Presidential Memorandum). Among the action items identified in the DHS Report was action 9, titled ''Assess Contributory Trademark Infringement Liability for E-Commerce.'' In order to implement this action item, the United States Patent and Trademark Office (USPTO) is seeking information from intellectual property rights holders, online third-party marketplaces and other third-party online intermediaries, and other private sector stakeholders, on the application of the traditional doctrines of trademark infringement to the e-commerce setting. More specifically, the USPTO seeks input on the application of contributory and/or vicarious trademark infringement liability (secondary infringement liability) to e-commerce.

DATES: Comments must be received by 5 p.m. EST on December 28, 2020.

ADDRESSES: You may submit comments and responses to the questions below by one of the following methods:

(a) *Electronic Submissions:* Submit all electronic comments via the Federal e-Rulemaking Portal at *https://www.regulations.gov* (at the homepage, enter PTO–T–2020–0035 in the ''Search''' box, click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments). The materials in the docket will not be edited to remove identifying or contact information, and the USPTO cautions against including any information in an electronic submission that the submitter does not want publicly disclosed. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF formats only. Comments containing references to studies, research, and other empirical data that are not widely published should include copies of the referenced materials. Please do not submit additional materials. If you want to submit a comment with confidential business information that you do not wish to be made public, submit the comment as a written/paper submission in the manner detailed below.

(b) *Written/Paper Submissions: Send all written/paper submissions to:* United States Patent and Trademark Office, Mail Stop OPIA, P.O. Box 1450, Alexandria, Virginia 22314. Submission packaging should clearly indicate that materials are responsive to Docket No. PTO–T–2020–0035, Office of Policy and International Affairs, Comment Request; Secondary Trademark Infringement Liability in the E-Commerce Setting.

Submissions of *Confidential Business Information:* Any submissions containing confidential business information must be delivered in a sealed envelope marked ''confidential treatment requested'' to the address listed above. Submitters should provide an index listing the document(s) or information that they would like the USPTO to withhold. The index should include information such as numbers used to identify the relevant document(s) or information, document title and description, and relevant page numbers and/or section numbers within a document. Submitters should provide a statement explaining their grounds for objecting to the disclosure of the information to the public as well. The USPTO also requests that submitters of confidential business information include a non-confidential version (either redacted or summarized) of those confidential submissions that will be available for public viewing and posted on *https://www.regulations.gov.* In the event that the submitter cannot provide a non-confidential version of its submission, the USPTO requests that the submitter post a notice in the docket stating that it has provided the USPTO with confidential business information. Should a submitter fail to either docket a non-confidential version of its submission or post a notice that confidential business information has been provided, the USPTO will note the receipt of the submission on the docket with the submitter's organization or name (to the degree permitted by law) and the date of submission.

FOR FURTHER INFORMATION CONTACT: Holly Lance, USPTO, Office of Policy and International Affairs, at *Holly.Lance@uspto.gov* or 571–272–9300. Please direct media inquiries to the USPTO's Office of the Chief Communications Officer at 571–272–8400.

SUPPLEMENTARY INFORMATION: The DHS Report describes how the rapid growth of e-commerce platforms, ''further catalyzed by third-party online marketplaces connected to the platforms, has revolutionized the way products are bought and sold.'' DHS Report at 7, available at *https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf* . This overall growth ''has facilitated online trafficking in counterfeit and pirated goods.'' *Id.* (The DHS Report addresses both trademark counterfeiting and copyright piracy, but action 9, the subject of this **Federal Register** Notice (FRN), is limited to trademark counterfeiting.) American consumers shopping on e-commerce platforms now face a greater risk of purchasing counterfeits, including goods that endanger the health and safety of unsuspecting consumers. The U.S. Congress has also taken up the issue of dangerous counterfeits. On March 2, 2020, H.R. 6058, the ''SHOP SAFE Act of 2020,'' which addresses the contributory liability of e-commerce platforms in relation to counterfeit goods implicating health and safety, was introduced in the House of Representatives.

Historically, counterfeits were distributed through in-person transactions, such as those at swap meets, and by individual sellers, often on street corners. Today, many counterfeits are trafficked through e-commerce supply chains in concert with marketing, sales, and distribution networks. *See* DHS Report at 10. While e-commerce has supported the launch of thousands of legitimate businesses, it has also enabled counterfeiters to easily establish attractive ''store-fronts'' to compete with legitimate businesses. *See id.* at 11.

The development of the DHS Report benefitted from extensive interagency discussion that included DHS, the Department of Justice, the Office of the United States Trade Representative, the Department of Commerce, the Food and Drug Administration, the Office of the Intellectual Property Enforcement Coordinator, and the Department of State. The DHS Report also benefited from outreach to, and comments from, numerous private sector stakeholders, including responses to the Department of Commerce's FRN 2019–14715 titled ''Comment Request; Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations,'' issued on July 10, 2019. 84 FR 32861. The FRN requested comments on a variety of issues drawn from the Presidential Memorandum. As summarized in the DHS Report, the comments relevant to the subject of this FRN included rights holder assertions that the present legal landscape for online secondary liability in the e-commerce space is ''out of date.'' DHS Report at 24. In particular, the rights holders noted, in the brick-and-mortar economy, contributory infringement liability has been well developed through case law for the licensing and oversight of sellers, but a comparable regime is largely nonexistent in the e-commerce realm. *Id.* at 24–25. Comments were also received from platforms noting that they have ''invested heavily in proactive efforts to prevent counterfeits from reaching their online stores,'' and several commenters noted that some platforms have significant interactions with law enforcement to combat counterfeits trafficking. *Id.* at 25.

The DHS Report includes a section on ''Immediate Action by DHS and Recommendations for the USG [U.S. Government].'' The ninth item, titled ''Assess Contributory Trademark Infringement Liability for E-Commerce,'' calls for the Department of Commerce to seek input from the private sector and other stakeholders as to the application of the traditional doctrines of trademark infringement to the e-commerce setting, including whether to pursue changes in the application of the secondary infringement standards to platforms. *See* DHS Report at 33. This FRN seeks comments on that issue.

Request for Information: The USPTO requests information from interested stakeholders, including but not limited to trademark owners affected by the sale of counterfeit goods offered through e-commerce platforms and online third-party marketplaces and intermediaries.

Respondents may address any, all, or none of the following questions. Please identify, where possible, the question(s) your comments are intended to address.

Respondents may organize their submissions in any manner. Reminder: Respondents have the responsibility to request that any information contained in a submission be treated as confidential business information and must certify that such information is confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and provided only by mail carrier as described above.

The USPTO welcomes all input relevant to the application of the traditional doctrines of secondary trademark infringement to the e-commerce setting, more specifically whether to pursue changes in the application of the secondary infringement standards to platforms. In particular, we seek the following information:

1. Is the doctrine of secondary infringement liability, as currently applied by the courts, an effective tool in addressing the problem of the online sale of counterfeit goods? If not, please identify the shortcomings in this approach to combatting counterfeits sold online, including whether the shortcomings are general to all goods and modes of e-commerce or whether they are specific to a particular type of goods or e-commerce.

2. Have you pursued or defended secondary trademark infringement claims against an e-commerce platform, online third-party marketplace, or other online third-party intermediary where the claim was that the intermediary facilitated the sale of counterfeit goods, including counterfeit goods offered by a third-party seller? If so, what challenges did you face in pursuing or defending these claims under a secondary infringement theory, and what was the result?

3. If you have chosen not to pursue a potential claim or defend against a claim for secondary trademark infringement against an e-commerce platform, online third-party marketplace, or other online third-party intermediary for reasons related to the current interpretation of the doctrine of secondary infringement, please explain how your decision-making was affected by the state of the law and how a different interpretation might have led to a different decision.

4. To the extent you have identified shortcomings in the current application of the doctrine of secondary infringement in your answers to the above questions, please explain how you would recommend resolving those shortcomings.

a. For all types of recommendations, please identify their scope, including the type of goods or e-commerce affected. Where appropriate, please prioritize your recommendations.

b. If your recommendation includes implementation in steps and/or over time, please identify each step and the contemplated timeframe for implementation.

5. Please provide any studies or other information in your possession that demonstrate whether or not a change in the law of secondary liability for trademark counterfeiting with respect to e-commerce platforms, online third-party marketplaces, and other online third-party intermediaries would be effective in reducing online sales of counterfeit goods, or whether it would pose any risks.

6. Are there any other areas of law or legal doctrines that could help inform or supplement the standard for secondary trademark infringement to reduce online sales of counterfeit goods?

Dated: November 6, 2020.

Andrei Iancu,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2020–25163 Filed 11–12–20; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the procurement list.

SUMMARY: This action adds products to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products and services from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* December 13, 2020.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 4/17/2020, the Committee for Purchase From People Who Are Blind or Severely Disabled published a notice of proposed addition to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and impact of the additions on the current or most recent contractors, the Committee has determined that the products listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product(s) and service(s) to the Government.

2. The action will result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products are added to the Procurement List:

Product(s)

NSN(s)—Product Name(s):
8920–01–E62–6404—Rice, Long Grain, Parboiled, White, 4/10 lb. Bags
8920–01–E62–6405—Rice, Long Grain, Parboiled, Brown, 4/10 lb. Bags
Designated Source of Supply: VisionCorps, Lancaster, PA
Mandatory For: Department of Defense
Contracting Activity: Defense Logistics Agency, DLA Troop Support
Distribution: C-List

Deletions

On 10/9/2020, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) and service(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
8415–01–494–4607—Cover, Parachutists' and Ground Troops' Helmet, All Services, Snow Camouflage, XL
Designated Source of Supply: Mount Rogers Community Services Board, Wytheville, VA
Contracting Activity: DLA Troop Support, Philadelphia, PA

Service(s)

Service Type: Janitorial/Minor Maintenance
Mandatory for: U.S. Post Office, Courthouse and Customs House, 301 Simonton Street, Key West, FL
Designated Source of Supply: Brevard Achievement Center, Inc., Rockledge, FL
Contracting Activity: Public Buildings Service, Acquisition Division/ Services Branch
Service Type: Janitorial/Custodial
Mandatory for: U.S. Courthouse and Customhouse, 1114 Market Street, St. Louis, MO
Designated Source of Supply: MGI Services Corporation, St. Louis, MO
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Janitorial/Custodial
Mandatory for: Social Security Administration Building: 1530 4th Street, Peru, IL
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Grounds Maintenance

Mandatory for: Rockville Post Office, 2 West Montgomery Avenue, Rockville, MD
Mandatory for: Consumer Product Safety Commission, 10901 Darnstown Road, Gaithersburg, MD
Mandatory for: Bureau of Alcohol, Tobacco and Firearms, 1401 Research Boulevard, Rockville, MD
Designated Source of Supply: Melwood Horticultural Training Center, Inc., Upper Marlboro, MD
Contracting Activity: Public Buildings Service, WPHBB—Aggregated Repair & Alterations Contracts Branch
Service Type: Grounds Maintenance
Mandatory for: U.S. Army Reserve Center: 70 Rochester Hill Road, Rochester, NH
Designated Source of Supply: Northern New England Employment Services, Portland, ME
Contracting Activity: Dept of the Army, W6QK ACC–PICA
Service Type: Janitorial/Custodial
Mandatory for: U.S. Coast Guard: CGC Eagle (WIX–327), 15 Mohegan Avenue, New London, CT
Designated Source of Supply: CW Resources, Inc., New Britain, CT
Contracting Activity: U.S. Coast Guard, U.S. Coast Guard
Service Type: Janitorial/Custodial
Mandatory for: U.S. Federal Building: 125 South Main Street, Muskogee, OK
Designated Source of Supply: Golden Rule Industries of Muskogee, Inc., Muskogee, OK
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Janitorial/Custodial
Mandatory for: Navy Exchange: Fort Adams, Building 402, Newport, RI
Designated Source of Supply: AccessPoint RI, Cranston, RI
Contracting Activity: NEXCOM-Navy Exchange Service Command
Service Type: Custodial Services
Mandatory for: Department of Homeland Security: CBP—Pier One Ala Moana Blvd., Honolulu, HI
Designated Source of Supply: Lanakila Pacific, Honolulu, HI
Contracting Activity: Office of Procurement Operations, Office of Procurement Operations
Service Type: Janitorial/Custodial
Mandatory for: U.S. Federal Building, 224 S. Boulder, Tulsa, OK
Mandatory for: Durward G. Hall Federal Building and Courthouse: 302 Joplin Street, Joplin, MO
Mandatory for: U.S. Federal Building: 123 Fourth Street, SW, Albuquerque, NM
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Custodial Services
Mandatory for: Customs and Border Protection, Checkpoint 808, I–8 Westbound 70.2 Mile Marker, Winterhaven, CA, I–8 Westbound 70.2 Mile Marker, Winterhaven, CA
Designated Source of Supply: ARC-Imperial Valley, El Centro, CA
Contracting Activity: U.S. Customs and Border Protection, Border Enforcement Contracting Division
Service Type: Document Destruction
Mandatory for: Department of Veterans Affairs, Veterans Integrated Service Network (VISN) 10, Kettering, OH, 3140 Governor's Place Blvd., Kettering, OH
Designated Source of Supply: Greene, Inc., Xenia, OH
Contracting Activity: Veterans Affairs, Department of, 552–Dayton
Service Type: Administrative Services
Mandatory for: Fort McPherson, GA, HQ USA Forscom Deslog CD, Fort McPherson, GA
Designated Source of Supply: Bobby Dodd Institute, Inc., Atlanta, GA
Contracting Activity: Dept of the Army, W6QM MICC–Ft Gordon
Service Type: Janitorial/Custodial
Mandatory for: U.S. Federal Building: Building #4, 4401 Suitland Road, Suitland, MD
Designated Source of Supply: Davis Memorial Goodwill Industries, Washington, DC
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Janitorial/Custodial
Mandatory for: U.S. Army Reserve, Fort Drum Units Home Station and Units Home Vehicle Storage (Motor Pool), Fort Drum, NY, 2490 Coyler Avenue, Fort Drum, NY
Designated Source of Supply: Jefferson County Chapter, NYSARC, Watertown, NY
Contracting Activity: Dept of the Army, W6QK ACC–PICA
Service Type: Janitorial/Custodial
Mandatory for: U.S. Federal Building and Courthouse: 101 First Street SE, Cedar Rapids, IA
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Janitorial/Custodial
Mandatory for: U.S. Customs Service, 7 S Nevada Street, Seattle, WA
Designated Source of Supply: Northwest Center, Seattle, WA
Contracting Activity: Treasury, Department of the, Dept of Treas/
Service Type: Facility Support Services
Mandatory for: U.S. Federal Building, Courthouse and Post Office: 330 Shawnee Street, Leavenworth, KS
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Janitorial/Custodial
Mandatory for: Naval Sea Systems Command (NAVSEA) Buildings 22,: 28, 104, 176, 197, 201, 213 and 214, Washington Navy Yd, DC
Designated Source of Supply: Melwood Horticultural Training Center, Inc., Upper Marlboro, MD
Contracting Activity: Dept of the Navy, U.S. Fleet Forces Command
Service Type: Laundry Service
Mandatory for: Department of Veterans Affairs, Wilmington VA Medical Center, Wilmington, DE, 1601 Kirkwood Highway, Wilmington, DE
Designated Source of Supply: Elwyn, Aston, PA
Contracting Activity: Veterans Affairs, Department of, 244–Network Contract OFC 4 (00244)
Service Type: Grounds Maintenance
Mandatory for: Federal Center: 620 Central Avenue, Alameda, CA
Designated Source of Supply: Rubicon Programs, Inc., Richmond, CA
Contracting Activity: General Services Administration, FPDS Agency Coordinator

Michael R. Jurkowski,

Deputy Director, Business & PL Operations.

[FR Doc. 2020–25141 Filed 11–12–20; 8:45 am]

BILLING CODE 6353–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application Package for AmeriCorps External Reviewer Survey

AGENCY: Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, AmeriCorps is proposing a new information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by January 12, 2021.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: AmeriCorps, Attention: Curtis Cannon, 250 E Street SW, Washington, DC 20525.

(2) By hand delivery or by courier to the AmeriCorps mailroom at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except federal holidays.

(3) Electronically through *www.regulations.gov.*

Comments submitted in response to this notice may be made available to the public through *regulations.gov.* For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public, notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Curtis Cannon at 202–606–6706, or by email to *ccannon@cns.gov.*

SUPPLEMENTARY INFORMATION:

Title of Collection: AmeriCorps External Reviewer Survey.

OMB Control Number: 3045–0090.

Type of Review: New.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 250.

Total Estimated Number of Annual Burden Hours: 60.

Abstract: The External Reviewer Survey is used by individuals who have served as External Reviewers or External Panel Coordinators for AmeriCorps to review grant applications. The information collected will be used by the Corporation for National and Community Service (operating as AmeriCorps) to assess and make improvements to grant competitions. The information is collected electronically. This is a new information collection.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information. All written comments will be available for public inspection on *regulations.gov.*

Dated: November 6, 2020.

Amy Hetrick,

Deputy Director, Office of Grant Administration.

[FR Doc. 2020–25094 Filed 11–12–20; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2020–HQ–0006]

Submission for OMB Review; Comment Request

AGENCY: U.S. Army Corps of Engineers (USACE), Department of the Army, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by December 14, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Wetland Determination Automated Data Sheets and Jurisdictional Determination Forms; Eng Form 6116 (1–9); OMB Control Number 0710–XXXX.

Type of Request: New.

Number of Respondents: 33,279.

Responses per Respondent: 1.

Annual Responses: 33,279.

Average Burden per Response: 63.03 minutes.

Annual Burden Hours: 34,960.

Needs and Uses: In an effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland delineation procedures, the USACE Research and Development Center (ERDC) developed ten regional supplements to the USACE manual, the most recent of which were issued in 2006. In developing the regional supplements, the USACE recognized that a single national manual is unable to consider regional differences that are important to the identification and functioning of wetlands. The wetland indicators and guidance provided in the 10 regional supplements are designed to be used in combination with the USACE manual to identify wetland waters of the United States. These forms are most often completed by USACE Project Managers or environmental consultants, but may also be completed by applicants themselves. The Automated Wetland Determination Sheets (ADSs) in this collection package streamline the information collection process by incorporating reference material and analytical processes directly into the form, which is provided as a Microsoft Excel document rather than the PDF form included in the regional supplements. The ADSs also automatically complete data analysis using inputted information, saving users time and effort and reducing the likelihood of human error. Applicants for USACE permits are generally required to submit JDs as part of their permit application or in support of the permit evaluation process. If wetlands are present, the USACE generally requires that JDs include adequately documented wetland data sheets in order for the JD to be considered technically adequate. The ADSs are formatted such that they may be readily

converted to Portable Document Format (PDF) for inclusion as part of the applicant's JD report.

Jurisdictional Determination Forms are tools used by the USACE to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA). JDs specify what geographic areas will be treated as subject to regulation by the USACE under one or both statutes. The three types of JDs included in this package are the Approved Jurisdictional Determination (AJD), Dry Land AJD, and Preliminary Jurisdictional Determination (PJD). The AJD form provides an official determination that there are/are not jurisdictional aquatic resources on a parcel based on the jurisdictional requirements, while the Dry Land AJD provides official determination that jurisdictional aquatic resources are absent. The PJD form is used to determine whether aquatic resources that exist on a particular parcel ''may be'' subject to regulatory jurisdiction.

It should be noted that the forms in this collection package may support associated permit reviews included in collection 0710–0003 which expires on 28 February 2022. Though they are being reviewed to be cleared under a new OMB control number, these forms and data sheets or any variations thereof will be included in the next renewal request for collection 0710–0003, which includes the standard and nationwide permit application forms, and will also include any local district forms in existence when the renewal package is submitted.

Affected Public: Individual or household.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Vlad Dorjets.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID 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.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: October 27, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–25090 Filed 11–12–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2019–HQ–0031]

Submission for OMB Review; Comment Request

AGENCY: U.S Army Corps of Engineers, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by December 14, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-Day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Corps Water Infrastructure Financing Program (CWIFP) Preliminary Application; OMB Control Number 0710–XXXX.

Type of Request: New.

Number of Respondents: 15.

Responses per Respondent: 1.

Annual Responses: 15.

Average Burden per Response: 50 hours.

Annual Burden Hours: 750.

Needs and Uses: The Water Infrastructure Finance and Innovation Act of 2014 (WIFIA, see also at 33 U.S.C. 3901–3914) authorizes entities such as corporations, partnerships, joint ventures, trusts, state infrastructure financing authorities, and federal, tribal, state or local government entities are eligible to receive federal credit assistance. The Preliminary Application collection requirement is necessary to (1) validate the eligibility of the prospective borrower and the proposed project, (2) perform a preliminary creditworthiness assessment, (3) perform a preliminary engineering and environmental feasibility assessment, and (4) evaluate the project against the selection criteria. Based on evaluation of the Preliminary Application, USACE will invite prospective borrowers to submit an application for projects likely to proceed to closing. Only five applicants are expected to move forward with the application process, and thus the Application is not subject to the provisions of the Paperwork Reduction Act and not included in this information collection proposal.

Affected Public: State, Local, or Tribal Governments; Private Sector; Federal Government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Vlad Dorjets.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID 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.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: October 27, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–25069 Filed 11–12–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2020–OS–0088]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, 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 Personnel and Readiness 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 12, 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: The 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 Rand Corporation, 1200 South Hayes Street, Arlington, VA 22202, ATTN: Stephani Wrabel, or call 703–413–1100.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: DoD Youth Programs School Leaders Survey; OMB Control Number 0704–YPSL.

Needs and Uses: The collection has several distinct tasks and includes a focus on the military-civilian divide. This information collection, using a nationally representative panel, is needed to learn about educators' awareness and knowledge of DoD youth programs. The collection will benefit further program and policy changes. The successful collection of information will be used to inform DoD policy recommendations and practice guidance, as well as provide respondents a better understanding and awareness of the DOD youth programs and what they offer to U.S. schools and students.

Affected Public: Individuals and households.

Annual Burden Hours: 195 hours.

Number of Respondents: 1,300.

Responses per Respondent: 1.

Annual Responses: 1,300.

Average Burden per Response: 9 minutes.

Frequency: Annually.

Dated: October 27, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–25067 Filed 11–12–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Board of Visitors, National Defense University; Notice of Federal Advisory Committee Meeting

AGENCY: Office of the Chairman of the Joint Chiefs of Staff, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Board of Visitors, National Defense University will take place.

DATES: Friday, December 11, 2020 from 10:00 a.m. to 3:15 p.m.

ADDRESSES: The meeting will be held online. Please see the Meeting Accessibility paragraph in the **SUPPLEMENTARY INFORMATION** section for more information.

FOR FURTHER INFORMATION CONTACT: Dr. Brian R. Shaw, (202) 664–2629 (Voice), (202) 685–3920 (Facsimile), *brian.r.shaw8.civ@mail.mil; brian.r.shaw.civ@ndu.edu;* Ms. Joycelyn Stevens, *joycelyn.a.stevens.civ@mail.mil; stevensj7@ndu.edu* (Email). Mailing address is National Defense University, Fort McNair, Washington, DC 20319–5066. website: *http://www.ndu.edu/About/Board-of-Visitors/.*

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150. Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, this meeting is open to the public.

Purpose of the Meeting: The purpose of the meeting will include discussion on accreditation compliance, organizational management, strategic planning, resource management, and other matters of interest to the National Defense University.

Agenda: Friday, December 11, 2020 from 10:00 a.m. to 3:15 p.m. (Eastern Time): Call to Order and Administrative Notes; State of the University Address; NDU Transformation; NDU Strategic Plan: Past, Present and Future; Supporting the Academic Mission; Accreditation: Middle States Commission on Higher Education Self-Study; Public Comment; Board of Visitors Member Deliberation and Feedback; Wrap-up and Closing Remarks.

Meeting Accessibility: The link to the virtual meeting will be posted on the NDU Board of Visitors website at *https://www.ndu.edu/About/Board-of-Visitors/BOV-Dec-11-2020/* by December 4th, one week prior to the meeting. The most up to-date changes to the meeting agenda as well as additional supporting documents including instructions on how to log into the meeting will also be posted there.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, written statements to the committee may be submitted to the committee at any time or in response to a stated planned meeting agenda by FAX or email to Ms. Joycelyn Stevens at (202) 685–0079, Fax (202) 685–3920 or *StevensJ7@ndu.edu.*

Dated: November 6, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–25093 Filed 11–12–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2020–OS–0090]

Proposed Collection; Comment Request

AGENCY: National Defense University, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the National Defense University 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 12, 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: The 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 National Defense University, 300 5th Avenue SW, Building 62, Washington, DC 20319, ATTN: LTC Ann Summers, or call (202) 685–3323.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: ISMO International Fellows Personal Information Collection; OMB Control Number 0704–XXXX.

Needs and Uses: This collection is necessary to collect essential personal information on foreign national students attending the National Defense University. The information collected is used to create profiles for the international students that ensures their needs are met as they transition to their time living in the United States as a student. It also helps them secure driving licenses, common access cards, facility identification number, temporary lodging assignment payments, and a defense travel system profile. Their preliminary information, including name, service, past assignments, etc. is collected via email correspondence while they are still in their home country. More sensitive information such as passport information, Date of Birth, Visa # and their FIN are collected either in person or over the WhatsApp messaging service, utilizing their end-end encryption. All student information is stored in a database that is only accessible to members of our office.

Affected Public: Individuals and Households, Foreign Nationals.

Annual Burden Hours: 109.

Number of Respondents: 109.

Responses per Respondent: 2.

Annual Responses: 218.

Average Burden per Response: 30 minutes.

Frequency: Annually.

Dated: October 27, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2020–25061 Filed 11–12–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Certificate of Alternate Compliance for USS COOPERSTOWN (LCS–23)

AGENCY: Department of the Navy, DoD.

ACTION: Notice of Issuance of Certificate of Alternate Compliance.

SUMMARY: The U.S. Navy hereby announces that a Certificate of Alternate Compliance has been issued for USS COOPERSTOWN (LCS–23). Due to the special construction and purpose of this vessel, the Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law) has determined it is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with the navigation lights provisions of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS) without interfering with its special function as a naval ship. The intended effect of this notice is to warn mariners in waters where 72 COLREGS apply.

DATES: This Certificate of Alternate Compliance is effective November 13, 2020 and is applicable beginning November 11, 2020.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Steven Gonzales, JAGC, U.S. Navy, Admiralty Attorney, Office of the Judge Advocate General, Admiralty and Maritime Law Division (Code 11), 1322 Patterson Ave. SE, Suite 3000, Washington Navy Yard, DC 20374–5066, 202–685–5040, or *admiralty@navy.mil.*

SUPPLEMENTARY INFORMATION: Background and Purpose.

Executive Order 11964 of January 19, 1977 and 33 U.S.C. 1605 provide that the requirements of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), as to the number, position, range, or arc of visibility of lights or shapes, as well as to the disposition and characteristics of sound-signaling appliances, shall not apply to a vessel or class of vessels of the Navy where the Secretary of the Navy shall find and certify that, by reason of special construction or purpose, it is not possible for such vessel(s) to comply fully with the provisions without interfering with the special function of the vessel(s). Notice of issuance of a Certificate of Alternate Compliance must be made in the **Federal Register**.

In accordance with 33 U.S.C. 1605, the DAJAG (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, hereby finds and certifies that U.S.S COOPERSTOWN (LCS–23) is a vessel of special construction or purpose, and that, with respect to the position of the following navigational lights, it is not possible to comply fully with the requirements of the provisions enumerated in the 72 COLREGS without interfering with the special function of the vessel:

Annex I, paragraph 2(a)(i), pertaining to the requirement that the forward masthead light be located at least 12 meters above the upper-most continuous deck; Annex I, paragraph 3(a), pertaining to the requirement that the forward masthead light be placed not more than one quarter of the length of the vessel from the stem; Annex I, paragraph 3(a), pertaining to the requirement that when two masthead

lights are prescribed for a power driven vessel, the horizontal distance between them shall not be less than one half the length of the vessel but need not be more than 100 meters. The DAJAG (Admiralty and Maritime Law) further finds and certifies that these navigational lights are in closest possible compliance with the applicable provision of the 72 COLREGS.

Authority: 33 U.S.C. 1605(c), E.O. 11964

Approved: November 9, 2020.

K.R. Callan,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2020–25117 Filed 11–12–20; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0175]

Agency Information Collection Activities; Comment Request; Work Colleges Application and Agreement

AGENCY: Federal Student Aid (FSA), 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 January 12, 2021.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2020–SCC–0175. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Work Colleges Application and Agreement.

OMB Control Number: 1845–0153.

Type of Review: Extension without change of an approved collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 10.

Total Estimated Number of Annual Burden Hours: 20.

Abstract: The Higher Education Opportunity Act, Public Law 110–315 includes provisions for the Higher Education Act of 1965, as amended, in section 448 that promotes the use of comprehensive work-learning-service programs as a valuable education approach when it is an integral part of the institution's education program and a part of a financial plan which decreases reliance on grants and loans. The Work Colleges Application and Agreement form is the tool for an institution to apply for participation in this program.

The data will be used by the Department to assess an institution's preparedness to participate in this program and as a signed agreement to comply with all requirements for participating in the program. The data is used in conjunction with institutional program reviews to assess the administrative capability and compliance of the applicant.

Dated: November 9, 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. 2020–25140 Filed 11–12–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 12–100–LNG]

Southern LNG Company, L.L.C.; Application To Amend Export Term Through December 31, 2050, for Existing Non-Free Trade Agreement Authorization

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice (Notice) of receipt of an application (Application), filed on November 4, 2020, by Southern LNG Company, L.L.C. (Southern LNG). Southern LNG seeks to amend the export term set forth in its current authorization to export liquefied natural gas (LNG) to non-free trade agreement countries, DOE/FE Order No. 3956, to a term ending on December 31, 2050. Southern LNG filed the Application under the Natural Gas Act (NGA) and DOE's policy statement entitled, ''Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050'' (Policy Statement). Protests, motions to intervene, notices of intervention, and written comments on the requested term extension are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, November 30, 2020.

ADDRESSES:

Electronic Filing by email: *fergas@hq.doe.gov*

Regular Mail: U.S. Department of Energy (FE–34), Office of Regulation,

Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375

Hand Delivery or Private Delivery Services (*e.g.,* FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585

FOR FURTHER INFORMATION CONTACT:

Benjamin Nussdorf or Amy Sweeney, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–7893; (202) 586–2627, *benjamin.nussdorf@hq.doe.gov* or *amy.sweeney@hq.doe.gov*

Cassandra Bernstein or Irene Nemesio, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9793; (202) 586–8606, *cassandra.bernstein@hq.doe.gov* or *irene.nemesio@hq.doe.gov*

SUPPLEMENTARY INFORMATION: On December 16, 2016, in Order No. 3956, DOE/FE authorized Southern LNG to export domestically produced LNG in a volume equivalent to 130 billion cubic feet per year of natural gas, pursuant to NGA section 3(a), 15 U.S.C. 717b(a).[1] Southern LNG is authorized to export this LNG by vessel from the Elba Island LNG Terminal, located in Chatham County, Georgia, to any country with which the United States has not entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy (non-FTA countries) for a 20-year term. In the Application,[2] Southern LNG asks DOE to extend its current export term to a term ending on December 31, 2050, as provided in the Policy Statement.[3] Additional details can be found in the Application, posted on the DOE/FE website at: *https://www.energy.gov/sites/prod/files/2020/11/f80/Southern%20LNG%20Company%2C%20L.L.C.%202050.pdf.*

DOE/FE Evaluation

In the Policy Statement, DOE adopted a term through December 31, 2050 (inclusive of any make-up period), as the standard export term for long-term non-FTA authorizations.[4] As the basis for its decision, DOE considered its obligations under NGA section 3(a), the public comments supporting and opposing the proposed Policy Statement, and a wide range of information bearing on the public interest.[5] DOE explained that, upon receipt of an application under the Policy Statement, it would conduct a public interest analysis of the application under NGA section 3(a). DOE further stated that ''the public interest analysis will be limited to the application for the term extension—meaning an intervenor or protestor may challenge the requested extension but not the existing non-FTA order.'' [6]

Accordingly, in reviewing Southern LNG's Application, DOE/FE will consider any issues required by law or policy under NGA section 3(a), as informed by the Policy Statement. To the extent appropriate, DOE will consider the study entitled, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (2018 LNG Export Study),[7] DOE's response to public comments received on that Study,[8] and the following environmental documents:

- *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States,* 79 FR 48132 (Aug. 15, 2014); [9]
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States,* 79 FR 32260 (June 4, 2014); [10] and
- *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update,* 84 FR 49278 (Sept. 19, 2019), and DOE/FE's response to public comments received on that study.[11]

Parties that may oppose the Application should address these issues and documents in their comments and/or protests, as well as other issues deemed relevant to the Application.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable, addressing the Application. Interested parties will be provided 15 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention. The public previously was given an opportunity to intervene in, protest, and comment on Southern LNG's long-term non-FTA application. Therefore, DOE will not consider comments or protests that do not bear directly on the requested term extension.

Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 12–100–LNG in the title

[1] *Southern LNG Co., L.L.C.,* DOE/FE Order No. 3956, FE Docket No. 12–100–LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Elba Island Terminal in Chatham County, Georgia to Non-Free Trade Agreement Nations (Dec. 16, 2016).

[2] Southern LNG Co., L.L.C., Application to Amend Export Term for Existing Long-Term Authorizations Through December 31, 2050, FE Docket Nos. 12–54–LNG and 12–100–LNG (Nov. 4, 2020). Southern LNG's request regarding its FTA authorization is not subject to this Notice. *See* 15 U.S.C. 717b(c).

[3] U.S. Dep't of Energy, Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050; Notice of Final Policy Statement and Response to Comments, 85 FR 52237 (Aug. 25, 2020) [hereinafter Policy Statement].

[4] *See id.,* 85 FR 52247.

[5] *See id.,* 85 FR 52247.

[6] *Id.,* 85 FR 52247.

[7] *See* NERA Economic Consulting, Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports (June 7, 2018), *available at: https://www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf.*

[8] U.S. Dep't of Energy, Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study; Notice of Response to Comments, 83 FR 67251 (Dec. 28, 2018).

[9] The Addendum and related documents are available at: *http://energy.gov/fe/draft-addendum-environmental-review-documents-concerning-exports-natural-gas-united-states.*

[10] The 2014 Life Cycle Greenhouse Gas Report is available at: *http://energy.gov/fe/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states.*

[11] U.S. Dep't of Energy, Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update—Response to Comments, 85 FR 72 (Jan. 2, 2020). The 2019 Update and related documents are available at: *https://fossil.energy.gov/app/docketindex/docket/index/21.*

line; (2) mailing an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 12–100–LNG. *Please Note:* If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Office of Regulation, Analysis, and Engagement docket room, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *https://www.energy.gov/fe/services/natural-gas-regulation.*

Signed in Washington, DC, on November 9, 2020.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Fossil Energy.

[FR Doc. 2020–25132 Filed 11–12–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–43–001.
Applicants: Exelon Generation Company, LLC.
Description: Compliance filing: Amendment to WECC Soft Offer Cap to be effective N/A.
Filed Date: 11/6/20.
Accession Number: 20201106–5126.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–335–000.
Applicants: DifWind Farms Limited II.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5077.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–336–000.
Applicants: DifWind Farms Limited V.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5079.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–337–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: City of Troy NITSA Amendment Filing to be effective 10/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5080.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–338–000.
Applicants: Dutch Wind, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5081.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–339–000.
Applicants: EUI Affiliate LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5084.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–340–000.
Applicants: PHWD Affiliate LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5086.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–341–000.
Applicants: Refresh Wind, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5090.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–342–000.
Applicants: Refresh Wind 2, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5092.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–343–000.
Applicants: San Jacinto Wind II, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5094.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–344–000.
Applicants: Terra-Gen 251 Wind, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5098.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–345–000.
Applicants: Victory Garden Phase IV, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5101.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–346–000.
Applicants: VPI Enterprises, LLC.
Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5102.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–347–000.
Applicants: Massachusetts Electric Company.
Description: § 205(d) Rate Filing: Filing of Letter Agreement to Amend Service Agreement Rider with GE Company to be effective 10/7/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5103.
Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–348–000.
Applicants: Entergy Arkansas, LLC.
Description: Compliance filing: EAL–MSS–4 Successor eTariff Compliance to be effective 11/30/2018.

Filed Date: 11/6/20.
Accession Number: 20201106–5105.
Comments Due: 5 p.m. ET 11/27/20.
Docket Numbers: ER21–349–000.
Applicants: Southwest Power Pool, Inc.
Description: Notice of Cancellation of Generator Interconnection Agreement of Southwest Power Pool, Inc.
Filed Date: 11/6/20.
Accession Number: 20201106–5111.
Comments Due: 5 p.m. ET 11/27/20.
Docket Numbers: ER21–350–000.
Applicants: Highlander Solar Energy Station 1, LLC.
Description: Baseline eTariff Filing: Reactive Power Compensation Filing to be effective 12/1/2020.
Filed Date: 11/6/20.
Accession Number: 20201106–5137.
Comments Due: 5 p.m. ET 11/27/20.

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 6, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25110 Filed 11–12–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2816–050]

Notice of Waiver Period for Water Quality Certification Application; North Hartland, LLC

On October 23, 2020, the Vermont Department of Environmental Conservation (Vermont DEC) notified the Federal Energy Regulatory Commission (Commission) that North Hartland, LLC submitted an application for a Clean Water Act section 401(a)(1) water quality certification to the Vermont DEC on October 22, 2020, in conjunction with the above captioned project. Pursuant to 40 CFR 121.6, we hereby notify the Vermont DEC of the following:

Date of Receipt of the Certification Request: October 22, 2020.

Reasonable Period of Time to Act on the Certification Request: One year.

Date Waiver Occurs for Failure to Act: October 22, 2021.

If the Vermont DEC fails or refuses to act on the water quality certification request by the above waiver date, then the agency's certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: November 6, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25114 Filed 11–12–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2299–082; 14581–002]

Notice of Petition for Declaratory Order; Turlock Irrigation District, Modesto Irrigation District

Take notice that on October 2, 2020, pursuant to Rule 207 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 385.207 (2020), Turlock Irrigation District and Modesto Irrigation District (collectively, Districts or Petitioners) filed a petition for declaratory order (Petition) requesting that the Commission issue a declaratory order finding that the California State Water Resources Control Board has waived its authority to issue certifications for the Don Pedro Hydroelectric Project and the La Grange Hydroelectric Project under section 401 of the Clean Water Act, 33 U.S.C. 1341(a)(1), as more fully explained in the Petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioners.

Any person wishing to comment on the Districts' petition may do so.[1] The deadline for filing comments is 30 days from the issuance of this notice. The Commission encourages electronic submission of comments in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should send comments to the following address: Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852. Be sure to reference the project docket numbers (P–2299–082 and P–14581–002) with your submission.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on December 7, 2020.

Dated: November 6, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25113 Filed 11–12–20; 8:45 am]

BILLING CODE 6717–01–P

[1] The Districts' request is part of the licensing proceedings in Project Nos. 2299–082 and 14581–002. Thus, any person that intervened in either licensing proceeding is already a party. Generally, the filing of a petition for a declaratory order involving an issue arising from the licensing proceeding does not trigger a new opportunity to intervene. Accordingly, at this point in this proceeding, any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedure that provides justification by reference to the factors set forth in Rule 214(d). The Commission may limit a late intervenor's participation to the issues raised in the petition for declaratory order. 18 CFR 385.214(d)(3)(i).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–10–000]

Pleinmont Solar 1, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On November 3, 2020, the Commission issued an order in Docket No. EL21–10–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2018), instituting an investigation into whether Pleinmont Solar 1, LLC's proposed rates may be unjust, unreasonable, unduly discriminatory or preferential, substantially excessive or otherwise unlawful. *Pleinmont Solar 1, LLC* 173 FERC ¶ 61,126 (2020).

The refund effective date in Docket No. EL21–10–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL21–10–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2019), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: November 6, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25111 Filed 11–12–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–15–000]

Citizens S-Line Transmission LLC ; Notice of Petition for Declaratory Order

Take notice that on November 6, 2020, pursuant to Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure,[1] section 219 of the Federal Power Act,[2] and Order No. 679,[3] Citizens S-Line Transmission LLC (Petitioners) submitted a petition for declaratory order requesting approval of certain treatments, in connection with the S-Line 230 kV Transmission Upgrade Project, as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern time on December 7, 2020.

Dated: November 6, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25112 Filed 11–12–20; 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: EC21–14–000.

Applicants: TCT Generation Holdings, LLC, Global Energy & Power Infrastructure Fun.

Description: Amendment to October 27, 2020 Application for Authorization Under Section 203 of the Federal Power Act, et al. of TCT Generation Holdings, LLC, et al.

Filed Date: 11/3/20.

Accession Number: 20201103–5174.

Comments Due: 5 p.m. ET 11/17/20.

Docket Numbers: EC21–18–000.

Applicants: Sun Streams 4, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Sun Streams 4, LLC.

Filed Date: 11/3/20.

Accession Number: 20201103–5155.

Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: EC21–19–000.

[1] 18 CFR 385.207.

[2] 16 U.S.C. 791a–828c, 824s.

[3] Promoting Transmission Investment Through Pricing Reform, Order No. 679, 116 FERC ¶ 61,057, order on reh'g, 117 FERC ¶ 61,345 (2006), order on reh'g, 119 FERC ¶ 61,062 (2007) (Order No. 679).

Applicants: Sun Streams Expansion, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Sun Streams Expansion, LLC.

Filed Date: 11/3/20.

Accession Number: 20201103–5157.

Comments Due: 5 p.m. ET 11/24/20.

Docket Numbers: EC21–20–000.

Applicants: Cleveland-Cliffs Inc., AK Electric Supply LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Cleveland-Cliffs Inc., et al.

Filed Date: 11/4/20.

Accession Number: 20201104–5137.

Comments Due: 5 p.m. ET 11/25/20.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG95–6–000.

Applicants: Dartmouth Power Associates L.P.

Description: Notice of Self-Recertification of Exempt Wholesale Generator Status of Dartmouth Power Associates Limited Partnership.

Filed Date: 10/8/20.

Accession Number: 20201008–5042.

Comments Due: 5 p.m. ET 11/9/20.

Docket Numbers: EG00–39–000.

Applicants: PPL Brunner Island, LLC.

Description: Notice of Self-Recertification of Exempt Wholesale Generator Status of Brunner Island, LLC.

Filed Date: 10/26/20.

Accession Number: 20201026–5060.

Comments Due: 5 p.m. ET 11/9/20.

Docket Numbers: EG21–26–000.

Applicants: Pacific Crest Power, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Pacific Crest Power, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5106.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–27–000.

Applicants: Ridgetop Energy, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Ridgetop Energy, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5109.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–28–000.

Applicants: San Gorgonio Westwinds II, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of San Gorgonio Westwinds II, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5112.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–29–000.

Applicants: San Gorgonio Westwinds II—Windustries, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of San Gorgonio Westwinds II—Windustries, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5115.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–30–000.

Applicants: Terra-Gen Mojave Windfarms, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Terra-Gen Mojave Windfarms, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5119.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–31–000.

Applicants: Terra-Gen VG Wind, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Terra-Gen VG Wind, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5129.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–32–000.

Applicants: Texas Big Spring, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Texas Big Spring, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5131.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–33–000.

Applicants: Yavi Energy, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Yavi Energy, LLC.

Filed Date: 11/5/20.

Accession Number: 20201105–5136.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: EG21–34–000.

Applicants: Hecate Energy Ramsey LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Hecate Energy Ramsey LLC.

Filed Date: 11/6/20.

Accession Number: 20201106–5123.

Comments Due: 5 p.m. ET 11/27/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2906–016; ER10–2908–016; ER11–4393–010; ER11–4669–008; ER11–4670–008; ER12–709–007; ER19–1716–004.

Applicants: Morgan Stanley Capital Group Inc., MS Solar Solutions Corp., Morgan Stanley Energy Structuring, L.L.C, TAQA Gen X LLC, NaturEner Montana Wind Energy, LLC, NaturEner Power Watch, LLC, NaturEner Wind Watch, LLC.

Description: Notice of Non-Material Change in Status of the MS Public Utilities and NaturEner Public Utilities.

Filed Date: 10/30/20.

Accession Number: 20201030–5470.

Comments Due: 5 p.m. ET 11/20/20.

Docket Numbers: ER19–13–005.

Applicants: Pacific Gas and Electric Company.

Description: Compliance filing: TO20 Motion for Interim Rates Compliance Filing to be effective 1/1/2021.

Filed Date: 11/5/20.

Accession Number: 20201105–5098.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER19–2828–004.

Applicants: American Electric Power Service Corporation, Ohio Power Company, AEP Ohio Transmission Company, Inc., PJM Interconnection, L.L.C.

Description: Compliance filing: AEP submits Compliance Filing in ER19–2828 to be effective 9/1/2019.

Filed Date: 11/6/20.

Accession Number: 20201106–5113.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–289–002.

Applicants: Ohio Power Company, AEP Ohio Transmission Company, Inc., American Electric Power Service Corporation, PJM Interconnection, L.L.C.

Description: Compliance filing: AESPC submits Compliance Filing in ER20–289 to be effective 12/31/2019.

Filed Date: 11/6/20.

Accession Number: 20201106–5128.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–609–002.

Applicants: Ohio Power Company, American Electric Power Service Corporation, AEP Ohio Transmission Company, Inc., PJM Interconnection, L.L.C.

Description: Compliance filing: AEP submits Compliance Filing in ER20–609 to be effective 2/14/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5120.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2158–002.

Applicants: Midcontinent Independent System Operator, Inc, Ameren Illinois Company.

Description: Tariff Amendment: 2020–11–06_SA 3527 Amended Deficiency Ameren Illinois-Hoopeston Wind (H094) FSA to be effective 8/25/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5088.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2370–001.

Applicants: Basin Electric Power Cooperative.

Description: Compliance filing: Submission of Second Order No. 845 Compliance Filing to be effective 9/9/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5063.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2845–001.

Applicants: Albemarle Beach Solar, LLC.

Description: Tariff Amendment: Response to Letter for Additional Information Under Docket ER20–2845–000 to be effective 11/9/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5116.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2846–001.

Applicants: Mechanicsville Lessee, LLC.

Description: Tariff Amendment: Response to Request for Additional Information Under Docket ER20–2846–000 to be effective 9/10/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5119.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2847–001.

Applicants: AB Lessee, LLC.

Description: Tariff Amendment: Response to Letter for Additional Information Under Docket ER20–2847 to be effective 11/9/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5115.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2874–001.

Applicants: Horizon West Transmission, LLC.

Description: Compliance filing: Horizon west Transmission, LLC Amendment Filing to be effective 9/15/2020.

Filed Date: 11/5/20.

Accession Number: 20201105–5054.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2881–001.

Applicants: Harts Mill Solar, LLC.

Description: Tariff Amendment: Response to Deficiency Letter in Docket ER20–2881–000 to be effective 11/14/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5099.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2978–000.

Applicants: Catalyst Power REPCo LLC.

Description: Supplement to Catalyst Power REPCo LLC tariff filing.

Filed Date: 11/5/20.

Accession Number: 20201105–5167.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER20–2979–000.

Applicants: Catalyst Power & Gas LLC.

Description: Supplement to Catalyst Power & Gas LLC tariff filing.

Filed Date: 11/5/20.

Accession Number: 20201105–5168.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–329–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: DSA Acorn I Energy Storage, LLC—Acorn I Energy Storage & Cancel Letter Agmt to be effective 11/15/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5061.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–330–000.

Applicants: Specialty Products US, LLC.

Description: Baseline eTariff Filing: Application for MBR Authority to be effective 1/4/2021.

Filed Date: 11/6/20.

Accession Number: 20201106–5065.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–331–000.

Applicants: DDP Specialty Electronic Materials US, Inc.

Description: Baseline eTariff Filing: Application for MBR Authority to be effective 1/4/2021.

Filed Date: 11/6/20.

Accession Number: 20201106–5066.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–332–000.

Applicants: Coachella Wind, LLC.

Description: Tariff Cancellation: Notice of Cancellation to be effective 12/31/9998.

Filed Date: 11/6/20.

Accession Number: 20201106–5073.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–333–000.

Applicants: Desert Hot Springs, LLC.

Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5075.

Comments Due: 5 p.m. ET 11/27/20.

Docket Numbers: ER21–334–000.

Applicants: DifWind Farms Limited I.

Description: Tariff Cancellation: Notice of Cancellation to be effective 11/7/2020.

Filed Date: 11/6/20.

Accession Number: 20201106–5076.

Comments Due: 5 p.m. ET 11/27/20.

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 6, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–25109 Filed 11–12–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9053–8]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed November 2, 2020 10 a.m. EST Through November 9, 2020 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20200221, Final, NRCS, WA, ADOPTION—Skokomish River Ecosystem Restoration, Review Period Ends: 12/14/2020, Contact: Karen Fullen 503–273–2404.

The Natural Resource Conservation Service (NRCS) has adopted the U.S. Army Corps of Engineer's Final EIS No. 20150267, filed 09/16/2015 with the Environmental Protection Agency. The NRCS was not a cooperating agency on this project. Therefore, republication of the document is necessary under Section 1506.3(b)(1) of the CEQ regulations.

EIS No. 20200222, Final, USFWS, BLM, UT, Northern Corridor—Highway Right-of-way, Issuance of an Incidental Take Permit, Final EIS and Proposed Resource Management Plan Amendments, Review Period Ends: 12/14/2020, Contact: Gloria Tibbetts 435–865–3063.

EIS No. 20200223, Draft, NRC, NM, Disposal of Mine Waste at the United Nuclear Corporation Mill Site in McKinley County, New Mexico, Comment Period Ends: 12/28/2020, Contact: Ashley Waldron 301–415–7317.

EIS No. 20200224, Second Final Supplemental, USACE, MS, Final Supplement II (SEIS II) to the Final Environmental Impact Statement, Mississippi River and Tributaries (MR&T) Project, Mississippi River Mainline Levees and Channel Improvement of 1976 (1976 EIS), as updated and supplemented by Supplement No. 1, Mississippi River and Tributaries Project, Mississippi River Mainline Levee Enlargement and Seepage Control of 1998 (1998 SEIS), Review Period Ends: 12/14/2020, Contact: Mike Thron 901–544–0708.

Dated: November 9, 2020.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2020–25203 Filed 11–12–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL TRADE COMMISSION

[File No. 192 3167]

Zoom Video Communications, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before December 14, 2020.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write ''Zoom Video Communications, Inc.; File No. 192 3167'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Linda Holleran Kopp (202–326–2267), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 14, 2020. Write ''Zoom Video Communications, Inc.; File No. 192 3167'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to the public health emergency in response to the COVID–19 outbreak and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Zoom Video Communications, Inc.; File No. 192 3167'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the *https://www.regulations.gov* website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive

public comments that it receives on or before December 14, 2020. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Zoom Video Communications, Inc. (''Zoom'').

The proposed consent order (''proposed order'') has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter involves Zoom, a videoconferencing platform provider that provides customers with videoconferencing services and various add-on services, such as cloud storage. Zoom's core product is the Zoom ''Meeting,'' which is a platform for one-on-one and group videoconferences. Users can also, among other things, chat with others in Meetings, share their screens, and record videoconferences.

In its proposed five-count complaint, the Commission alleges that Zoom violated Section 5(a) of the Federal Trade Commission Act. First, the proposed complaint alleges that Zoom misrepresented to users since at least June 2016 that they could secure all Meetings with end-to-end encryption. End-to-end encryption is a method of securing communications where an encrypted communication can only be deciphered by the communicating parties. No other person—not even the platform provider—can decrypt the communication because they do not possess the necessary cryptographic keys. Contrary to its representations to users, Zoom did not provide end-to-end encryption for all Meetings because Zoom's servers maintained the cryptographic keys that could allow Zoom to access the content of its customers' Meetings.

Second, the proposed complaint alleges that Zoom misrepresented the level of encryption it used to secure communications between participants using Zoom's video conferencing service. Specifically, Zoom had claimed since at least June 2016 that it secured Meetings, in part, with Advanced Encryption Standard (AES) and using a 256-bit encryption key (''AES 256-bit encryption''). The 256-bit encryption key refers to the length of the key needed to decrypt the communication. Generally speaking, longer encryption keys provides more confidentiality protection than shorter keys because there are more possible key combinations, thereby making it harder to find the correct key and crack the encryption. Contrary to its representation to users, Zoom in fact secured its Meetings with AES with a 128-bit encryption key.

Third, the proposed complaint alleges that Zoom misrepresented that, for users who opted to store recordings of their Zoom Meetings in Zoom's secure cloud storage (''Cloud Recordings''), Zoom would process and store such recordings in Zoom's cloud ''once the meeting has ended.'' Contrary to its representations to users, Zoom kept Cloud Recordings on Zoom's servers for up to 60 days, unencrypted, before transferring them to Zoom's secure cloud storage, where they are then stored encrypted.

Fourth, the proposed complaint alleges that Zoom violated Section 5 when it installed a local hosted web server (called ''ZoomOpener'') on 3.8 million users' Mac computers. In July 2018, Zoom updated its application for Mac desktop computers by secretly deploying a web server onto users' computers. The ZoomOpener web server was designed to circumvent a security and privacy safeguard in Apple's Safari browser. Apple had updated its Safari browser to help defend its users from malicious actors and popular malware by requiring interaction with a dialogue box when a website or link attempts to launch an outside App. As a result of the new browser safeguard, users who clicked on a link to join a Zoom Meeting would receive an additional prompt that read, ''Do you want to allow this page to open '*zoom.us*'?'' If the user selected ''Allow'', the browser would connect the user to the Meeting, while clicking ''Cancel'' would end the interaction and prevent the Zoom application from launching. The ZoomOpener web server was designed to avoid this extra prompt. It also remained on users' computers even after users deleted the Zoom application, and would automatically reinstall the Zoom app—without any user interaction—if the user clicked on a link to join a Zoom Meeting or visited a website that had a Zoom Meeting embedded in it.

The proposed complaint alleges that it was an unfair act or practice for Zoom, without adequate notice or consent, to circumvent the Safari browser safeguard without implementing any measures to compensate for the circumvented privacy and security protections. The proposed complaint alleges that doing so caused or was likely to cause substantial injury to consumers, that consumers could not reasonably avoid themselves, and that was not outweighed by countervailing benefits to consumers or competition. Apple removed the ZoomOpener web server from users' computers through an automatic update in July 2019.

Finally, the proposed complaint alleges Zoom violated Section 5 when it represented that it was updating its Mac application to resolve minor bug fixes, but failed to disclose, or failed to disclose adequately, the material information that the update would deploy the ZoomOpener web server, that the web server would circumvent a Safari browser privacy and security safeguard, or that the web server would remain on users' computers even after they had uninstalled Zoom's Mac application.

Part I of the proposed order prohibits Zoom from misrepresenting its privacy and security practices in the future. It prohibits, for example, misrepresentations about Zoom's collection, maintenance, use, deletion, or disclosure of Covered Information; the security features, or any feature that impacts a third-party security feature, included in any Meeting Service; or the extent to which Respondent otherwise maintains the privacy, security, confidentiality, or integrity of Covered Information. ''Covered Information'' means information from or about an individual.

Part II of the proposed order requires Zoom to establish, implement, and maintain a comprehensive information security program that protects the security, confidentiality, and integrity of Covered Information. Among other things, Zoom must implement specific security safeguards, such as a security review for all new software, a vulnerability management program for its internal networks, security training for its employees, inventorying personal information stored in its systems and implementing data deletion policies, and other specific security measures, such as proper network segmentation and remote access authentication.

Part III of the proposed order requires Zoom to obtain initial and biennial data security assessments for twenty years.

Part IV of the agreement requires Zoom to disclose all material facts to the assessor and prohibits Respondent from

misrepresenting any fact material to the assessments required by Part III.

Part V requires Zoom to submit an annual certification from a senior corporate manager (or senior officer responsible for its information security program) that it has implemented the requirements of the Order, and is not aware of any material noncompliance that has not been corrected or disclosed to the Commission.

Part VI requires Zoom to submit a report to the Commission of its discovery of any Covered Incident. A ''Covered Incident'' is when any federal, state, or local law or regulation requires Zoom to notify any federal, state, or local government entity that information collected or received by Zoom from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization. Video and audio content are specifically included as a type of personal information that would trigger notification.

Parts VII through X of the proposed order are reporting and compliance provisions. Part VII requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VIII ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IX requires the company to create and retain certain documents relating to its compliance with the order. Part X mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part XI states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission, Commissioner Chopra and Commissioner Slaughter dissenting.

April J. Tabor,

Acting Secretary.

Majority Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson

At a time when millions of Americans are using videoconferencing services on a daily basis, the settlement that the Commission announces today ensures that Zoom will prioritize consumers' privacy and security. The Commission's complaint alleges that Zoom made misrepresentations regarding the strength of its security features and implemented a software update that circumvented a browser security feature. The proposed order provides immediate and important relief to consumers, addressing this conduct. The order requires that Zoom establish and implement a comprehensive security program that includes detailed and specific security measures. These obligations include reviews of all new software for common security vulnerabilities; quarterly scans of its internal network and prompt remediation of critical or severe vulnerabilities; and prohibitions against privacy and security misrepresentations.[1] This order will enable the Commission to seek significant penalties for noncompliance. This settlement provides critical, and timely, relief.

We are confident that the proposed relief appropriately addresses the conduct alleged in the complaint and is an effective, efficient resolution of this investigation. Our dissenting colleagues suggest additional areas for relief that likely would require protracted litigation to obtain. Given the effective relief this settlement provides, we see no need for that. Hundreds of millions of people use Zoom on a daily basis, often for free or through month-to-month contracts. We feel it is important to put in place measures to protect those users' privacy and security now, rather than expend scarce staff resources on speculative, potential relief that a Court would not likely grant, given the facts here.[2] Our goal is a safe and secure Zoom that can continue to provide essential services to enable Americans to conduct business, engage in learning, participate in religious services, and stay connected. We applaud the FTC Staff for their professional and expeditious work to achieve this settlement in the midst of the pandemic. This case reflects the Commission's ongoing commitment to work on behalf of consumers to respond to the panoply of new challenges presented by COVID–19.

[1] Although the complaint does not allege privacy violations, the order includes targeted fencing in relief providing privacy protections to consumers. For example, it prohibits Zoom from misrepresenting its privacy practices, and requires Zoom to implement changes to its naming procedures for saving or storing recorded videoconference meetings, and to develop data deletion policies and procedures. These and other requirements serve to protect consumers' privacy as well as the security of their information and communications.

[2] Our dissenting colleagues also argue that the settlement is insufficient because it does not require Zoom to notify consumers of its past misconduct. The conduct at issue was broadly publicized and we believe the Commission's press release and business and consumer education provide ample information for consumers to learn more.

Dissenting Statement of Commissioner Rohit Chopra

Summary

- When companies deploy deception, this harms customers and honest competitors, and it distorts the marketplace. This is particularly problematic when it comes to the digital economy.
- Zoom's alleged security failures warrant serious action. But the FTC's proposed settlement includes no help for affected parties, no money, and no other meaningful accountability.
- The FTC's status quo approach to privacy, security, and other data protection law violations is ineffective. However, Commissioners can take a series of concrete steps to change this.

Introduction

Sometimes a new product becomes inextricably linked to the brand that made it popular. Kleenex, Band-Aids, and Frisbees are examples where the company became synonymous with the product.[1] This is particularly true in the digital economy where products can improve the use and capability of technology to the point of transforming its role in everyday life. We use ''Google'' as a verb when referring to use of a search engine. We ''Uber'' when we need a ride across town. And now, we ''Zoom'' when referring to videoconferencing. If becoming a verb threatens a trademark, firms fight against it. If it means becoming the default product in a market, they fight for it. But, profiting through unlawful means must come with real consequences.

Zoom (NASDAQ: ZM) did not invent web-based video conferencing. Indeed, there are many other players in the market. But Zoom succeeded in becoming the ''default'' for many businesses, both large and small, capturing a significant market share despite a crowded field. However, the allegations in the FTC's complaint raise questions whether Zoom's success—and the tens of billions of dollars of wealth created for its shareholders and executives in a short period of time—was advanced through fair play.[2] In my

[1] Mark Abadi, *Taser, Xerox, Popsicle, and 31 more brands-turned-household names,* Business Insider (June 3, 2018), *https://www.businessinsider.com/google-taser-xerox-brand-names-generic-words-2018-5.*

[2] Richard Waters, *Zoom to cash in on pandemic success with apps and events,* Financial Times (Oct.

view, the evidence suggests that deception helped to create this windfall.

With businesses, families, schools, and even governments using Zoom to share extremely sensitive information, the alleged security vulnerabilities of this video conferencing platform raise major concerns, including threats to our privacy [3] and national security.[4]

Today, the Federal Trade Commission has voted to propose a settlement with Zoom that follows an unfortunate FTC formula. The settlement provides no help for affected users. It does nothing for small businesses that relied on Zoom's data protection claims. And it does not require Zoom to pay a dime. The Commission must change course.

Deception Distorts Competition

When companies need to act quickly to exploit an opportunity, deploying deception to steal users or sales from competing players is tantalizing. When video conferencing became a necessity for many businesses and families, existing players saw a potential gold mine. Even though we can all technically use multiple videoconferencing platforms as participants, a videoconferencing provider's monetization will largely be driven by how many businesses adopt its offering as their enterprise videoconferencing solution.[5] FTC prohibitions on unfair or deceptive practices are supposed to temper the temptation to deceive customers.

Before the pandemic, Zoom primarily focused on business customers. Small and large businesses alike were looking for ways to connect with clients and business partners through video conferencing. Zoom competed with Microsoft's Skype, Microsoft's Teams, Cisco's WebEx, BlueJeans, and many other products. Comparison guides point out the different strong points of each service—from encryption to price.[6] In the summer of 2019, Zoom had over 600,000 customers that paid fees to use Zoom's services.[7] These customers were overwhelmingly small businesses.[8]

Small businesses often don't have employees dedicated to information security or even to information technology more broadly. That's why they rely on representations made by those they purchase software and services from. Many businesses want to ensure that any software application they use, including any video conferencing solution, comes with meaningful security standards. Zoom had to respond to this critical customer need if it was going to compete. Once the pandemic shut down workplaces across the country, businesses needed to find a reliable solution that was also secure. Many chose Zoom.[9]

Zoom sold its customers on the idea that it was an easy-to-use service that took ''security seriously.'' However, when examining the company's engineering and product decisions, a different reality emerges. For example, as the complaint alleges, Zoom installed a web server onto users' computers, without permission, as an end-run that would circumvent a browser security feature—all to avoid an extra dialogue box.[10] Zoom went further: Even if you managed to uninstall Zoom, it would not remove the web server.[11] And that web server could secretly re-install Zoom, even without your permission.[12] This is not just troubling conduct—this is what some have called ''malware-like'' behavior.[13]

This fervent attention to detail—going to great lengths to avoid a single dialogue box—did not extend to the security features it touted in sales materials.[14] The FTC's complaint details a litany of serious security allegations, from not using what is ''the commonly accepted definition'' of end-to-end encryption to being a year or more behind in patching software in its commercial environment.[15]

Zoom's Windfall

Zoom has ''cashed in'' on the pandemic.[16] While Zoom doesn't publicly share its total number of users, the company has confirmed that it has nearly four times the number of customers with 10 or more employees than they had at this time a year ago.[17] Their stock value has soared.[18] Zoom's CEO, Eric Yuan, has increased his net worth by almost $16 billion *since March,* and is now one of the wealthiest individuals in America.[19]

Zoom can now use this new market penetration to increase monetization for users who currently do not pay any fees. With the pandemic-driven expansion, Zoom has announced that they're going to make a platform pivot and begin to offer an app marketplace and a paid events platform.[20] Zoom disclosed to its investors how a shift to a ''platform and sales model allow[s] us to turn a single non-paying user into a full enterprise deployment.'' [21]

Zoom stands ready to emerge as a tech titan. But we should all be questioning whether Zoom and other tech titans expanded their empires through deception.[22] Zoom could have taken the time to ensure that its security was up to the right standards. But, in my view, Zoom saw the opportunity for massive growth by quickly leaping into the consumer market, allowing it to rapidly emerge as the new way to virtually celebrate birthdays and weddings and

14, 2020), *https://www.ft.com/content/f1731672-e965-48a1-9362-bab122fc9bf4.*

[3] In her voting statement, Commissioner Rebecca Kelly Slaughter details some of the key intersections between privacy and security.

[4] Sonam Sheth, *Foreign intelligence operatives are reportedly using online platforms and video-conferencing apps like Zoom to spy on Americans,* Business Insider (Apr. 9, 2020), *https://www.businessinsider.com/foreign-intelligence-agents-china-spying-on-americans-zoom-2020-4.*

[5] Zoom Video Communications, Inc., Oct. 2019 Quarterly Report (Form 10–Q) (Dec. 9, 2019), *https://www.sec.gov/ix?doc=/Archives/edgar/data/1585521/000158552119000059/zm-20191031.htm.*

[6] Kari Paul, *Worried about Zoom's privacy problems? A guide to your video-conferencing options,* The Guardian (Apr. 9, 2020), *https://www.theguardian.com/technology/2020/apr/08/zoom-privacy-video-chat-alternatives.*

[7] Compl., *In the Matter of Zoom Video Communications, Inc.,* Comm'n File No. 1923167 (Nov. 9, 2020).

[8] *Id.*

[9] Matt Torman, *5 Reasons Why Zoom Will Benefit Your Small Business,* Zoom (Jan. 24, 2020), *https://blog.zoom.us/zoom-video-communications-small-business-benefits/.*

[10] Compl., *supra* note 7.

[11] David Murphy, *Remove Zoom From Your Mac Right Now,* LifeHacker (July 9, 2020), *https://lifehacker.com/remove-zoom-from-your-mac-right-now-1836209383.*

[12] *Id.*

[13] Jacob Kastrenakes, *Zoom saw a huge increase in subscribers—and revenue—thanks to the pandemic,* The Verge (June 2, 2020), *https://www.theverge.com/2020/6/2/21277006/zoom-q1-2021-earnings-coronavirus-pandemic-work-from-home.*

[14] Compl., *supra* note 7.

[15] Michael Lee & Yael Grauer, *Zoom Meetings Aren't End-to-End Encrypted, Despite Misleading Marketing,* The Intercept (Mar. 31, 2020), *https://theintercept.com/2020/03/31/zoom-meeting-encryption/;* Compl., *supra* note 7; Oded Gal, *The Facts Around Zoom and Encryption for Meetings/Webinars, Zoom* (Apr. 1, 2020), *https://blog.zoom.us/facts-around-zoom-encryption-for-meetings-webinars/.*

[16] Richard Waters, *Zoom to cash in on pandemic success with apps and events,* Financial Times (Oct. 14, 2020), *https://www.ft.com/content/f1731672-e965-48a1-9362-bab122fc9bf4.*

[17] *Id.*

[18] *Id.*

[19] Taylor Nicole Rogers, *Meet Eric Yuan, the founder and CEO of Zoom, who has made over $12 billion since March and now ranks among the 400 richest people in America,* Business Insider (Sep. 9, 2020), *https://www.businessinsider.com/meet-zoom-billionaire-eric-yuan-career-net-worth-life;* Kerry A. Dolan et al., *The Forbes 400: The Definitive Ranking of the Wealthiest Americans in 2020,* Forbes (Sep. 8, 2020), *https://www.forbes.com/profile/eric-yuan/?list=forbes-400&sh=474b78c761bf.*

[20] *Supra* note 16.

[21] Zoom Video Communications, Inc., Quarterly Report (Form S–1) (Dec. 21, 2018), *https://www.sec.gov/Archives/edgar/data/1585521/000095012318012479/filename1.htm.*

[22] Decision and Order, *In the Matter of Google Inc.,* Comm'n File No. 1023136 (Oct. 24, 2011), *https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330googlebuzzagreeorder.pdf;* Decision and Order, *In the Matter of Facebook, Inc.,* Comm'n File No. 0923184 (July 27, 2012), *https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf.*

further solidify itself into our lives. But had Zoom followed the law, it might all be different.

Status Quo Approach to Privacy and Security Settlements

In matters like these, investigations should seek to uncover how customers were baited by any deception, how a company gained from any misconduct, and the motivations for this behavior. This approach can help shape an effective remedy. While deciding to resolve a matter through a settlement, regulators and enforcers must seek to help victims, take away gains, and fix underlying business incentives.

Of course, all settlements involve tradeoffs, but like other FTC data protection settlements, the FTC's proposed settlement with Zoom accomplishes none of these objectives. This is particularly troubling given the nature of the alleged deception. Key features of the FTC's proposed settlement include:

No help. Small businesses that purchased Zoom services or signed long-term contracts based on false representations are not even addressed in the Commission's order. They will not have the ability to be released from any contracts, seek refunds, or get credit toward future service. Similarly, Zoom's law-abiding competitors and other consumers affected by the alleged misconduct will not get anything to address how they were harmed.

No notice. The targets of deception deserve the dignity of knowing that the product they were using did not use the security features that were advertised. Notice also provides information on whether or not users need to take any specific further actions to protect themselves or their place of business. This is especially critical in cases where individuals may not know if they are affected. In this matter, Zoom's technology was integrated into white label products that may not use Zoom's brand. Notice is also helpful when victims receive no restitution.

No money. In my view, the evidence is clear that Zoom obtained substantial benefits through its alleged conduct. However, the resolution includes no monetary relief at all, despite existing FTC authority to seek it in settlements when conduct is dishonest or fraudulent. If the FTC was concerned about its ability to seek adequate monetary relief, it could have partnered with state law enforcers, many of whom can seek civil penalties for this same conduct.

No fault. The Commission's order includes no findings of fact or liability. In other words, Zoom admits nothing and the Commission's investigation makes no significant conclusions. This will make it more difficult for affected parties to exercise any contractual rights or seek help through private actions.

Earlier this year, after a number of security concerns emerged, the Attorney General of New York quickly took action, and Zoom signed a voluntary compliance agreement, which requires certain third-party reports and compliance with additional standards.[23] The FTC's proposed settlement terms add some requirements to what Zoom has already agreed to with New York, largely involving additional independent monitoring and paperwork submissions. It is not clear to me that these new obligations are actually changing the way Zoom does business. In fact, Zoom may already be retaining third parties to assist with compliance as part of its contractual obligations with its largest customers.

Recommendations To Restore Credibility

To protect the public and promote fair markets, the FTC must be a credible law enforcement agency, especially when it comes to large players in digital markets. Our recent law enforcement actions raise questions that warrant careful attention if we aspire to be an effective enforcer. Below are some of the tangible steps the Commission should pursue:

1. Strengthen orders to emphasize more help for individual consumers and small businesses, rather than more paperwork.

When consumers and small businesses are the targets of unlawful data protection practices, the FTC's status quo approach often involves requiring the company engaged in misconduct to follow the law in the future and submit periodic paperwork. In certain orders, the Commission requires the retention of a third-party assessor, which the company might already be doing.

The FTC should focus its efforts on ensuring resolutions lead to meaningful help and assistance to affected consumers and small businesses. For example, the Commission could seek requirements that defendants respond to formal complaints and inquiries. This assists consumers while also allowing the Commission to track emerging harms and how the company is remediating them.

Another way to help affected consumers and businesses is to order releases from any long-term contractual arrangements. When customers are baited with deceptive claims, it would be appropriate to allow them to be released from any contract lock-in or otherwise amend contractual terms to make customers whole. This would also help honest competitors regain some of the market share improperly diverted by deceptive conduct.

The Commission should seek notices to affected parties, so that these individuals and businesses can determine whether they need to take any action and whether they want to continue to do business with a company that engaged in any wrongdoing.

2. Investigate firms comprehensively across the FTC's mission.

The FTC is a unique institution with legal authorities related to data protection, consumer protection, and competition, all under one roof, rather than divided up across multiple agencies. It is critical that the agency use its authority to deter unfair or deceptive conduct in conjunction with our authority to deter unfair methods of competition. The agency can do more to comprehensively use its authorities across its mission, particularly when unfair or deceptive practices can advance dominance in digital markets. When we do not, investigations may result in ineffective resolutions that fail to fix the underlying problems and may increase the likelihood of recidivism. The Commission may need to reorganize its offices and divisions to ensure investigations are comprehensive.

3. Diversify the FTC's investigative teams to increase technical rigor.

Engineers, designers, and other technical experts can offer major contributions to our investigative teams. Many of the cases previously pursued by the FTC were the result of press coverage from technical experts, especially security researchers. In fact, an independent researcher working in his private capacity was one of the first to discover a serious vulnerability in Zoom's product.[24]

Many of our peer agencies around the world approach investigations with diverse, interdisciplinary teams. Unfortunately, the Commission has deprived our litigators and enforcement

[23] Press Release, N.Y. Att'y Gen., Attorney General James Secures New Protections, Security Safeguards for All Zoom Users (May 7, 2020), *https://ag.ny.gov/press-release/2020/attorney-general-james-secures-new-protections-security-safeguards-all-zoom-users.*

[24] The independent research solicited readers for contributions to assist with his work and pay off his student loans. Jonathan Leitschuh, *Zoom Zero Day: 4+ Million Webcams & maybe an RCE? Just get them to visit your website!,* InfoSec Write-Ups (July 8, 2019), *https://medium.com/bugbountywriteup/zoom-zero-day-4-million-webcams-maybe-an-rce-just-get-them-to-visit-your-website-ac75c83f4ef5.*

attorneys of this needed expertise. The Commission should restore the role of the Chief Technologist and make a concerted effort to increase the proportion of technologists and others with technical knowledge in our investigative teams. If these individuals play meaningful leadership roles in our investigations, the agency can be much more effective.

With these technical skills and leadership in place, the Commission could proactively review the dominant digital products and services rather than primarily following up on concerning media reports after sensitive information or access has been at risk.

4. Restate existing legal precedent into clear rules of the road and trigger monetary remedies for violations.

Markets benefit when there are simple, clear rules of the road. This allows honest businesses to know what is and is not permissible. This especially helps small businesses and startups. On the other hand, ambiguity helps large incumbents who can hire lawyers and lobbyists to sidestep their obligations. The FTC can promote fair markets by restating accepted legal precedent and past Commission experience through an agency rulemaking. These would create no new substantive obligations on market participants. But once restated and enforced, violations trigger significant monetary relief.

Under the FTC Act, the Commission has a number of authorities to seek monetary relief. While one of these authorities, Section 13(b), is under considerable scrutiny in the courts, the Commission can also seek money by restating existing legal precedent through a rulemaking. When the Commission has issued prior orders for past misconduct in the market or there is other information indicating a widespread pattern of unfair or deceptive conduct, Section 18 of the FTC Act authorizes the Commission to define what constitutes an unfair or deceptive practice by rule. Violations of these rules can trigger liability for redress, damages, penalties, and more.

Over the years, the Commission has finalized a substantial number of orders related to data protection, including privacy and data security. There have also been developments in case law in the courts. The Commission should consider restating this past precedent into a rule under Section 18 or other appropriate statutes to provide clear guidance and systematically deter unlawful data protection practices.[25]

5. Demonstrate greater willingness to pursue administrative and federal court litigation.

Congress intended for the FTC to serve as an expert agency that analyzes emerging business practices and determines whether they might be unfair or deceptive. Administrative litigation and final Commission orders can provide important guidance to the marketplace on the agency's analytical approach. It can also serve as the basis for triggering financial liability for other market actors, pursuant to the Commission's Penalty Offense Authority.[26]

Federal court litigation pursued by our staff has contributed to strong outcomes and important development of the law. For example, in 2012, the FTC took action against Wyndham Hotels, a major hospitality chain the Commission charged with employing unfair data practices. Wyndham Hotels waged an aggressive defense, challenging the FTC's theories before the District Court and the Third Circuit Court of Appeals. The court's ruling cemented the Commission's ability to target lax data security practices under existing law.

The public benefits from the work of the FTC's talented investigators and litigators across the agency, and as Commissioners, we should have confidence that they can hold accountable even the largest players in the economy. But recently, when it comes to data protection, FTC Commissioners have rarely voted to authorize agency staff to sue national players for misconduct. We must do more to safeguard against any perception about the agency's unwillingness to litigate.

6. Increase cooperation with international, federal, and state partners.

When it comes to data protection abuses and other harmful practices by large technology firms, these concerns are increasingly global. The FTC can use its resources more effectively and obtain superior outcomes when it cooperates with other law enforcement partners.

In the Ashley Madison matter, the FTC partnered with the Office of the Privacy Commissioner of Canada, Office of the Australian Information Commissioner, and many state attorneys general. This action was the result of significant cooperation and ultimately led to a joint resolution.[27] Unfortunately, this is too rare.

The FTC can rely on key provisions of the U.S. SAFE WEB Act that allow the FTC to share information with foreign counterparts to combat deceptive or unfair practices that cross national borders. Domestically, agencies can form multistate working groups to combine resources and leverage a diverse set of legal authorities.

In the matter before the Commission today, the conduct at issue might have also violated state laws. Additional liability triggered by these laws could have led to a resolution with a far superior outcome. Instead, other law enforcement agencies both at home and abroad will likely need to continue to scrutinize Zoom's practices, given the FTC's proposed resolution.

In addition, the Commission needs to rethink its approach to enforcing privacy promises by large technology firms related to their participation in international agreements, such as the EU–U.S. Privacy Shield Framework. Zoom's conduct may have violated key aspects of the framework, and I believe the Commission should have taken action accordingly. The Commission should now fully cooperate with our international partners to ensure that they can proceed with appropriate sanctions.

7. Determine whether third-party assessments are effective.

A common provision in FTC orders requires the defendant to retain a third party to monitor compliance and the company's data protection protocols. However, it is unclear whether those assessments are truly effective when it comes to deterring or uncovering misconduct. For example, in the FTC's investigation of Facebook for compliance with its privacy obligations under a 2012 Commission order, the FTC alleged major violations of the order even though an independent third party, PriceWaterhouseCoopers (PwC), was supposedly watching over the company's compliance.[28]

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[25] Statement of Commissioner Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers, Comm'n File No. P144400 (Oct. 19, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1581862/p144400choprastatementolderamericansrpt.pdf.*

[26] *See* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority* (Oct. 29, 2020), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256.*

[27] Press Release, Fed. Trade Comm'n, Operators of AshleyMadison.com Settle FTC, State Charges Resulting From 2015 Data Breach that Exposed 36 Million Users' Profile Information (Dec. 14, 2016), *https://www.ftc.gov/news-events/press-releases/2016/12/operators-ashleymadisoncom-settle-ftc-state-charges-resulting.*

[28] *See* Nitasha Tiku, *Facebook's 2017 Privacy Audit Didn't Catch Cambridge Analytica,* Wired (Apr. 19, 2018), *https://www.wired.com/story/facebooks-2017-privacy-audit-didnt-catch-cambridge-analytica/;* S*ee also* Dissenting Statement of Commissioner Rohit Chopra In re Facebook, Inc., Comm'n File No. 1823109 (July 24, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.*

Additionally, the Commission's decision to not proactively make certain information about these third party reports public limits our ability to determine their effectiveness.[29] If independent researchers and journalists—often the ones who originally discovered data protection failures in the first place—had access to these reports, companies and third-party monitors might take them more seriously, which would help to fulfill the intended purpose of their efforts.

Conclusion

This year families have said their final goodbyes to loved ones over Zoom.[30] Desperate parents have propped their children in front of screens for school and hoped that they won't fall too far behind.[31] Small businesses have been turned upside down by our new way of life and have fought for a chance at survival by switching to doing business virtually.[32] But when tech companies cheat, rather than compete, and then face no meaningful accountability, all of us suffer.

I am concerned that Zoom simply thought that the FTC's law enforcement inquiry wasn't serious. That's probably why the company didn't even bother to disclose the agency's inquiry to its investors.[33] The company seemed to guess that the FTC wouldn't do anything to materially impact their business. Sadly, for the public, they guessed right. Given the company's approach, efforts to hold Zoom accountable by regulators and enforcers in the U.S. and abroad will clearly need to continue.

Finally, the Federal Trade Commission has requested greater authority from Congress to protect Americans from abuse and misuse of personal data. But, actions like today's proposed settlement undermine these efforts. The agency must demonstrate that it is willing to use all of its existing tools to protect consumers and the market. Only then will the Commission be entrusted to take on more responsibilities.

It is critical that we restore the agency's credibility deficit when it comes to oversight of the digital economy. This does not stem from a lack of authority or resources or capabilities from our staff—it stems from the policy and enforcement approach of the Commission, and this needs to change.

For these reasons, I respectfully dissent.

Dissenting Statement of Commissioner Rebecca Kelly Slaughter

Most weekday mornings, my two elementary-age children log on to school through Zoom. Their faces, voices, and occasional silliness are all captured in the Zoom classroom. I try not to dwell on what might occasionally float through in the background of their camera or microphone, but, like many families, we've had moments in our home where we are very much live. After my older kids settle in for class, my own workday begins in earnest and typically involves a series of confidential discussions often made possible through a Zoom meeting. My experience is not unique: Zoom expanded from 10 million daily users last December to over 300 million daily participants this spring. Zoom's overnight expansion from a modest video conferencing company to a company providing critical infrastructure for business, government, education, and social connection raises important questions for the Commission's obligations to protect consumer security and privacy.

Years before the global pandemic would make Zoom a household name, the company made decisions that threatened the security and privacy of its longstanding core business customers. Yet the Commission's proposed settlement provides no recourse for these paying customers. When Zoom's user base rapidly expanded, its failure to prioritize privacy and security suddenly posed a much more serious risk in terms of scope and scale. This proposed settlement, however, requires Zoom only to establish procedures designed to protect user *security* and fails to impose any requirements directly protecting user *privacy.* For a company offering services such as Zoom's, users must be able to trust that the company is committed to ensuring security and privacy alike.

Because the proposed resolution fails to require Zoom to address privacy as well as security, and because it fails to require Zoom to take any steps to correct the deception we charge it perpetrated on its paying clients, I respectfully dissent.[1]

Zoom's Practices

As set forth in the Commission's complaint, Zoom engaged in a series of practices that undermined the security and privacy of its users. First, we allege Zoom made multiple misrepresentations about its use of encryption. As charged in the complaint, Zoom made false statements about its encryption being ''end-to-end,'' the level of encryption that it offered, and the time it took to store recorded meetings in an encrypted server.[1]

Zoom's problematic conduct was not limited to deception. The complaint charges that beginning in July 2018, Zoom secretly *and unfairly* deployed a web server, called the ''ZoomOpener,'' to circumvent certain Apple privacy and security safeguards enjoyed by Safari browser users. Because of these safeguards, Safari users who clicked on a link to join a Zoom meeting would receive an additional prompt that read, ''Do you want to allow this page to open 'zoom.us'?'' [2] That is until, we allege, Zoom overrode this feature through its secret ZoomOpener, which bypassed the Safari safeguard to directly launch the Zoom App.[3] The user was then automatically placed in the Zoom meeting, and, if the user had not changed her default video settings, her webcam was activated.[4]

In addition to these unfair and deceptive practices, which the Commission charged as law violations, there has been extensive public reporting on several other Zoom practices that raised serious privacy concerns. For example, Zoom business customers who subscribed to a service called ''LinkedIn Sales Navigator'' had access to LinkedIn profile data about other users in a meeting—even when the other user wished to remain

[29] Statement of Commissioner Rohit Chopra In the Matter of Uber Technologies, Inc., Comm'n File No. 1523054 (Oct. 26, 2018), *https://www.ftc.gov/system/files/documents/public_statements/1418195/152_3054_c-4662_uber_technologies_chopra_statement.pdf.*

[30] Sarah Zhang, *The Pandemic Broke End-of-Life Care,* The Atlantic (June 16, 2020), *https://www.theatlantic.com/health/archive/2020/06/palliative-care-covid-19-icu/613072/.*

[31] Heather Kelly, *Kids used to love screen time. Then schools made Zoom mandatory all day long.,* Wash. Post (Sep. 4, 2020), *https://www.washingtonpost.com/technology/2020/09/04/screentime-school-distance/.*

[32] Justin Lahart, *Covid Is Crushing Small Businesses. That's Bad News for American Innovation.,* Wall Street J. *https://www.wsj.com/articles/covid-is-crushing-small-businesses-thats-bad-news-for-american-innovation-11602235804.*

[33] Zoom Video Communications, Inc., July 2020 Quarterly Report (Form 10–Q) (Sep. 3, 2020), *https://www.sec.gov/ix?doc=/Archives/edgar/data/1585521/000158552120000238/zm-20200731.htm.* When publicly traded firms do not disclose to their investors that they are facing a federal law enforcement inquiry, this suggests that they do not believe the inquiry is material to their financial or operational performance.

[1] *See* Complaint ¶¶ 16–33.

[2] Complaint ¶ 35. If the user selected ''Allow,'' the browser would connect the user to the Zoom meeting. *Id.* This safeguard was not specific to Zoom; Apple had designed its Safari browser to help defend its users from malicious actors and popular malware by requiring interaction with a dialogue box whenever any website or link attempted to launch an outside app. *Id.* at ¶ 34.

[3] *Id.* at ¶ 36.

[4] *Id.* at ¶ 37.

anonymous.[5] Additionally, Security researchers found that Zoom-meeting video recordings saved on Zoom's cloud servers had a predictable URL structure and were thus easy to find and view.[6] And of course there was widespread coverage of ''Zoom-bombing,'' in which uninvited users crashed Zoom meetings.[7] Zoom took steps to address these vulnerabilities after they surfaced by changing naming conventions, permanently removing the LinkedIn Sales Navigator app,[8] and requiring meeting passwords as the default setting for more Zoom users,[9] but these problems suggest Zoom's approach to user privacy was fundamentally reactive rather than proactive.

Lack of Privacy Protections

Too often we treat data security and privacy as distinct concerns that can be separately preserved. In reality, protecting a consumer's privacy and providing strong data security are closely intertwined, and when we solve only for one we fail to secure either. The Commission's proposed order resolving its allegations against Zoom requires the company to establish an information-security program and submit to related independent third-party assessments. These provisions strive to improve data-security practices at the company and to send a signal to others regarding the baseline for adequate data-security considerations. Nowhere, however, is consumer privacy even mentioned in these provisions. This omission reflects a failure by the majority to understand that the reason customers care about security measures in products like Zoom is that they value their privacy.

Some might argue that sound data security practices should naturally guarantee consumer privacy. I disagree. Strong security is necessary for consumer privacy, but it does not guarantee its achievement. Zoom's launch of its ''ZoomOpener'' to undermine the Apple Safari browser protections is an instructive example. Zoom prioritized maintaining its one-click functionality for users over privacy and security protections offered by Apple. The Commission's proposed order tries to solve for this problem solely as a security issue and makes it difficult for Zoom to bypass third-party security features in the future. But the order does not address the core problem: Zoom's demonstrated inclination to prioritize some features, particularly ease of use, over privacy protections. Dumping Safari users automatically into a Zoom meeting, with their camera on, the first time they clicked on a link was not only a data-security failing—it was a privacy failing.

Similarly, we often discuss data encryption as a security issue, which of course it is, but we should simultaneously be recognizing it as a privacy issue. When customers choose encrypted communications, it is because they value their privacy in the content of their conversations. Treating encryption failures as a security-only issue fails to recognize the important privacy implications.

The FTC has approached privacy and security issues with related but distinct remedies: by imposing a comprehensive privacy program (as we did in *FTC* v. *Uber*) or by imposing a comprehensive information security program (as we did in *FTC* v. *Equifax*). This case provides a perfect example of a place where we ought to have required elements of both privacy and security programs. A more effective order would require Zoom to engage in a review of the risks to consumer *privacy* presented by its products and services, to implement procedures to routinely review such risks, and to build in privacy-risk mitigation before implementing any new or modified product, service, or practice. The Commission required this type of privacy-focused inquiry in the ''Privacy Review Statement'' provisions of its order in the *FTC* v. *Facebook* matter.[10] Privacy-focused provisions such as these should either be added to relevant data-privacy orders as a separate privacy program or review, *or* the Commission's information security programs should be modified to better integrate privacy and security.

When companies offer services with serious security and privacy implications for their users, the Commission must make sure that its orders address not only security but also privacy.

No Recourse for Customers

As of July 2019, Zoom had approximately 600,000 paying customers, and approximately 88% of those customers were small businesses with ten or fewer employees.[11] In securing these customers, the Commission charges that Zoom made express representations regarding its encryption offerings that were false. Yet, the proposed order does not require Zoom to take *any* steps to mitigate the impact of these statements we contend are false. Zoom is not required to offer redress, refunds, or even notice to its customers that material claims regarding the security of its services were false. This failure of the proposed settlement does a disservice to Zoom's customers, and substantially limits the deterrence value of the case.

Finally, I join Commissioner Chopra's call for the Commission to engage in critical reflection to strengthen our enforcement efforts regarding technology across the board—from investigation to resolution.[12]

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[5] *See* Aaron Krolik and Natasha Singer, *A Feature on Zoom Secretly Displayed Data From People's LinkedIn Profiles,* N.Y. Times (Apr. 2, 2020), *https://www.nytimes.com/2020/04/02/technology/zoom-linkedin-data.html.* Zoom subsequently stated that it had disabled the feature.

[6] *See* Paul Wagenseil, *Zoom security issues: Here's everything that's gone wrong (so far),* Tom's Guide (Nov. 3, 2020), *https://www.tomsguide.com/news/zoom-security-privacy-woes.*

[7] *See* Jay Peters, *Zoom adds new security and privacy measures to prevent Zoombombing,* The Verge (Apr. 3, 2020), *https://www.theverge.com/2020/4/3/21207643/zoom-security-privacy-zoombombing-passwords-waiting-rooms-default.*

[8] *See* Eric S. Yuan, *A Message To Our Users,* Zoom Blog (Apr. 1, 2020), *https://blog.zoom.us/a-message-to-our-users/.*

[9] *See* Deepthi Jayarajan, *Enhanced Password Capabilities for Zoom Meetings, Webinars & Cloud Recordings,* Zoom Blog (Apr. 14, 2020), *https://blog.zoom.us/enhanced-password-capabilities-for-zoom-meetings-webinars-cloud-recordings/.*

[10] To be clear, I am not suggesting that Zoom's conduct giving rise to this matter and Facebook's order violations are equivalents. Nor do the companies share similar business models. But in terms of the importance of consumer privacy, hundreds of millions of users are entrusting Zoom with some of their most sensitive interactions, and they are doing so from their homes.

[11] Complaint ¶ 9.

[12] Commissioner Chopra's dissenting statement sets forth an excellent list of *Recommendations and Corrective Actions* for the Commission to consider to improve the effectiveness of our enforcement efforts.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 98 FR 30106–30708, dated May 20, 2020) is amended to reflect reorganizations of the Human Resources Office and the Office of Safety, Security and Asset Management, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the titles and the mission and function statements for the *Human Resources Office (CAJQ),* and insert the following:

Human Resources Office (CAJQ). (1) Provides leadership, policy formation, oversight, guidance, service, and advisory support and assistance to the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR); (2) collaborates as appropriate, with the CDC Office of the Director (OD), Centers/Institute/Offices (CIOs), domestic and international agencies and organizations; and provides a focus for short- and long-term planning within the Human Resource Office (HRO); (3) develops and administers human capital and human resource management policies; (4) serves as the business steward for all CDC developed human capital and human resources management systems and applications; (5) develops, maintains, and supports information systems to conduct personnel activities and provide timely information and analyses of personnel and staffing to management and employees; (6) conducts and coordinates human resources management for civil service and Commissioned Corps personnel; (7) manages the administration of fellowship programs; (8) conducts recruitment, special emphasis, staffing, position classification, position management, pay and leave administration, work-life programs, performance management, employee training and development, and employee and labor relations programs; (9) maintains personnel records and reports, and processes personnel actions and documents; (10) administers the federal life and health insurance programs; (11) administers employee recognition, suggestion, and incentive awards programs; (12) furnishes advice and assistance in the processing of workers compensation claims; (13) interprets standards of conduct regulations, reviews financial disclosure reports, and offers ethics training and counseling services to CDC/ATSDR employees; (14) maintains liaison with the Department of Health and Human Services (HHS) and the Office of Personnel Management (OPM) on human resources management, policy, compliance and execution of the Human Capital Assessment and Accountability Framework; (15) conducts organizational assessments to determine compliance with human capital policies, guidance, regulatory and statutory requirements of federal human capital and resource management programs and initiatives; (16) plans, directs, and manages CDC/ATSDR-wide training programs, monitors compliance with mandatory training requirements, and maximizes economies of scale through systematic planning and evaluation of agency-wide training initiatives to assist employees in achieving required competencies; (17) assists in the definition and analysis of training needs and develops and evaluates instructional products designed to meet those needs; (18) develops, designs, and implements a comprehensive leadership and career management program for all occupational series throughout CDC/ATSDR; (19) provides technical assistance in organizational development, career management, employee development, and training; (20) collaborates and works with partners, internally and externally, to develop workforce goals and a strategic vision for the public health workforce; (21) provides support for succession planning, forecasting services, and environmental scanning to ascertain both current and future public health workforce needs; (22) administers and maintains the customer service help desk; (23) coordinates with CIOs to in-process FTEs and non-FTEs requiring access to CDC facilities and systems; and (24) processes FTE and non-FTE separation and out-processing requests.

Office of the Director (CAJQ1). (1) Provides leadership and overall direction for HRO; (2) develops goals and objectives, and provides leadership, policy formation, oversight, and guidance in program planning and development; (3) plans, coordinates, and develops strategic plans for HRO; (4) develops and administers human capital and human resource management policies and procedures; (5) coordinates all program reviews; (6) provides technical assistance and consultation in the development of proposed legislation, Congressional testimony, and briefing materials; (7) establishes performance metrics and coordinates quarterly reviews to ascertain status on meeting of the metrics; (8) coordinates budget formulation, negotiation, and execution of financial resources; (9) identifies relevant scanning/benchmarking on workforce and career development processes, services and products; (10) provides leadership and guidance on new developments and national trends for the public health workforce; (11) establishes and oversees policies governing human capital and human resources management, and works collaboratively within CDC/ATSDR and other components in planning, developing and implementing policies; (12) develops strategic plans for information technology and information systems required to support human capital and human resources management information requirements; (13) serves as the business steward for CDC/ATSDR-wide human capital and human resources administrative systems and advocates and supports the commitment of resources to application development; (14) coordinates human resource (HR) information resource management activities with the Office of the Chief Information Office and the related governance groups; (15) coordinates management information systems and analyses of data for improved utilization of resources; (16) serves as a liaison with HHS on the utilization and deployment of centralized HHS human capital and human resource management systems and applications; (17) applies standards of conduct regulations, reviews financial disclosure reports, and offers ethics training and counseling services to CDC/ATSDR employees; and (18) conducts demographic analysis of the CDC/ATSDR work force and publishes results in management reports.

Ethics and Compliance Activity (CAJQ12). (1) Oversees the CDC/ATSDR ethics and compliance program to ensure that processes and procedures are in place to ensure compliance with government-wide ethics statutes, regulations, and standards; (2) identifies and corrects weaknesses in policy, training, and monitoring to prevent CDC/ATSDR non-compliance of HHS supplemental ethics regulations; (3) serves as a liaison between the Office of Government Ethics and HHS on ethics matters; (4) applies standards of conduct regulations; (5) reviews financial disclosure reports for potential conflicts of interest; (6) provides continuing ethics training and counseling services; and (7) reviews and approve ethics-related requests for employees.

Commissioned Corps Activity (CAJQ14). (1) Serves as the primary contact for CDC/ATSDR management and employees in obtaining the full range of personnel assistance and management services for Commissioned Corps personnel; (2) provides leadership, technical assistance, guidance, and consultation in benefits, entitlements, and obligations of the Commissioned Corps to commissioned officers; (3) plans, directs, and manages the Department of Defense's Defense Eligibility Enrollment Report System identification card program for all active

duty officers, retirees, and eligible dependents; (4) implements and evaluates Commissioned Corps policies and systems such as salary/benefits, performance management, assignments, health benefits, training, travel, relocation, and retirement; (5) manages the CDC/ATSDR's Commissioned Corps promotion and awards programs; (6) maintains liaison and coordinates personnel services for Commissioned Corps personnel with the Office of Commissioned Corps Operations and the Office of Surgeon General; (7) coordinates the agency deployment status of commissioned officers assigned to CDC and manages the Emergency Operation Center (EOC) Commissioned Corps deployment desk during activation of the CDC EOC; and (8) establishes and maintains personnel and payroll records and files.

Operations Management Activity (CAJQ17). (1) Provides leadership, oversight, and guidance in the management and operations of HRO programs; (2) provides and oversees the delivery of HRO-wide administrative management and support services in the areas of fiscal management, personnel, travel, records management, internal controls, and other administrative services; (3) prepares annual budget formulation and budget justifications; (4) coordinates HRO requirements relating to contracts, grants, cooperative agreements, and reimbursable agreements; (5) develops and implements administrative policies, procedures, and operations, as appropriate, for HRO, and prepares special reports and studies, as required, in the administrative management areas; and (6) maintains liaison with related staff offices and other officials of CDC/ATSDR.

In- and Out-Processing Activity (CAJQ19). (1) serves as the central point of integration for employees, non-employees and affiliates (referred to in their entirety as ''customer or staff'') requiring access to CDC facilities and use of systems and resources; (2) coordinates with the support of centers, institute, and offices to retrieve customer information needed for in- or out-processing (IOP) services; (3) provides customer and CIOs with clarity about expectations for in- or out-processing; (4) coordinates with applicable business service offices (BSOs) to assure the appropriate requirements have been obtained for the clearance of staff; (5) initiates feedback and follows-up with CIOs to determine customer information is prepared for final processing; (6) provides technical assistance, guidance, and consultation regarding IOP activities to customers and stakeholders; (7) establishes, maintains, and distributes records associated with the completion of the mandatory training requirements to gain physical access to CDC facilities and Information technology systems; (8) coordinates with BSOs about the issuance and activation of Smart Cards and automation assets; (9) processes customer separation requests; (10) administers and maintains exit interview survey data; (11) serves as a point of contact for BSOs and programs to integrate customer requirements upon exiting the physical facility; and (12) maintains customer records in accordance with applicable disposition requirements.

Strategic Programs Office (CAJQB). (1) Provides a broad array of strategic programs, workforce support, and development services; (2) develops and implements methodologies to measure, evaluate, and improve human capital results to ensure mission alignment; (3) assesses and evaluates the overall effectiveness and compliance of human resources programs and policies related to merit-based decision-making and compliance with laws and regulations; (4) works with the OPM, HHS, and CDC Governance Boards and agency managers to carry out human capital management planning and development activities; and (5) establishes, coordinates, develops, and monitors implementation of human capital initiatives and the agency Strategic Human Capital Management Plan.

Office of the Director (CAJQB1). (1) Provides leadership and overall direction for the Strategic Program Office (SPO); (2) develops goals and objectives, and provides leadership, policy formation, oversight, and guidance in program planning and development; (3) plans, coordinates, and develops strategic plans for the SPO; (4) develops and administers human capital and human resource management policies and procedures; (5) coordinates all program reviews; (6) provides technical assistance and consultation to the activities within the SPO; (7) establishes performance metrics and coordinates reviews to ascertain status on meeting of the metrics; and (8) coordinates, develops, and monitors implementation of human capital initiatives and the agency Strategic Human Capital Management Plan.

Workforce Planning Activity (CAJQB3). (1) Advises and facilitates strategic workforce planning and development for CDC/ATSDR; (2) supports HRO and CIO program officials in the development, implementation and evaluation of workforce plans, policies, and initiatives; (3) serves as a liaison with HHS and entities within and outside the agency to develop CDC/ATSDR's human capital management direction and strategies; (4) coordinates the development and implementation of an agency-wide strategic human capital plan; (5) identifies mission-critical occupations and associated competencies to assess potential gaps in occupations and competencies that are essential to CDC/ATSDR achieving its strategic goals; (6) reports on CDC/ATSDR's progress in meeting human capital management improvement objectives associated with HHS-wide and government-wide human capital management improvement; (7) develops and executes a strategic hiring plan to facilitate the recruitment and retention of members of under- represented groups and for closing occupational series and/or competency gaps in the workforce; (8) provides recruitment, retention, consultation and support to customers; and (9) supports CIO-specific, mission-critical work by managing various training programs designed to provide students, postgraduates, and university faculty with opportunities to participate in projects and assignments in support of CDC/ATSDR's missions.

Information Systems and Data Analytics Activity (CAJQB4). (1) Oversees all human resources information technology CDC/ATSDR systems and serves as the liaison to HHS in the development, maintenance, and support of Department-wide human resource information systems and applications; (2) manages capital planning and investment control activities related to all CDC/ATSDR developed human capital and human resources management systems and applications; (3) serves as liaison and provides support in the development and maintenance of HHS enterprise human resources systems; (4) facilitates the administration, analysis and reporting of, and provides recommendations for, business process improvements in regards to survey data or other business process reengineering efforts; (5) supports periodic reporting requirements from CDC/ATSDR, HHS, OPM, and Office of Management and Budget (OMB); (6) provides business strategy, data analytics, and reporting services; (7) performs analysis, forecasting, and modeling to interpret quantitative and qualitative data; (8) reports and evaluates organizational performance outcomes on key measures and metrics; (9) oversees the human resources governance structure and change control board activities; (10)

develops strategic plans for information technology and information systems required to support human capital and human resources management information requirements; (11) coordinates HR information resource management activities with the Office of the Chief Information Officer and the related governance groups; and (12) coordinates management information systems and analyses of data for improved utilization of resources.

CDC University Office (CAJQC). (1) Provides agency-wide leadership and guidance in all functional areas related to training and career development; (2) designs, develops, implements and evaluates a comprehensive strategic human resource leadership and career training and development program for all occupational series throughout CDC; (3) develops and implements training strategies and activities that contribute to the agency's mission, goals and objectives; (4) maximizes economies of scale through systematic planning, administration, delivery, and evaluation of agency-wide training initiatives to assist CDC employees in achieving required competencies; (5) develops retraining activities for CDC managers/employees affected by organizational changes (*e.g.* major reorganizations, outsourcing initiatives, etc.); (6) maintains employee training records; (7) develops and validates occupational and functional competencies and develops related training plans and career maps; (8) develops and administers professional development programs; (9) administers and monitors the Training and Learning Management System for compliance with the Government Employees Training Act; (10) conducts training needs assessment of employees, provides analysis and data to correlate individual training with strategic plans; (11) develops and maintains assessment tools to identify core competency requirements for each occupational series throughout the agency; (12) provides consultation, guidance, and technical assistance to managers and employees in organizational development, career management, employee development, and training; (13) develops and delivers education and training programs to meet the identified needs of the workforce; (14) promotes, develops, and implements training needs assessment methodology to establish priorities for training interventions; (15) collaborates, as appropriate, with the CDC/OD, CIOs, HHS, OPM and other domestic and international agencies and organizations; and (16) develops and implements policies related to employee training.

Office of the Director (CAJQC1). (1) Processes timecards; (2) provides assistance with travel orders and ICAP entry; (3) manages in processing, out processing and personnel actions; (4) liaises with the Policy, Accountability, Communications, and Engagement Office (PACE) and the Strategic Business Initiatives Unit regarding policy development/revision; (5) manages implementation of policy at CDCU; (6) consults with CIOs regarding policy tracking/reporting policy compliance; (7) manages website/liaises with IT group, Listserve/CDC/Liaise with PCA; (8) develops/revises SOPs, job aids, and manages mandatory training process; (9) manages budget, distribution, monitoring, staffing/workforce plans, physical space planning/management, equipment/other resources; (10) develops and communicates vision/mission, strategic plans and goals/priorities; (11) sets office-wide processes and guidelines (telework, workflow, approval chains); (12) monitors work processes and products, approve all procurement and personnel actions; and (13) establishes key performance indicators/metrics, monitoring/analyzing/interpreting/reporting division's performance data.

Developmental Assessment, Design, and Evaluation Activity (CAJQC2). (1) Develops and validates competency models; (2) develops and validates career paths for all competency models; (3) advises CIOs and individuals on use of individual development plans (IDP/eIDP); (4) designs, administers, scores/analyzes, and interprets/reports competency assessments for CIOs, individuals, and enterprise-wide; (5) advises CIOs and individuals on best practices for assessing/identifying competency gaps/strengths and training needs; (6) designs, implements, scores/analyzes and interprets/reports developmental program evaluation methodologies within CDCU; (7) advises CIOs on the design and implementation of developmental programs; (8) advises CIOs on the design and implementation of developmental program evaluation; and (9) collects, analyzes and interprets/reports of organizational-level data (Disabled Veterans Affirmative Action and Federal Equal Opportunity Recruitment Report, certification eligibility/compliance, quarterly/annual report).

Training Administration Activity (CAJQC3). (1) Manages room reservation/specification details (for CDCU & CIOs using our space), visitor access, room setup, room signs, makes/posts schedules, receives/manages/distributes training materials; (2) processes vendor supplied training system/training orders and SharePoint entry; (3) manages Learning Portal, roster management, course communications; and (4) supports customers with phone calls, emails, CIO training request process consultation, and processes coaching requests/tracking.

Program Development Activity (CAJQC4). (1) Manages classroom/web-based/blended program design and development, vendor/internal facilitator selections, programs curriculum planning/scheduling program administration process development; (2) markets and manages participant application/enrollment process, participant selection/notification, program communications, and monitors participant attendance/participation; (3) develops/distributes program information/materials to participants, coordinates with vendors/internal facilitators regarding program requirements, and opens/facilitates the program; (4) coordinates with the Developmental Assessment, Design and Evaluation (DAD–E) Activity to establish evaluation methodology, auditing program courses, collection of evaluation data, reviews performance of program elements to inform revisions; and (5) establishes memoranda of understanding/agreement with local universities and other learning institutions, recruits and consults with potential participants of external continuous learning programs, and manages LTE process and manages NEO, mentoring and coaching programs.

Curriculum Development Activity (CAJQC5). (1) Manages classroom/web-based/blended curriculum, vendor/internal facilitator selections, curriculum/planning scheduling, program administration processes, determines courses that meet mandatory requirements, utilizes processes and requirements to provide CEs to applicable courses; (2) manages all aspects of the biennial request for quote (RFQ) process to meet CDC training requirements, to include solicitation of proposals, vendor selection, and RFQ database maintenance, conducts market research to identify vendors that supply training via traditional and alternative platforms that meet CDC needs; (3) markets and manages participants enrollment process, determines audience types, program communications, and monitors participant attendance/participation; (4) develops/distributes course information/materials to participants, coordinates with vendors/internal facilitators to ensure facility access,

opening/facilitating courses; (5) coordinates with DAD–E to establish evaluation methodology, auditing courses, collection of evaluation data, reviews performance of courses to curriculum revisions; (6) forms and manages advisory councils to support curricula development; and (7) provides consultation and assistance to CIOs in selecting vendor supplied training to meet identified training needs.

Workforce Relations Office (CAJQD). (1) Provides leadership, technical assistance, guidance, and consultation on employee and labor relations, employee services and assistance, work-life programs, performance management, incentive awards, pay, overseas allowances, leave and benefits administration, on-the-job injuries and exposures to infectious diseases, debt complaints and other job-related issues; (2) develops and administers labor-management and employee relations program including: Disciplinary actions, grievances and appeals, labor negotiations, collective bargaining, management representation before third parties, and partnership activities; (3) serves as liaison with the Office of Safety, Security and Asset Management and other CDC/ATSDR staff for personnel matters relating to substance abuse and other employee assistance programs; (4) coordinates and processes garnishment, child support, and other collection actions for CDC/ATSDR employees; (5) plans, directs, coordinates, and conducts contract negotiations on behalf of agency management with labor organizations holding exclusive recognition; (6) represents management in third party proceedings involving labor and employee relations issues; (7) serves as the authority to ensure validity, consistency, and legality of employee relations matters concerning grievances (both negotiated and agency procedures), disciplinary actions, adverse actions, and resultant third party hearings; (8) plans and coordinates all programmatic activities to include preparation of disciplinary and adverse action letters and all final agency decisions in grievances and appeals; (9) provides technical advice, consultation, and training on matters of employee conduct and performance; (10) provides consultation, guidance, and technical advice to human resources specialists, managers, and employees on the development, coordination and implementation of all work-life program initiatives; (11) provides personnel services relating to on-the-job injuries and exposures to infectious diseases; (12) facilitates the development and implementation of an agency-wide strategic approach to monitoring, evaluating, aligning, and improving performance management policies and practices for all CDC performance management systems (Title 5, Title 38 Hybrid, Title 42, Senior Executive Service (SES), Senior Biomedical Research Service (SBRS), and the Commissioned Officer Effectiveness Report (COER); (13) coordinates performance management, strategic rewards and recognition programs and systems; (14) provides human resources services and assistance on domestic and international employee benefits, allowances and leave administration; (15) serves as liaison between CDC/ATSDR and the HHS payroll office resolving discrepancies with pay and leave; (16) administers the leave donor program and processes time and attendance amendments; (17) administers the federal life and health insurance programs; (18) provides policy guidance and technical advice and assistance on retirement, the Thrift Savings Plan, health/life insurance, and savings bonds; (19) furnishes advice and assistance in the processing of Office of Workers Compensation Program claims and the Voluntary Leave Donation Program; and (20) administers the Veteran's Leave Program and process the leave in the payroll system and coordinates with Technical Service Activity to update employee's record.

Office of the Director (CAJQD1). (1) Provides leadership and overall direction for the Workforce Relations Office; (2) develops goals and objectives, and provides leadership, policy formation, oversight, and guidance in program planning and development; (3) plans, coordinates, and develops strategic plans for the Workforce Relations Offices; (4) coordinates all program reviews; (5) provides technical assistance and consultation to the activities within the Workforce Relations Office; and (6) coordinates, develops, and monitors implementation of program initiatives.

Employee and Labor Relations Activity (CAJQD2). (1) Provides leadership, technical assistance, guidance, and consultation on employee and labor relations, employee services; (2) develops and administers labor-management and employee relations program including: Disciplinary actions, grievances and appeals, labor negotiations, collective bargaining, management representation before third parties, and partnership activities; (3) serves as liaison with OSSAM and other CDC/ATSDR staff for personnel matters relating to substance abuse and other employee assistance programs; (4) coordinates and processes garnishment, child support, and other collection actions for CDC/ATSDR employees; (5) plans, directs, coordinates, and conducts contract negotiations on behalf of agency management with labor organizations holding exclusive recognition; (6) represents management in third party proceedings involving labor and employee relations issues; (7) serves as the authority to ensure validity, consistency, and legality of employee relations matters concerning grievances (both negotiated and agency procedures), disciplinary actions, adverse actions, and resultant third party hearings; (8) plans and coordinates all programmatic activities to include preparation of disciplinary and adverse action letters and all final agency decisions in grievances and appeals; (9) provides technical advice, consultation, and training on matters of employee conduct and performance; (10) provides consultation, guidance, and technical advice to human resources specialists, managers, and employees on the development; (12) furnishes advice and assistance in the processing of the Voluntary Leave Donation Program; (13) administers Veterans Leave Program and coordinates with the Technical Services Activity for record update; and (14) provides guidance on the Family Medical Leave Act.

Employee Benefits, Payroll, and Workers Compensation Activity (CAJQD3). (1) Provides consultation, guidance, and technical advice to human resources specialists, managers, and employees on the development, coordination and implementation of all Work Life program initiatives; (2) provides personnel services relating to on-the-job injuries and exposures to infectious diseases; (3) provides human resources services and assistance on domestic and international employee benefits, overseas allowances and leave administration; (4) serves as liaison between CDC/ATSDR and the HHS payroll office resolving discrepancies with pay and leave; (5) audits payroll related discrepancies regarding leave programs and processes time and attendance amendments; (6) administers the federal life and health insurance programs; (7) provides policy guidance and technical advice and assistance on retirement, the Thrift Savings Plan, health/life insurance, and savings bonds; (8) furnishes advice and assistance in the processing of Office of Workers Compensation Program claims; (9) manages and administers the Workers Compensation Program; and

(10) manages the chargeback code and return to work program.

Performance Management, Strategic Rewards, Recognitions, and Work Life Activity (CAJQD4). (1) Facilitates the development and implementation of an agency-wide strategic approach to monitoring, evaluating, aligning, and improving performance management policies and practices for all CDC/ATSDR performance management systems (Title 5, Title 38 Hybrid, Title 42, SES, SBRS, and the COER); (2) coordinates performance management, strategic rewards and recognition programs and systems; (3) administers and manages the Worklife Program, lactation support, transportation subsidy, child care centers; and (4) administers the telework programs to include medical telework.

Client Services Office (CAJQE). (1) Serves as the primary contact for CDC/ATSDR management and employees in obtaining the full range of personnel assistance and management services for civil service personnel; (2) provides leadership, technical assistance, guidance, and consultation in human resource utilization, position management, classification and pay administration, recruitment, staffing, placement, reorganizations, program evaluation, and personnel records and files management; (3) maintains liaison with HHS and OPM in the area of human resources management;

(4) provides leadership in identifying the CIOs recruiting needs, and assesses, analyzes, and assists CDC/ATSDR programs in developing and executing short- and long-range hiring plans to meet these needs; (5) provides guidance to CDC/ATSDR organizations in the development of staffing plans and job analyses, evaluating/classifying position descriptions, conducting position management studies, and responding to desk audit requests; (6) processes personnel actions by determining position classification, issuing vacancy announcements, assisting in development of selection criteria, conducting examining under delegated examining authority, conducting candidate rating and ranking under CDC Merit Promotion Plan, making qualification determinations, determining pay, conducting reductions-in-force, effecting appointments and processing other actions; (7) codes and finalizes all personnel actions in the automated personnel data system, personnel action processing, data quality control/assessment, and files/records management; (8) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (9) establishes objectives, standards, and internal controls; (10) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; (11) manages various staffing programs such as the CDC summer program, Priority Placement Program, Priority Consideration Program, the Interagency Career Transition Assistance Program, and the Career Transition Assistance Program and other special emphasis programs; (12) provides consultation, guidance, and technical advice on recruitment and special emphasis policies, practices, and procedures, including search committees, strategizes on the best approach to recruitment at specific events, and designs and develops recruitment materials for events; (13) establishes and maintains personnel records, files, and controls; (14) establishes and maintains the official personnel files system and administers personnel records storage and disposal program; (15) collaborates with personnel security in initiating suitability background checks and fingerprints for all CDC/ATSDR personnel; (16) responds to employment verification inquiries; and (17) administers the special emphasis programs and student intern/fellowship programs.

Office of the Director (CAJQE1). (1) Provides leadership and overall direction for the Client Services Office; (2) develops goals and objectives, and provides leadership, policy formation, oversight, and guidance in program planning and development; (3) plans, coordinates, and develops strategic plans for the Client Services Offices; (4) coordinates all program reviews; (5) provides technical assistance and consultation to the activities within the Client Services Office; and (6) coordinates, develops, and monitors implementation of program initiatives.

Customer Staffing Activity 1 (CAJQE2). (1) Provides leadership in identifying CIOs recruiting needs, and assesses, analyzes, and assists CDC programs in developing and executing short- and long-range hiring plans to meet these needs; (2) provides guidance to CDC organizations in the development of staffing plans and job analyses; (3) processes personnel actions by issuing vacancy announcements, assisting in development of selection criteria, conducting examinations under delegated examining authority, conducting candidate rating and ranking under CDC Merit Promotion Plan, making qualification determinations, determining pay, conducting reductions-in-force, effecting appointments and processing other actions; (4) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (5) establishes objectives, standards, and internal controls; (6) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; (7) provides consultation, guidance, and technical advice on recruitment policies, practices, and procedures, including search committees, strategizes on the best approach to recruitment at specific events, and designs and develops recruitment materials for events; (8) provides leadership, technical assistance, guidance, and consultation in human resource utilization, position management, classification and pay administration; and (9) codes and finalizes all personnel actions in the automated personnel data system and ensures data quality control/assessment, and files/records management.

Customer Staffing Activity 2 (CAJQE3). (1) Provides leadership in identifying CIOs recruiting needs, and assesses, analyzes, and assists CDC/ATSDR programs in developing and executing short- and long-range hiring plans to meet these needs; (2) provides guidance to CDC/ATSDR organizations in the development of staffing plans and job analyses; (3) processes personnel actions by issuing vacancy announcements, assisting in development of selection criteria, conducting examinations under delegated examining authority, conducting candidate rating and ranking under CDC Merit Promotion Plan, making qualification determinations, determining pay, conducting reductions-in-force, effecting appointments and processing other actions; (4) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (5) establishes objectives, standards, and internal controls; (6) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; (7) provides consultation, guidance, and technical advice on recruitment policies, practices, and procedures, including search committees; strategizes on the best approach to recruitment at specific events, and designs and develops recruitment materials for events; (8) provides leadership, technical assistance, guidance, and consultation in human resource utilization, position management, classification and pay

administration; and (9) codes and finalizes all personnel actions in the automated personnel data system and ensures data quality control/assessment, and files/records management.

Customer Staffing Activity 3 (CAJQE4). (1) Provides leadership in identifying CIOs recruiting needs, and assesses, analyzes, and assists CDC/ATSDR programs in developing and executing short- and long-range hiring plans to meet these needs; (2) provides guidance to CDC organizations in the development of staffing plans and job analyses; (3) processes personnel actions by issuing vacancy announcements, assisting in development of selection criteria, conducting examinations under delegated examining authority, conducting candidate rating and ranking under CDC Merit Promotion Plan, making qualification determinations, determining pay, conducting reductions-in-force, effecting appointments and processing other actions; (4) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (5) establishes objectives, standards, and internal controls; (6) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; (7) provides consultation, guidance, and technical advice on recruitment and special emphasis policies, practices, and procedures, including search committees; strategizes on the best approach to recruitment at specific events, and designs and develops recruitment materials for events; (8) provides leadership, technical assistance, guidance, and consultation in human resource utilization, position management, classification and pay administration; and (9) codes and finalizes all personnel actions in the automated personnel data system and ensures data quality control/assessment, and files/records management.

Classification and Advisory Activity (CAJQE5). (1) Provides guidance to CDC/ATSDR organizations in the development of staffing plans and job analyses, evaluating/classifying position descriptions, conducting position management studies, and responding to desk audit requests; (2) provides leadership, technical assistance, guidance, and consultation in human resource utilization, position management, classification and pay administration; (3) provides leadership in identifying CIOs classification and position management needs; (4) provides guidance to CDC organizations in the development, evaluation/classification of position descriptions; (5) conducts position management studies and responds to desk audit requests; (6) reviews reorganization proposals and provides advice on proposed staffing plans and organizational structures; (7) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (8) establishes objectives, standards, and internal controls; and (9) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures.

Technical Services Activity (CAJQE6). (1) Processes personnel actions by determining pay, conducting reductions-in-force, effecting appointments and processing other actions; (2) codes and finalizes all personnel actions in the automated personnel data system, personnel action processing, data quality control/assessment, and files/records management; (3) establishes objectives, standards, and internal controls; (4) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; (5) establishes and maintains personnel records, files, and controls; (6) establishes and maintains the official personnel files system and administers personnel records storage and disposal program; (7) collaborates with Personnel Security in initiating suitability background checks and fingerprints for all CDC/ATSDR personnel; and (8) responds to employment verification inquiries.

Customer Staffing Activity 4 (CAJQE7). (1) Provides leadership in identifying the CDC/ATSDR international workforce recruiting needs, and assesses, analyzes, and assists programs in developing and executing short- and long-range hiring plans to meet these needs; (2) provides guidance to CDC/ATSDR in the development of staffing plans and job analyses; (3) processes personnel actions by issuing vacancy announcements, assisting in development of selection criteria, conducting examinations under delegated examining authority, conducting candidate rating and ranking under CDC Merit Promotion Plan, making qualification determinations, determining pay, conducting reductions-in-force, effecting appointments and processing other actions; (4) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (5) establishes objectives, standards, and internal controls; (6) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; (7) provides consultation, guidance, and technical advice on recruitment policies, practices, and procedures, including search committees; strategizes on the best approach to recruitment at specific events, and designs and develops recruitment materials for events; (8) provides leadership, technical assistance, guidance, and consultation in human resource utilization, position management, classification and pay administration; and (9) codes and finalizes all personnel actions in the automated personnel data system and ensures data quality control/assessment, and files/records management.

Customer Staffing Activity 5 (CAJQE8). (1) Provides leadership in identifying CIOs recruiting needs, and assesses, analyzes, and assists CDC programs in developing and executing short- and long-range hiring plans to meet these needs; (2) provides guidance to CDC organizations in the development of staffing plans and job analyses; (3) processes personnel actions by issuing vacancy announcements, assisting in development of selection criteria, conducting examinations under delegated examining authority, conducting candidate rating and ranking under CDC Merit Promotion Plan, making qualification determinations, determining pay, conducting reductions-in-force, effecting appointments and processing other actions; (4) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (5) establishes objectives, standards, and internal controls; (6) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; (7) provides consultation, guidance, and technical advice on recruitment policies, practices, and procedures, including search committees; strategizes on the best approach to recruitment at specific events, and designs and develops recruitment materials for events; (8) provides leadership, technical assistance, guidance, and consultation in human resource utilization, position management, classification and pay administration; and (9) codes and finalizes all personnel actions in the automated personnel data system and ensures data quality control/assessment, and files/records management.

Customer Staffing Activity 7/Special Emphasis Activity (CAJQEB). (1) Serves as the primary contact for CDC/ATSDR management and employees in obtaining the full range of personnel assistance and management services for excepted service personnel; (2) manages various staffing programs such as the CDC summer program, Priority Placement Program, Priority Consideration Program, the Interagency Career Transition Assistance Program, and the Career Transition Assistance Program, Pathways Program, Public Health Associates Program, and other special emphasis programs; (3) provides consultation, guidance, and technical advice on recruitment and special emphasis policies, practices, and procedures, including search committees, strategizes on the best approach to recruitment at specific events, and designs and develops recruitment materials for events; (4) establishes and maintains personnel records, files, and controls; (5) administers the Special Emphasis Programs and Student Intern/Fellowship Programs; (6) plans, develops, implements, and evaluates systems to ensure consistently high quality human resources services; (7) establishes objectives, standards, and internal controls; (8) evaluates, analyzes, and makes recommendations to improve personnel authorities, policies, systems, operations, and procedures; and (9) process the agency's Intergovernmental Personnel Act Employees.

Executive and Scientific Resources Office (CAJQG). (1) Provides leadership, technical assistance, guidance, and consultation in the administration of policies and procedures for appointment of individuals through the SBRS, SES, distinguished consultants, experts, consultants, and fellows under Title 42 appointment authorities; (2) provides advisory services and technical assistance on pay and compensation guidelines in accordance with OPM rules and regulations, HHS and CDC/ATSDR established pay and compensation recommendation policies, and procedures; (3) provides expert human resources advisory services and technical assistance support to the CDC/ATSDR performance review boards and compensation committees; (4) reviews actions for statutory and regulatory compliance; (5) manages strategic recruitment, relocation, and retention incentives to facilitate attraction of a quality, diverse workforce to ensure accomplishment of the CDC/ATSDR missions; (6) provides performance management training for all SES and Title 42 executives with emphasis on performance systems, timelines, supervisory and employee responsibilities; (7) provides guidance on establishing performance plans, conducting mid-year reviews, and conducting final performance rating discussions and closing performance plans; (8) develops and maintains a standard Department-wide performance management system and forms for executives; (9) conducts reviews of SES performance plans and appraisals and provide feedback; (10) prepares and submits SES performance system certification request to OPM and OMB; (11) processes performance awards and performance-based pay adjustments; (12) provides advice, assistance, templates and training workshops on performance award and Presidential Rank Award requirements; (13) manages the HHS Executive Development Program, including developmental activities, rotational assignments, and the Candidate Development Program; (14) advises on development of executive succession planning activities; and (15) provides program guidance, administration, and oversight of CDC/ATSDR immigration and visa programs.

Office of the Director (CAJQG1). (1) Provides leadership and overall direction for the Executive and Scientific Resources Office (ESRO); (2) develops goals and objectives, and provides leadership, policy formation, oversight, and guidance in program planning and development; (3) plans, coordinates, and develops strategic plans for ESRO; (4) coordinates all program reviews; (5) provides technical assistance and consultation to the activities within ESRO; and (6) coordinates, develops, and monitors implementation of program initiatives.

Senior Executive Compensation and Performance Activity (CAJQG2). (1) Provides advisory services, and technical assistance on pay and compensation guidelines in accordance with OPM rules and regulations, HHS and CDC/ATSDR established pay and compensation recommendation policies, and procedures; (2) provides expert human resources advisory services and technical assistance support to the CDC performance review boards and compensation committees; (3) reviews actions for statutory and regulatory compliance; (4) manages strategic recruitment, relocation, and retention incentives to facilitate attraction of a quality, diverse workforce to ensure accomplishment of the CDC/ATSDR missions; (5) provides performance management training for all SES and Title 42 executives with emphasis on performance systems, timelines, supervisory and employee responsibilities; (6) provides guidance on establishing performance plans, conducting mid-year reviews, and conducting final performance rating discussions and closing performance plans; (7) develops and maintains a standard Department-wide performance management system and forms for executives; (8) conducts reviews of SES performance plans and appraisals and provides feedback; (9) prepares and submits SES performance system certification request to OPM and OMB; (10) processes performance awards and performance-based pay adjustments; (11) provides advice, assistance, templates and training workshops on performance award and Presidential Rank Award requirements; (12) manages the HHS Executive Development Program, including developmental activities, rotational assignments, and the Candidate Development Program; and (13) advises on development of executive succession planning activities.

Title 42 Staffing and Recruitment Activity (CAJQG3). (1) Provides leadership, technical assistance, guidance, and consultation in the administration of policies and procedures for appointment of individuals through the distinguished consultants, experts, consultants, and fellows under Title 42 appointment authorities; and (2) administers and manages the Guest Researcher and Oak Ridge Institute for Science and Education Program.

Immigration Activity (CAJQG4). (1) Provides technical guidance and visa-assistance for employment based, CDC-sponsored visas; (2) administers and manages the Exchange Visitor Program; (3) works closely with the U.S. Office of Exchange and Cultural Affairs, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, U.S. Department of State, Office of the Secretary/DHHS, and U.S. Department of Labor) to facilitate immigration procedures; (4) reviews, processes and files H–1B, O–1, and Green Card (I–140) Petitions with the U.S. Citizenship and Immigration Services; (5) provides advisory services and guidance on employment based green card petitions in the Alien of Extraordinary Ability category; (6) issues Certificate of Eligibility for J–1 Exchange Visitor Status through the Student and Exchange Visitor Information System to non U.S. citizens seeking CDC J–1 visa sponsorship; (7) coordinates and provides consultations and guidance on Interested Government Agency Waivers; (8) provides immigration training

workshops to CDC/ATSDR administrative staff; and (9) determines the appointment mechanism, legal status, and work authorizations for non U.S. citizens through the Visitors Management System.

Policy, Accountability, Communication, and Engagement Office (CAJQH). (1) Provides leadership, oversight, guidance and support for policy, human capital accountability, communication, and customer engagement activities supporting HRO and CDC/ATSDR; (2) develops, administers and monitors the implementation of human capital and human resources management policies and operational procedures as directed by OPM, HHS, CDC/ATSDR or other pertinent federal agencies to ensure consistent application across CDC/ATSDR; (3) maintains liaison with HHS and OPM on human resources management, policy, compliance and execution of the Human Capital Assessment and Accountability Framework; (4) conducts organizational assessments to determine compliance with human capital policies, guidance, regulatory and statutory requirements of federal human capital and resource management programs and initiatives; and (5) provides issues management and resolution support to HRO as well as internal and external customers.

Office of the Director (CAJQH1). (1) Provides leadership and overall direction for the Policy, Accountability, Communication, and Engagement Office (PACE); (2) develops goals and objectives, and provides leadership, policy formation, oversight, and guidance in program planning and development; (3) plans, coordinates, and develops strategic plans for the PACE Office; (4) coordinates all program reviews; (5) provides technical assistance and consultation to the activities within PACE; and (6) coordinates, develops, and monitors implementation of PACE program initiatives and activities.

Policy Activity (CAJQH2). (1) Provides leadership, oversight, guidance and support for policy activities supporting HRO; (2) develops, administers and monitors the implementation of human capital and human resources management policies and operational procedures as directed by OPM, HHS, CDC/ATSDR or other pertinent federal agencies to ensure consistent application across CDC/ATSDR; (3) serves as the focal point for the analysis, development, technical review and clearance of controlled correspondence and non-scientific policy documents that require approval/signature from the HRO Director or other senior CDC/ATSDR leadership; and (4) responds to and coordinates requests from the OD for issues management information to ensure efficient responses to the director's priority issues.

Human Capital Effectiveness and Accountability Activity (CAJQH3). (1) Operates as an internal audit function to maintain the operational integrity of human resources and human capital areas and safeguards legal and regulatory requirements; (2) ensures that human capital goals and programs are aligned with and support CDC/ATSDR missions; (3) ensures that human capital planning is guided by a data driven, results-oriented process toward goal achievement; (4) ensures that managers and HR practitioners are held accountable for their human capital decisions; (5) assesses the effectiveness and efficiency of the HR function; (6) ensures human capital programs and policies adhere to merit system principles and other pertinent laws and regulations; (7) conducts recurring delegated examining audits and periodic human capital management reviews to verify and validate the level of compliance and performance; and (8) implements a plan for addressing issues or problems identified during accountability audits and related activities.

Communications Activity (CAJQH3). (1) Provides leadership, oversight, guidance and support for communication activities supporting HRO; (2) responds to and coordinates requests from the OD for issues management information to ensure efficient responses to the director's priority issues; (3) provides and manages a wide range of communication services in support of HRO; (4) facilitates open and transparent employee communication; (5) develops and implements internal and external public relations strategies to communicate upward and outward to customers, partners, and other stakeholders; and (6) utilizes multiple channels and methods to communicate and disseminate HR policies, announcements, procedures, information, and other relevant messages.

Customer Service Help Desk and Engagement Activity (CAJQH5). (1) Provides technical assistance, guidance, and consultation on employee and labor relations, employee services, pay, leave and benefits administration, staffing and recruitment, position classification; (2) provides issues management and resolution support to HRO as well as internal and external customers; (3) manages workload assessment and customer based training; (4) monitors customer satisfaction; (5) tracks and assess key performance indicators and other reporting requirements; and (6) administers and maintains the customer service help desk.

Delete in its entirety the titles and the mission and function statements for the *Office of Safety, Security and Asset Management (CAJS),* and insert the following:

Office of Safety, Security, and Asset Management (CAJS). The Office of Safety, Security, and Asset Management (OSSAM) serves as the lead organizational entity for providing a safe, secure, functional, and healthy workplace environment for the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR) staff while ensuring environmental stewardship and appropriate management of CDC assets.

Office of the Director (CAJS1). (1) Directs, manages, coordinates and evaluates the programs and activities of OSSAM service offices; (2) develops goals and objectives, and provides leadership, policy formulation, and guidance in program planning and development; and (3) provides advice and counsel to the CDC Director, the Chief Operating Officer, and other senior Office of the Director (OD) and Centers/Institute/Offices (CIO) officials on all OSSAM programs and activities; (4) provides quality assurance and continuous improvement by establishing a framework for process improvement associated with all OSSAM functions; conducts quality improvement audits on all OSSAM program areas of responsibility; (5) assembles technical advisory teams, as needed, to conduct audits/reviews of OSSAM program areas, (6) oversees technical programs to ensure a safe, secure, and healthy workplace while ensuring all worksite issues are properly addressed and brought to closure; (7) provides oversight and guidance to CIOs through OSSAM liaison officers who support programs as the key contact for matters related to safety, security, facilities, logistics, and sustainability; (8) manages space requests and provides recommendations to the Chief Operating Officer for approval for all CDC CIOs; (9) manages OSSAM information technology support, including system development, maintenance, design, and implementation; (10) provides administrative guidance, advice, and support to OSSAM employees; (12) provides direction, strategy, analysis, and operational support in all aspects of OSSAM's human capital management and administrative operations; (13) develops and implements internal

policies and procedures, including developing related communications; (14) provides employee and labor relations support; (15) serves as the point of contact between OSSAM OD and each of the CDC Business Service Offices (BSOs); (16) provides overall budgetary support and oversight for OSSAM, including budget planning, execution, monitoring, and reporting; (17) provides oversight, guidance and approval for the procurement process OSSAM-wide; (18) provides oversight of property accountability, including appointing an OSSAM property accountability officer; (19) provides guidance and oversight related to the records management requirements and process; (20) establishes and enforces OSSAM-related travel policies; (21) provides technical and managerial direction for the development of organizational and CDC-wide policies as it relates to safety, security, and asset management to support CDC's public health science and programs; (22) participates with senior management in program planning, policy determinations, evaluations, and decisions concerning escalation points for safety, security, and asset management; (23) provides leadership, coordination, and collaboration on issues management and triaging, and ensures the process of ongoing issues identification, management, and resolution; (24) conducts policy analysis, tracking, review, and clearance as it relates to safety, security, and asset management to support CDC's public health science and programs; (25) coordinates with CDC-Washington on authorizations; (26) coordinates with the CDC Office of Financial Resources regarding budget justifications and appropriation matters; (27) manages and responds to Congressional inquiries and media requests as it relates to safety, security, and asset management to support CDC's public health science and programs; (28) serves as the point of contact for the policy analysis, technical review, and final clearance of executive correspondence and policy documents that require approval from the CDC Director, CDC leadership team, or officials; (29) leads OSSAM performance management, including the development of strategic plans, performance metrics, dashboards, quarterly program review materials, and Office of the Chief Operating Officer performance management initiatives; (30) provides OSSAM-wide communications support which includes presentations, messages, clearances, emergency notifications, and meetings; (31) ensures accurate and consistent information dissemination, including Freedom Of Information Act requests and CDC's Division of Issues Management, Analysis, and Coordination controlled correspondence; (32) ensures consistent application of CDC correspondence standards and styles; (33) provides leadership, technical assistance, and consultation in establishing best practices in internal and external business communication and implements external communication strategies to promote and protect CDC's brand (*e.g.,* employee communications, intranet, internet and other communication platforms); (34) serves as OSSAM's community engagement arm; and (35) performs enterprise risk management for OSSAM.

Asset Management Services Office (CAJSB). The Asset Management Services Office (AMSO) provides a safe, secure, healthy, and functional workplace environment for CDC staff by ensuring that assets are managed effectively while maintaining efficient operations and logistical support, customer satisfaction, and environmental stewardship.

Office of the Director (CAJSB1). (1) Plans, directs, and coordinates the functions and activities of AMSO; (2) provides management and administrative direction for budget planning and execution, property management, and personnel management within AMSO; (3) provides leadership and strategic support to senior managers in the determination of CDC's long-term facility needs; (4) coordinates the operations of AMSO staff involved in the planning, evaluation, design, construction, and management of facilities and acquisition of property; (5) provides centralized value engineering services, policy development and coordination, and global acquisition planning for AMSO; (6) assists and advises senior CDC officials in the development, coordination, direction, and assessment of facilities and real property activities throughout CDC's facilities and operations, and assures consideration of facilities management implications in program decisions; (7) provides collaboration and centralized consolidation of division reporting requirements and other deliverables to the Department of Health and Human Services (HHS), the Office of Financial Resources (OFR), and other internal and external entities; and (8) oversees functions of the campus portfolio managers who prepare the capital and repair and improvements (R&I), CDC and HHS-level Facility Project Approval Agreements, asset business plans, campus master plans, and special studies, monitors performance indicators to identify/address portfolio deficiencies, serves on project core teams including, Historic Preservation, Green Building, International Facilities, Real Property Acquisition, Asset Management Team and Security Liaison Activities, and administers the National Environmental Policy Act.

Leased Property Management Services Activity (CAJSB12). (1) Conducts real estate activities throughout CDC, including the acquisition of leased space, and the purchase and disposal of real property for CDC nationwide, with emphasis on current and long-range planning for the utilization of existing and future real property resources; (2) performs space management (assignment and utilization) of all CDC space, both owned and leased, nationwide; (3) provides technical assistance in space planning to meet programmatic needs; (4) executes all easements for owned property, in coordination with campus liaison officers; (5) administers day-to-day management of leased facilities and ensures contract compliance by lessors; (6) provides technical assistance and prepares contract specifications for all repair and improvement projects in leased space; (7) maintains liaison with the General Services Administration regional offices; (8) performs all functions relating to leasing and/or acquisition of real property under CDC's delegation of authority for leasing, including direct lease actions; and (9) coordinates the relocation of CDC personnel within owned and leased space.

Engineering, Maintenance, and Operations Services Office (CAJSBB). The Engineering, Maintenance, and Operations Services Office (EMOSO) manages facilities engineering, engineering controls, security systems engineering, fire alarm and life safety, and monitors, operates, and maintains owned buildings, central utility plants, systems, equipment, and performs systems/building commissioning. Specifically, EMOSO: (1) Operates, maintains, repairs, and modifies CDC's Atlanta-area office buildings, laboratories, and plant facilities, and other designated CDC facilities throughout the U.S. and other geographic areas, and conducts a maintenance and repair program for CDC's program support equipment; (2) develops services for new, improved, and modified equipment to meet program needs; (3) provides technical assistance, reviews maintenance and operation programs, and recommends appropriate action for all Atlanta-area

facilities and other designated CDC facilities throughout the U.S. and other geographic areas; (4) provides recommendations, priorities, and services for new, improved, or modified equipment to meet program needs; (5) provides maintenance and operation of the central energy plant including structures, utilities production and distribution systems, and equipment; (6) conducts a program of custodial services, waste disposal, incinerations, disposal of biological waste and chemical hazardous waste, and other building services at all CDC Atlanta-area facilities and other designated CDC facilities throughout the U.S. and other geographic areas; (7) provides landscape development, repair, and maintenance at all Atlanta-area facilities and other designated CDC facilities throughout the U.S. and other geographic areas; (8) provides hauling and moving services for CDC in the Atlanta-area; (9) provides an Integrated Pest Management Program to control insect and rodents for CDC in Atlanta-area facilities; (10) develops required contractual services and provides supervision for work performed; (11) establishes and maintains a computerized system for maintenance services, for stocking and ordering supplies, and replacement parts; (12) provides for pick-up and delivery of supplies and replacement parts to work sites; (13) maintains adequate stock levels of supplies and replacement parts; (14) prepares design and contract specifications, and coordinates completion of contract maintenance projects; (15) manages CDC's Energy Conservation Program for all CDC facilities; (16) reviews all construction documents for energy conservation goals and compliance with applicable CDC construction standards; (17) participates on all core teams and value engineering teams; (18) provides maintenance and inspection for fire extinguishers and fire sprinkler systems; (19) provides services for the procurement of natural gas; (20) develops and maintains a standard equipment list for all CDC facilities; (21) assists the other AMSO offices with facility-related issues, as needed; (22) provides building coordinators to interface with program personnel to keep the building and equipment functioning; (23) functions as the CDC waste and recycling services manager and (24) coordinates the commissioning of new buildings, structures, systems and components, as necessary; (25) manages the Locksmith Office; (26) maintains inventory controls and measures, and implements, installs, repairs, and re-keys all locks with emphasis on the overall physical security of CDC and its owned and leased facilities; (27) provides security recommendations to CDC programs regarding capabilities and limitations of locking devices; (28) provides combination change services to organizations equipped with cipher locking devices; and (29) coordinates with engineers and architects on CDC lock and keying requirements for new construction.

Projects and Construction Management Services Office (CAJSBC). Projects and Construction Management Services Office (PCMSO) will manage capital improvement projects and repair and improvement projects and project management and construction services: (1) Provides professional architectural/engineering capabilities, and technical and administrative project support to CDC and the national centers for renovations and improvements to CDC-owned facilities and construction of new facilities via capital improvement projects, and repair and improvement projects; (2) develops project management requirements (including determination of methods, means of project completion, and selection of resources; (3) provides critical path method scheduling support for all large capital construction projects and all repair and improvements projects; and (4) provides central cost estimating support for all large capital construction projects, all R&I projects, special projects, feasibility studies, as requested, and certain work orders, as requested.

Design Support Services Office (CAJSBE). The Design Services and Support Office (DSSO) provides (1) professional interior design services, (2) document control and records management—including computer-aided design and drafting, (3) computer-aided facilities management; (4) document and records management, architecture/engineering codes and standards management services ensuring proper configuration control; (5) manages, maintains, and archives facility plans, drawings and technical documents including interim and as-built architectural, mechanical, engineering, plumbing, and concept drawings sufficient to provide accurate sf measurements used by Centers, Institute, and Offices of CDC; (6) maintains space management records in support of work capital fund billing basis; and (7) provides these services and support to all OSSAM customers as well as other BSO customers that require facility drawings/records support in executing mission.

Occupational Health and Safety Office (CAJSC). The Occupational Health and Safety Office (OHSO) works conjointly with all CDC organizations to help create and maintain a safe environment that is free from recognized hazards for all CDC staff, contractors, and visitors; prepares CDC staff for working in hazardous conditions domestically and abroad; and maintains compliance with relevant health, safety and environmental laws and regulations.

Office of the Director (CAJSC1). (1) Provides leadership and direction for OHSO to proactively ensure safe and healthy workplaces at CDC worksites for CDC employees, contractors, and visitors, including deployed personnel; (2) serves as the principal advisor to the Director, OSSAM, with responsibility for the CDC health and safety program; (3) plans, identifies and requests required resources for OHSO; (4) directs, manages and evaluates the operations and programs of OHSO; (5) assures compliance with applicable Federal, state, and local health, safety, and environmental laws and regulations; (6) provides the tools, knowledge, and resources needed for workers to be safe and healthy and to protect the communities adjacent to CDC-owned and leased facilities; (7) promotes healthy and safe work practices to help prevent and mitigate the cause of injuries and illnesses within CDC workplaces; (8) provides advice and counsel to the CDC Director and CIO leadership, CDC safety officers, and nationally and internationally assigned CDC staff on health, safety, and environment-related matters; (9) collaborates with domestic and global partners on CDC staff health and safety issues; (10) plans, organizes and directs OHSO health communication strategies and activities; (11) collaborates with CIOs to provide safety training; (12) provides leadership and oversight to the Quality and Compliance Branch; the Industrial Hygiene and Safety Branch; and (13) supports management and operations by providing administrative and financial services.

Quality and Compliance Branch (CAJSCB). (1) Provides coordination and expertise in program planning, policy development, quality assurance, evaluation, data management, information technology, and risk management to assure compliance; (2) ensures accurate record keeping, reporting, data analysis, and trend identification to improve safety at CDC; (3) provides leadership to ensure completion, updates, and continuous improvement of all required manuals and standard operating procedures; (4)

develops and maintains annual quality and safety improvement plans and assessments; (5) conducts continuous quality improvement of data collection through a data management plan which includes comprehensive systems review and improvement to support service enhancements; (6) identifies CDC and/or government policy priorities for implementation; (7) serves as a primary source of information and expertise regarding policies, activities, and issues related to safety and health; (8) develops quality improvement strategies for customer service and service enhancements that will be incorporated in OHSO program, strategic, and performance plans; and (9) provides ongoing assessments and analysis to identify continuous quality improvement to ensure all OHSO staff provide consistent and accurate information to stakeholders and CDC.

Industrial Hygiene and Safety Branch (CAJSCC). (1) Identifies, assesses, mitigates, and monitors hazards in the workplace; (2) provides leadership, expertise, and training on safety/occupational health and industrial hygiene; (3) provides occupational health and safety technical and consultative services to all (owned and leased) CDC campuses to assure compliance with Federal Occupational Health and Safety Standards, and to provide a workplace free of recognized hazards; (4) supports safety activities of domestic and global staff through the establishment of a safety and occupational health plan, the development and implementation of the risk management policy, and coordination of standard operating procedures with the CIOs; (5) conducts comprehensive safety reviews through safety surveys and audits to ensure that CDC workplaces are free from potential and identified hazards; (6) provides coordinated responses to requests that reflect OHSO policy and compliance standards; and (7) conducts health and safety surveys, accident/illness investigations, safety help desk response/investigations, ergonomic evaluations and follow-ups, employee and workplace monitoring for chemical exposures, noise, indoor air quality and other chemical and physical hazards, job hazard/job safety assessments and use of personal protective equipment, lock-out tag-out procedures, environmental audits and compliance, contractor health and safety plan review, and requested safety support services.

Worklife Wellness Office (CAJSD). The Worklife Wellness Office (WWO) provides an environment that promotes a culture that improves the health and well-being of workers by integrating effective policies, programs, and processes accessible to all staff to sustain and improve performance, increase readiness, and support healthy choices and behaviors. Specifically, WWO: (1) Provides a core set of services and resources related to health and wellness including preventive screenings, health education and campaigns, health consults, personalized evaluation, counseling, and follow-up care/referrals; (2) engages in holistic organizational wellness efforts such as benchmarking best practices, implementing or maintaining proper policy, systems, linkages, physical environment, social environment, and external partners/coalitions outreach; (3) oversees the lifestyle fitness centers; (4) directs the employee assistance program; (5) manages the vending and food services for Atlanta campuses and (6) manages the wellness educational offerings and provides resilience support to staff involved in emergency responses throughout the agency.

Security Services Office (CAJSE). The Security Services Office (SSO) serves as the lead organizational entity for providing the overall framework, direction, coordination, implementation, oversight and accountability for CDC's infrastructure protection, and personnel security program. Specifically, SSO: (1) Serves as the primary liaison for homeland security activities; (2) provides a secure work environment for CDC/ATSDR personnel, visitors and contractors; and (3) plans and implements CDC's crisis management activities which ensure a continued public health response to the nation.

Office of the Director (CAJSE1). (1) Directs, manages, coordinates and evaluates the programs and activities of SSO; (2) develops goals and objectives, and provides leadership, policy formulation and guidance in program planning and development; (3) prepares, reviews, and coordinates budgetary, informational, and programmatic documents; and (4) and serves as a liaison to local, state, and Federal law enforcement entities and security personnel within other HHS Operating Divisions.

Physical Security Operations Branch (CAJSEC). The Physical Security Operations Branch (PSOB) coordinates and implements security operations, including access control and crisis management, for the CDC Headquarters campus and directs and oversees the security guard contract for Atlanta facilities. Specifically, PSOB: (1) Provides coordination, guidance, and security operations; (2) provides campus-wide access control; (3) provides management and oversight of contract guard force and local police; (4) conducts physical security during emergency operations; (5) promotes theft prevention, provides training and conducts investigations; (6) conducts site surveys to assess all physical security activities and correct deficiencies, and implement improvements as necessary; (7) manages and operates CDC's Security Operations Center (SOC) 24 hours a day, seven days a week at the Roybal campus, and other sites as constructed; (8) coordinates nationwide security operations through the Roybal campus SOC; (9) maintains 24-hour emergency notification procedures; (10) manages and maintains the emergency alert system; (11) improves and expands video monitoring to ensure the security of all employees, visitors, contractors and the general public while at the CDC; (12) provides coordination, guidance, and security operations for all Global Communication Center events and visits; (13) manages and coordinates the security of all visitors and guests to all Atlanta-area CDC campuses; (14) provides coordination, guidance, and security operations to all facilities CDC, including all owned and leased sites; (15) provides campus-wide access control for all the Atlanta leased sites, the Chamblee and Lawrenceville campuses, Anchorage, Alaska, and Fort Collins, Colorado, and all other CDC laboratories; (16) provides management and oversight of contract guard force and local police; (17) responsible for physical security during emergency operations; (18) promotes theft prevention, provides training and conducts investigations; (19) conducts site surveys to assess all physical security activities and correct deficiencies and implement improvement as necessary; (20) manages and maintains the emergency alert system; (21) maintains 24-hour emergency notification procedures for Fort Collins, Colorado, San Juan, Puerto Rico, and Anchorage, Alaska; (22) manages and operates CDC's SOC 24 hours a day, seven days a week at Roybal, Ft. Collins, and other sites as constructed; (23) improves and expands video monitoring to ensure the security of all employees, visitors, contractors and the general public while at the CDC; (24) manages and coordinates select agent security and the CDC Safety and Security Plan; (25) manages and maintains the Intrusion Detection Automated System, including P2000; (26) provides coordination, guidance,

and security operations for all CDC laboratories nationwide; and (27) performs parking administration.

Personnel Security Branch (CAJSED). (1) Conducts background investigations and personnel suitability adjudications for employment with CDC in accordance with 5 CFR 731, Executive Order 12968 and Executive Order 10450; (2) submits documentation for security clearances, and maintains an access roster in a security clearance database; (3) implements high risk investigations such as Public Trust Investigations for employees GS–13s and above who meet HHS criteria standards for employees working in Public Trust positions; (4) conducts adjudications for National Agency Check with Inquiries cases and assists HHS in adjudicating security clearance cases; (5) provides personnel security services for full time employees, guest researchers, visiting scientists, students, contract employees, fellows, and the commissioned corps; (6) conducts initial Security Education Briefing and annual Operational Security Training; (7) coordinates employee drug testing; (8) provides identification badges and cardkey access for personnel within all CDC metro Atlanta area facilities as well as some out-of-state CDC campuses; (9) enrolls individuals with a security clearance or approval in the biometric encoding system; (10) maintains hard copy records of all individuals' requests and authorizations for access control readers; and (11) manages and operates cardkey systems.

Internal Emergency Management Branch (CAJSEE). (1) Leads a comprehensive internal emergency management program that efficiently coordinates CDC resources to, first and foremost, protect lives, then to safeguard the environment and property through mitigation, preparedness training, response, continuity and recovery from all natural, man-made and technological hazards that may impact CDC facilities; (2) implements, maintains, and updates CDC's Occupant Emergency Plan/Program; (3) conducts and evaluates annual tabletop, functional, and full-scale exercises for all CDC facilities with Designated Officials and Occupant Emergency Organizations; (4) recommends future emergency management and emergency response-related programs, policies, and/or procedures; (5) provides leadership and coordination in planning and implementation for internal emergencies; and (6) provides leadership and coordination in planning and implementation for internal emergency incidents affecting the CDC facilities, including incident response and support.

Logistics and Property Management Services Office (CAJSG). (1) Develops and implements CDC-wide policies, procedures, and criteria necessary to comply with federal and departmental regulations governing inventory management; property administration; property reutilization and disposal; supply management; shipping, receiving, distribution; (2) determines, recommends, and implements procedural changes needed to maintain effective management of CDC property including but not limited to: Inventory control; property records; and property reutilization and disposal; (3) provides audits, training and technical assistance to CDC Centers/Institute/Offices on inventory management; property administration; property reutilization and disposal including medical and scientific equipment; supply management; and property receiving; (4) determines the requirement for and serves as the functional proponent for the design, test, and implementation of logistics management systems; (5) represents CDC on inter- and intra-departmental committees relevant to logistical functions; (6) serves as the CDC liaison to HHS and other federal agencies on logistical matters such as inventory management; property administration; property reutilization and disposal including chemical hazardous waste; supply management; and receiving and distribution; (7) functions as the CDC waste and recycling services manager; (8) provides medical maintenance management support for CDC's personal property; (9) provides logistics and movement planning support for CDC CIOs; (10) establishes branch goals, objectives, and priorities, and assures consistency and coordination with overall OSSAM logistical goals and objectives; (11) provides expertise for shipping activities, domestic and overseas; (12) determines, recommends, and implements procedural changes needed to maintain effective management of CDC transportation services including but not limited to: Shipping and return of CDC material and transportation of freight, and fleet management; (13) represents CDC on inter- and intra-departmental committees relevant to logistics activities; and (14) develops and implements CDC-wide policies, procedures, and criteria necessary to comply with federal and departmental regulations governing transportation and fleet management.

Public Health Intelligence Office (CAJSH). (1) Provides leadership and operational and technical support for development, and implementation of intelligence consumption activities; (2) analyzes and disseminates intelligence related to public health, medical and scientific intelligence, counterintelligence, insider threat, and global security; (3) researches, compiles, produces, and provides classified and unclassified briefings; (4) performs prepublication review of classified and sensitive information; (5) serves as the CDC liaison with U.S. intelligence community agencies; (6) provides global security oversight in coordination with U.S. government agencies, international organizations, and non-governmental organizations; (7) identifies training needs and recommends specific training objectives to be met and the methods to achieve them; (8) develops, implements, and presents sound and well-grounded training programs to prepare CDC staff members pending deployments or travel abroad; (9) performs security assessments of and technical assistance to CDC international facilities; (10) supports CDC international operational goals through membership on the Department of State Overseas Security Policy Board; (11) provides oversight of the Defensive Counterintelligence and Insider Threat program; (12) processes non-United States citizen requests for physical or logical access; (13) provides guidance over all security issues related to foreign travel matters; (14) provides policy and implementation guidance on all standards and requirements related to the processing and storing of controlled unclassified information; (15) manages and operates CDC's Sensitive Compartmented Information Facility (SCIF) and its secure communications systems; (16) maintains accreditation of CDC's SCIF; (17) manages and operates collateral-level secure facilities nationally; (18) provides policy and implementation guidance on the standards for using classified document control for CDC; (19) provides policy and implementation guidance on all standards and requirements related to the processing and storing of classified information by CDC; (20) develops and administers a physical protection plan for all national security information and material held or processed by CDC in accordance with established laws, mandates, and government-wide policies; (21) acts as Communications Security Custodian for all classified matters involving the National Security Agency; (22) maintains CDC's emergency destruction plan for classified material and equipment; (23) conducts preliminary investigations of security violations relative to the loss or compromise/suspected compromise of

sensitive, classified, or crypto-logic materials or devices throughout CDC; (24) ensures proper destruction of classified documents that are no longer required; (25) conducts security inspections and audits of all national security information storage and processing areas; and (26) provides deployable unclassified and classified communication platforms to support high-level deploying staff to natural or manmade disaster areas in support of COOP plans.

Occupational Health Clinic (CAJSJ). (1) Provides occupational health services to maintain a healthy domestic and global CDC workforce through occupational health clinics and contracted health services; (2) manages CDC occupational health services to ensure CDC compliance with Occupational Health and Safety Standards and to support the occupational requirements of CDC; (3) serves as the CDC resource for routine and emergency response occupational health services; (4) prepares CDC staff to work in hazardous conditions in response to domestic and international public health threats or concerns; (5) provides medical evaluations and consultation for personal protective equipment; (6) assures the safety and health of the CDC workforce for during deployments; (7) supports deployment processes through health screenings and physical examinations, administration of vaccinations and medications, and respiratory clearance; (8) conducts and documents ongoing medical surveillance, as needed, for post-exposures or deployed staff; (9) ensures a prepared and resilient workforce; and (10) develops and maintains procedures that support the occupational health of the CDC workforce.

Robert R. Redfield,

Director, Centers for Disease Control and Prevention.

[FR Doc. 2020–25115 Filed 11–12–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[CDC–2020–0082]

Public Health Associate Program (PHAP) Alumni and Host Site Assessment; Reopening of the Comment Period

AGENCY: Center for State, Tribal, Local, and Territorial Support (CSTLTS), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice and reopening of comment period.

SUMMARY: On July 28, 2018 the Center for State, Tribal, Local, and Territorial Support (CSTLTS), Centers for Disease Control and Prevention (CDC), published a notice in the **Federal Register** announcing the Public Health Associate Program (PHAP) Alumni and Host Site Assessment. Written comments were to be received by September 28, 2020. The Docket Number that was included in the initial publication of this 60 Day **Federal Register** Notice was incorrect. CDC is announcing the reopening of the comment period.

DATES: Electronic or written comments must be received by January 12, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0082, by any of the following methods:

Federal eRulemaking Portal: Regulations.gov. Follow the instructions for submitting comments.

Mail: Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

FOR FURTHER INFORMATION CONTACT: Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

Dated: November 4, 2020.

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–25146 Filed 11–12–20; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Deputy Director for Infectious Diseases (BSC, DDID)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Board of Scientific Counselors, Deputy Director for Infectious Diseases (BSC, DDID). This virtual meeting is open to the public via Zoom, limited only by the space available, which is 500 seats. Pre-registration is required by accessing the link below in the address section.

DATES: The meeting will be held on December 9, 2020, 1:00 p.m. to 5 p.m., EST.

ADDRESSES: Zoom virtual meeting. Pre-registration is required by accessing the link at *https://cdc.zoomgov.com/webinar/register/WN_6_Kuhs0ERBSX73CRak7gRQ.* Instructions to access the meeting will be provided following registration.

FOR FURTHER INFORMATION CONTACT: Hilary Eiring, MPH, Designated Federal Officer, CDC, 1600 Clifton Road NE, Mailstop H24–12, Atlanta, Georgia 30329–4027, Telephone (770) 488–3901; *HEiring@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The BSC, DDID, provides advice and guidance to the Secretary, Department of Health and Human Services; the Director and the Deputy Director for Infectious Diseases (DDID), CDC; and the Directors of the National Center for Emerging and Zoonotic Infectious Diseases, the National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, and the National Center for Immunization and Respiratory Diseases, CDC, in the following areas: Strategies, goals, and priorities for programs and research within the national centers and monitor the overall strategic direction and focus of DDID and the national centers.

Matters To Be Considered: The agenda will include updates and discussions on recent outbreaks and affected populations, as well as a brief report back from the Board's Food Safety Modernization Act Surveillance Working Group. Agenda items are subject to change as priorities dictate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–25063 Filed 11–12–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0052]

Documenting Electronic Data Files and Statistical Analysis Programs; 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 (GFI) #197 entitled ''Documenting Electronic Data Files and Statistical Analysis Programs.'' This guidance is intended to inform sponsors of recommendations for documenting electronic data files and statistical analyses submitted to the Center for Veterinary Medicine (CVM) to support new animal drug applications.

DATES: The announcement of the guidance is published in the **Federal Register** on November 13, 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–2009–D–0052 for ''Documenting Electronic Data Files and Statistical Analysis Programs.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. 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: Virginia Recta, Center for Veterinary Medicine (HFV–160), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0840, *virginia.recta@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of GFI #197 entitled ''Documenting Electronic Data Files and Statistical Analysis Programs.'' In the **Federal Register** of May 21, 2018 (83 FR 23468), FDA published the notice of availability for a draft guidance entitled ''Documenting Electronic Data Files and Statistical Analysis Programs,'' giving interested persons until July 20, 2018, to comment on the draft guidance. On July 20, 2018, FDA published a notice of availability announcing the extension of the comment period to October 18, 2018 (83 FR 34595). FDA received numerous comments on the draft guidance and these comments were considered as the guidance was finalized. The guidance announced in this notice finalizes the draft guidance dated May 2018.

This guidance is intended to inform sponsors of recommendations for

documenting electronic data files and statistical analyses submitted to CVM to support new animal drug applications. These recommendations are intended to reduce the number of revisions that may be required for CVM to effectively review data submissions. They are also intended to simplify submission preparation for sponsors by providing a suggested documentation framework, including a sample structure on how to describe and organize the information regarding the electronic data files and statistical analysis programs.

This Level I 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 ''Documenting Electronic Data Files and Statistical Analysis Programs.'' 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 (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required.

However, this guidance refers to previously approved collections of information. These collections of information are subject to review by OMB under the PRA (44 U.S.C. 3501–3521). The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032.

III. Electronic Access

Persons with access to the internet may obtain the guidance at either *https://www.fda.gov/animal-veterinary/guidance-regulations/guidance-industry* or *https://www.regulations.gov.*

Dated: November 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–25131 Filed 11–12–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1992]

Prospective Grant of an Exclusive Patent License: Field-Deployable Mass Spectrometer Diagnostic for SARS, SARS–CoV–2 and Other Viruses, Bacteria and Bacterial Serovar, and Drug Impurities

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is contemplating the grant of an Exclusive Patent License to practice the invention embodied in the U.S. Patent listed in the Supplementary Information section of this notice to Advion, Inc. located in Ithaca, New York.

DATES: Only written comments and/or applications for a license which are received by the Food and Drug Administration's Technology Transfer Program on or before November 30, 2020 will be considered.

ADDRESSES: Inquiries and comments relating to the contemplated Exclusive Patent License should be directed to: Ken Millburne, Food and Drug Administration Technology Transfer Program, Bldg. 1, Rm. 4213, Silver Spring, MD 20993, 240–478–1662; email: *Kenneth.millburne@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Intellectual Property

FDA Reference No.: E–2011–021: ''Direct Impact Ionization (DII) Mass Spectrometry.''

I. U.S. Non-Provisional Application 13/271,182, filed October 11, 2011 (FDA Reference No.: E–2011–021/US–02).

II. U.S. Patent granted April 22, 2014: U.S. Patent 8,704,169 B2 (FDA Reference No. E–2011–021/U.S.–02)

The patent rights in this invention have been assigned to the Government of the United States of America.

The prospective exclusive license territory may be worldwide and in fields of use that may be limited to manufacture and commercialization of a field-deployable mass spectrometer diagnostic for the rapid detection of SARS, SARS–CoV–2 and other viruses, bacteria and bacterial serovar, and drug impurities.

Above listed patent covers inventions directed to a mass spectrometer for analyzing samples suspected of having microorganisms. It is also directed to methods for generating a mass spectrum profile of a sample.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing. The prospective exclusive license may be granted unless within 15 days from the date of this published notice, FDA receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: November 9, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–25142 Filed 11–12–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Special Volunteer and Guest Researcher Assignment (Office of Intramural Research, Office of the Director)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, to provide opportunity for public comment on proposed data collection projects, the Office of Intramural Research (OIR), Office of the Director (OD), National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection

plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Dr. Arlyn Garcia-Perez, Director of Policy and Analysis, Office of Intramural Research, Office of the Director, National Institutes of Health, 1 Center Drive MSC 0140, Building 1, Room 160, MSC–0140, Bethesda, Maryland, 20892 or call non-toll-free number (301) 496–1921 or (301) 496–1381 or Email your request, including your address to: *GarciaA@od.nih.gov*. Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimizes the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Special Volunteer and Guest Researcher Assignment form—EXTENSION OMB # 0925–0177, exp., date February 28, 2021, Office of Intramural Research (OIR), Office of the Director (OD), National Institutes of Health (NIH).

Need and Use of Information Collection: Form Number: NIH–590 is a single form completed by an NIH official for each Guest Researcher or Special Volunteer prior to his/her arrival at NIH. The information on the form is necessary for the approving official to reach a decision on whether to allow a Guest Researcher to use NIH facilities, or whether to accept volunteer services offered by a Special Volunteer. If the original assignment is extended, another form notating the extension is completed to update the file. In addition, each Special Volunteer and Guest Researcher reads and signs an NIH Agreement.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 422.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual hour burden hours
Special Volunteer and Guest Researcher Assignment.	Special Volunteers and Guest researchers.	2,300	1	6/60	230
NIH Special Volunteer Agreement	Special Volunteers	2,100	1	5/60	175
NIH Guest Researcher Agreement ...	Guest Researchers	200	1	5/60	17
Totals	.....	2,300	4,600	.....	422

Dated: November 4, 2020.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2020–25091 Filed 11–12–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Dianca Finch, Ph.D., 240–669–5503; *dianca.finch@nih.gov*. Licensing information and copies of the U.S. patent application listed below may be obtained by communicating with the indicated licensing contact at the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD 20852; tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished patent applications.

SUPPLEMENTARY INFORMATION: Technology description follows:

Identification of a New Human Monoclonal Antibody That More Potently Prevents Malaria Infection

Description of Technology:

Malaria is a major disease caused by a parasite transmitted through the bite of infected female mosquitoes. Globally, an estimated 214 million cases of malaria and 438,000 deaths from malaria occur annually, with chidren in African and South Asian regions being most vulnerable. Approximately 1,500–2,000 cases of malaria are reported in the United States each year, mostly in returning travelers from malaria-endemic countries. Among the international travelers, military personnel, diplomats, pregnant women, children and older individuals with weakened immune systems are more likely to be at risk of malaria infection and mortality.

Currently, there is no licensed vaccine against *Plasmodium falciparum,* the deadliest species of malaria parasites. Antibodies can prevent malaria infection by binding to sporozoites, the infectious form of *P. falciparum* that is transmitted to humans by the bites of infected mosquitoes. The major target of anti-sporozoite antibodies is the *P. falciparum* circumsporozoite protein (PfCSP), an abundant surface protein on sporozoites that is essential for infecting liver cells, which is the critical step for initiating a productive infection. PfCSP is comprised of an N-terminal domain, a central region and the C-terminal region.

Researchers at the Vaccine Research Center (VRC) of the National Institute of Allergy and Infectious Diseases (NIAID)

have isolated a new neutralizing recombinant human monoclonal antibody, L9, from a protected volunteer immunized with whole *Plasmodium falciparum* sporozoites. L9 is notable for targeting PfCSP, the immunodominant immunogen that coats the surface of the sporozoite, specifically the Plasmodium infectious form injected into the human host by the mosquito. Also, in vivo studies in a mouse model of malaria infection demonstrated that L9 is more potent than CIS43, another antimalarial mAb, at preventing malaria infection.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404.

Potential Commercial Applications:

• A passive vaccine candidate to prevent and eradicate malaria.

Competitive Advantages:

• L9 may represent a more attractive passive vaccine candidate to advance through clinical testing and could yield a product superior to other vaccine candidates due to potency and preferential binding to unique epitopes on PfCSP.

• L9 may result in more durable protection than other vaccine candidates.

Development Stage: Preclinical Research.

Inventors: Robert Alan Seder (NIAID); Lawrence Tsuchun Wang (NIAID); Rachel Marie Vistein (NIAID); Joseph Richard Francica (NIAID).

Publications: Wang, L. T., *et al.* (2020). A Potent Anti-Malarial Human Monoclonal Antibody Targets Circumsporozoite Protein Minor Repeats and Neutralizes Sporozoites in the Liver. *Immunity.*

Intellectual Property: HHS Reference Number E–087–2019 includes PCT Patent Application Number PCT/US2020/031345 filed on 05/04/2020.

Licensing Contact: To license this technology, please contact Dianca Finch, Ph.D., 240–669–5503; *dianca.finch@nih.gov.*

Dated: November 6, 2020.

Surekha Vathyam,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2020–25098 Filed 11–12–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Environmental Health Training Grant Review Meeting II.

Date: November 20, 2020.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

Contact Person: Varsha Shukla, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, National Institute of Environmental Health Science, 530 Davis Dr., Keystone Bldg., Room 3094, Durham, NC 27713, 984–287–3288, *Varsha.shukla@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Review of EHS Conference Grant Applications.

Date: December 3, 2020.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

Contact Person: Janice B. Allen, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Science, P.O. Box 12233, MD EC–30/Room 3170 B, Research Triangle Park, NC 27709, 984–287–3232, *allen9@niehs.nih.gov.*

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel; Educational Training in Occupational Health and Safety.

Date: December 11, 2020.

Time: 11:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

Contact Person: Linda K. Bass, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, 984–287–3236, *bass@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: November 6, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–25097 Filed 11–12–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3547–EM; Docket ID FEMA–2020–0001]

Louisiana; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Louisiana (FEMA–3547–EM), dated October 7, 2020, and related determinations.

DATES: This amendment was issued October 9, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of an emergency declaration for the State of Louisiana is hereby amended to include reimbursement for eligible emergency protective measures for the following areas among those areas determined to have been adversely affected by the event declared an

emergency by the President in his declaration of October 7, 2020.

The parishes of Grant, La Salle, Natchitoches, Sabine, Vernon, and Winn for reimbursement for eligible emergency protective measures (already designated for emergency protective measures (Category B), limited to direct Federal assistance assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25073 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4562–DR; Docket ID FEMA–2020–0001]

Oregon; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Oregon (FEMA–4562–DR), dated September 15, 2020, and related determinations.

DATES: This amendment was issued October 20, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Oregon is hereby amended to include permanent work for the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 15, 2020.

Tillamook County for debris removal [Category A] and permanent work [Categories C–G] (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

Clackamas, Douglas, Jackson, Klamath, Lane, Lincoln, Linn, and Marion Counties for permanent work [Categories C–G] (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25082 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3548–EM; Docket ID FEMA–2020–0001]

Mississippi; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Mississippi (FEMA–3548–EM), dated October 8, 2020, and related determinations.

DATES: This amendment was issued October 19, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective October 11, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25074 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4564–DR; Docket ID FEMA–2020–0001]

Florida; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–4564–DR), dated September 23, 2020, and related determinations.

DATES: This amendment was issued October 14, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective September 28, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049,

Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25087 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4566–DR; Docket ID FEMA–2020–0001]

Delaware; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Delaware (FEMA–4566–DR), dated October 2, 2020, and related determinations.

DATES: The declaration was issued October 2, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 2, 2020, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Delaware resulting from Tropical Storm Isaias during the period of August 4 to August 7, 2020, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Delaware.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Timothy S. Pheil, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Delaware have been designated as adversely affected by this major disaster:

Kent County for Public Assistance.

All areas within the State of Delaware are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25089 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3545–EM; Docket ID FEMA–2020–0001]

Alabama; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Alabama (FEMA–3545–EM), dated September 14, 2020, and related determinations.

DATES: This amendment was issued October 14, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective September 16, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25071 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4558–DR; Docket ID FEMA–2020–0001]

California; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4558–DR), dated August 22, 2020, and related determinations.

DATES: This amendment was issued October 15, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to include the following areas among those areas determined to have been adversely

affected by the event declared a major disaster by the President in his declaration of August 22, 2020.

Lassen and Tulare Counties for Individual Assistance.

Lassen and Tulare Counties for Public Assistance, including direct federal assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25079 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3534–EM; Docket ID FEMA–2020–0001]

North Carolina; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of North Carolina (FEMA–3534–EM), dated August 2, 2020, and related determinations.

DATES: This change occurred on October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Myra M. Shird, of FEMA is appointed to act as the Federal Coordinating Officer for this emergency.

This action terminates the appointment of Elizabeth Turner as Federal Coordinating Officer for this emergency.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25070 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4412–DR; Docket ID FEMA–2020–0001]

North Carolina; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA–4412–DR), dated January 31, 2019, and related determinations.

DATES: This change occurred on October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Myra M. Shird, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Elizabeth Turner as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25076 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4558–DR; Docket ID FEMA–2020–0001]

California; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of California (FEMA–4558–DR), dated August 22, 2020, and related determinations.

DATES: This amendment was issued October 14, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 14, 2020, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), in a letter to Pete Gaynor, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in certain areas of the State of California resulting from wildfires beginning on August 14, 2020, and continuing, is of sufficient

severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act'').

Therefore, I amend my declaration of August 22, 2020, to authorize a 100 percent Federal cost share for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program for a continuous period of 30 days established by the State of California.

This adjustment to State and local cost sharing applies only to Public Assistance costs and direct Federal assistance eligible for such adjustments under the law. The Robert T. Stafford Disaster Relief and Emergency Assistance Act specifically prohibits a similar adjustment for funds provided for Other Needs Assistance (Section 408), and the Hazard Mitigation Grant Program (Section 404). These funds will continue to be reimbursed at 75 percent of total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25139 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3546–EM; Docket ID FEMA–2020–0001]

Florida; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Florida (FEMA–3546–EM), dated September 15, 2020, and related determinations.

DATES: This amendment was issued October 14, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective September 28, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25072 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4563–DR; Docket ID FEMA–2020–0001]

Alabama; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–4563–DR), dated September 20, 2020, and related determinations.

DATES: This amendment was issued October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 20, 2020.

Barbour, Butler, Clark, Coffee, Covington, Crenshaw, Geneva, Houston, and Pike Counties for Public Assistance.

The Poarch Band of Creek Indians for debris removal [Category A] and permanent work [Categories C–G] (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25085 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4543–DR; Docket ID FEMA–2020–0001]

North Carolina; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA–4543–DR), dated May 8, 2020, and related determinations.

DATES: This change occurred on October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order

12148, as amended, Myra M. Shird, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Elizabeth Turner as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25078 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4465–DR; Docket ID FEMA–2020–0001]

North Carolina; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA–4465–DR), dated October 4, 2019, and related determinations.

DATES: This change occurred on October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Myra M. Shird, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Elizabeth Turner as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25077 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4393–DR; Docket ID FEMA–2020–0001]

North Carolina; Amendment No. 13 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA–4393–DR), dated September 14, 2018, and related determinations.

DATES: This change occurred on October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Myra M. Shird, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Elizabeth Turner as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25075 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4564–DR; Docket ID FEMA–2020–0001]

Florida; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–4564–DR), dated September 23, 2020, and related determinations.

DATES: This amendment was issued October 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Florida is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 23, 2020.

Jefferson County for Public Assistance, including direct federal assistance.

Bay, Okaloosa, and Walton Counties for debris removal [Category A] and permanent work [Categories C–G] (already designated for Individual Assistance and assistance for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

Calhoun, Franklin, Gadsden, Gulf, Holmes, Jackson, Liberty, and Washington Counties

for debris removal [Category A] and permanent work [Categories C–G](already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25086 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4563–DR; Docket ID FEMA–2020–0001]

Alabama; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–4563–DR), dated September 20, 2020, and related determinations.

DATES: This amendment was issued October 9, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include permanent work under the Public Assistance program for those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 20, 2020.

Baldwin, Escambia, and Mobile Counties for permanent work [Categories C–G] (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program.)

Conecuh County for Public Assistance, including direct federal assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25083 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4558–DR; Docket ID FEMA–2020–0001]

California; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4558–DR), dated August 22, 2020, and related determinations.

DATES: This amendment was issued October 18, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 22, 2020.

Trinity County for Individual Assistance.

Sierra, Trinity, and Tuolumne Counties for Public Assistance, including direct federal assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25080 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4563–DR; Docket ID FEMA–2020–0001]

Alabama; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–4563–DR), dated September 20, 2020, and related determinations.

DATES: This amendment was issued October 9, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective September 16, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049,

Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25084 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4565–DR; Docket ID FEMA–2020–0001]

North Dakota; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of North Dakota (FEMA–4565–DR), dated October 2, 2020, and related determinations.

DATES: The declaration was issued October 2, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated October 2, 2020, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of North Dakota resulting from severe storms and flooding during the period of June 29 to July 1, 2020, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of North Dakota.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, James R. Stephenson, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of North Dakota have been designated as adversely affected by this major disaster:

Benson, Grand Forks, McKenzie, Mountrail, Nelson, and Wells Counties for Public Assistance.

All areas within the State of North Dakota are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25088 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4559–DR; Docket ID FEMA–2020–0001]

Louisiana; Amendment No. 12 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–4559–DR), dated August 28, 2020, and related determinations.

DATES: This amendment was issued October 15, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 28, 2020.

St. Mary Parish for debris removal [Category A] (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

Acadia, La Salle, Natchitoches, Sabine, and Vermilion Parishes for permanent work [Categories C–G] (already designated for Individual Assistance and debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

Bienville, Claiborne, Evangeline, and Webster Parishes for permanent work [Categories C–G] (already designated for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

Lafayette, Pointe Coupee, St. Martin, and West Feliciana Parishes for debris removal [Category A] and permanent work [Categories C–G] (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

Morehouse, St. Landry, and Union Parishes for debris removal [Category A] and permanent work [Categories C–G] (already designated for Individual Assistance and emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–25081 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0124]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Consideration of Deferred Action for Childhood Arrivals

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until January 12, 2021.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0124 in the body of the letter, the agency name and Docket ID USCIS–2012–0012. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2012–0012. USCIS is limiting communications for this Notice as a result of USCIS' COVID–19 response actions.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number 240–721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, the associated draft supporting statement, or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2012–0012 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Consideration of Deferred Action for Childhood Arrivals.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–821D; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals or households. The information collected on this form is used by USCIS to determine eligibility of certain illegal aliens who entered the United States as minors and meet the following guidelines to be considered for Deferred Action for Childhood Arrivals:

1. Was under the age of 31 as of June 15, 2012;

2. Came to the United States before reaching his or her 16th birthday;

3. Has continuously resided in the United States since June 15, 2007, up to the present time;

4. Was present in the United States on June 15, 2012 and at the time of making his or her request for consideration of deferred action with USCIS;

5. Had no lawful status on June 15, 2012; NOTE: No lawful status on June 15, 2012 means that:

a) You never had a lawful immigration status on or before June 15, 2012; or

b) Any lawful immigration status or parole that you obtained prior to June 15, 2012 had expired as of June 15, 2012.

6. Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED) certificate, or is an honorably discharged veteran of the U.S. Armed Forces or U.S. Coast Guard; and

7. Has not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and does not otherwise pose a threat to national security or public safety.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–821D Renewal Requests is 418,775 and the estimated hour burden per response is 3 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,256,325 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $46,065,250.

Dated: November 5, 2020.

Samantha L Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2020–25036 Filed 11–12–20; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7027–N–33]

60-Day Notice of Proposed Information Collection: FHA-Insured Mortgage Loan Servicing of Delinquent, Default, and Foreclosure With Service Members Act

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date: January 12, 2021.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400 (this is not a toll-free number) . Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: FHA-Insured Mortgage Loan Servicing of Delinquent, Default and Foreclosure With Service Members Act.

OMB Approval Number: 2502–0584.

Type of Request: Extension of currently approved collection.

Form Numbers: HUD–2008–5–FHA Save Your Home Tips to Avoid Foreclosure, Electronic HUD–92068–A Monthly Delinquent Loan Report, HUD–92070 Service Members Civil Relief Act Notice Disclosure, Electronic EVARS New Extension Request.

Description of the need for the information and proposed use: This information request for OMB review involves mortgage loan servicers, ''mortgagees'' that service Federal Housing Administration (FHA) insured mortgage loans and the borrowers (Mortgagors) who are involved with the delinquent, in default, in foreclosure with Service Members Act activities. The data and information provided is essential for managing HUD's programs and the FHA's Mutual Mortgage Insurance Fund (MMI).

Respondents: Business or other for-profit Servicers of FHA-insured mortgage loans.

Estimated Number of Respondents: 14,609.

Estimated Number of Responses: 37,756,732.

Frequency of Response: Monthly.

Average Hours per Response: 7 minutes.

Total Estimated Burdens: 4,458,637.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 2 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Dana T. Wade,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2020–25047 Filed 11–12–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Fish and Wildlife Service

[21XL1109AF LLUTC03000 L16100000.DS0000 LXSSJ0740000; UTU–93620; 13–08807]

Notice of Availability of the Final Environmental Impact Statement To Consider a Highway Right-of-Way, Amended Habitat Conservation Plan and Issuance of an Incidental Take Permit for the Mojave Desert Tortoise, and Proposed Resource Management Plan Amendments, Washington County, UT

AGENCY: Bureau of Land Management, Interior; Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 (NEPA), as amended, the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, the Omnibus Public Land Management Act of 2009 (OPLMA), and the Endangered Species Act of 1973 (ESA), as amended, the Bureau of Land Management (BLM) and the United States Fish and Wildlife Service (FWS), as co-lead agencies, announce the availability of the Final Environmental Impact Statement (EIS) to consider a right-of-way (ROW) application (referred to henceforth as the Northern Corridor) submitted by the Utah Department of Transportation (UDOT) and Proposed Amendments to the St. George Field Office and Red Cliffs National Conservation Area (NCA) Resource Management Plans (RMPs).

DATES: The BLM planning regulations state that any person who meets the conditions as described in the regulations may protest the planning-level management actions in the BLM's Proposed Amendments to the RMPs. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its Notice of Availability of the Final EIS and Proposed

Amendments to the RMPs in the **Federal Register**.

ADDRESSES: The Final EIS, Proposed Amendments to the RMPs, and amended Habitat Conservation Plan (HCP) are available for review on the BLM ePlanning project website at *https://eplanning.blm.gov/eplanning-ui/project/1502103/510.* Click the ''Documents'' link on the left side of the screen to find the electronic versions of these materials. Instructions for filing a protest regarding the Proposed Amendments to the RMPs may be found online at *https://www.blm.gov/filing-a-plan-protest* and at 43 CFR 1610.5–2.

All protests must be in writing and submitted, as set forth in the **DATES** and **ADDRESSES** sections above.

FOR FURTHER INFORMATION CONTACT: Gloria Tibbetts, BLM Color Country District Planning and Environmental Coordinator, telephone: (435) 865–3063; address: 176 DL Sargent Dr., Cedar City, UT 84721; email: *BLM_UT_NorthernCorridor@blm.gov.* If you would like to request to view a hard copy, please call the St. George Field Office for more information at (435) 688–3200, Monday through Friday, except holidays. For information on the Amended HCP or Incidental Take Permit (ITP) application, please contact Yvette Converse, Field Supervisor, U.S. Fish and Wildlife Service, telephone: (801) 975–3330 ext. 61912; email: *utahfieldoffice_esa@fws.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, 7 days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: In compliance with section 10(a)(1)(B) of the ESA, the FWS is considering the issuance of an ITP to Washington County, Utah (County). The ITP would authorize the take of the federally listed as threatened Mojave desert tortoise incidental to covered activities such as residential and commercial development for a 25-year permit term. The application for the permit requires the County to amend its 1995 HCP to current standards and ensure impacts from covered activities and changed circumstances are avoided, minimized, and mitigated to the maximum extent practicable. The 62,000-acre Red Cliffs Desert Reserve (Reserve)—of which approximately 70 percent is now within the congressionally-designated Red Cliffs NCA—was established pursuant to commitments in the 1995 HCP.

On September 4, 2018, UDOT submitted an application for a ROW grant for the Northern Corridor Project north of the City of St. George, Utah, on BLM-administered public and non-Federal lands across the NCA and Reserve. The Reserve was established for the protection of the Mojave desert tortoise under the 1995 Washington County HCP. The NCA was established in 2009 through the passage of OPLMA. The 1995 HCP expired in 2016 and the FWS extended it to allow the County to amend the HCP pursuant to Section 10(a)(1)(B) of the ESA. The FWS received an application for an ITP dated January 30, 2015. The amended HCP includes the proposed Northern Corridor as a changed circumstance, with Reserve Zone 6 as the primary proposed addition to the conservation strategy. The BLM is also proposing amendments to the Red Cliffs NCA and St. George Field Office RMPs that would allow consideration of and mitigation (Reserve Zone 6) for the proposed Northern Corridor Project.

The Final EIS considers four proposed actions: (1) Whether the BLM will approve a 1.9-mile ROW section of the approximately four-mile long Northern Corridor Project that crosses the 62,000-acre Reserve, of which 45,000 acres were congressionally established as the Red Cliffs NCA; (2) Whether the BLM will amend the Red Cliffs NCA RMP to allow for a transportation ROW and/or utility corridor within the NCA; (3) Whether the FWS will issue an ITP for the Mojave desert tortoise for specific land use and land development activities in Washington County; and (4) Whether the BLM will amend the St. George Field Office RMP to modify management on approximately 3,471 acres within a 6,813-acre area (Reserve Zone 6) outside the Reserve and NCA to offset the ROW impacts. The other half of Reserve Zone 6 is primarily owned by the Utah School and Institutional Trust Lands Administration and proposed management of this area is included in the HCP Implementation Agreement and would be generally consistent with similar areas in the Reserve.

Scoping was initiated with the publication of a Notice of Intent in the **Federal Register** on December 5, 2019 (84 F R 66692). The scoping period was open through January 6, 2020. A public scoping meeting was held in St. George, Utah, on December 17, 2019. The BLM and FWS considered all input received during the scoping period. A summary of the comments received during the scoping period can be found in the Scoping Report posted on the project website at *https://eplanning.blm.gov/eplanning-ui/project/1502103/510.* The Notice of Availability for the Draft EIS was published on June 12, 2020, (85 FR 35950) initiating a 90-day public comment period. Online public meetings were held on July 16, 2020 and July 21, 2020. In accordance with the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, Public Law 116–9, 16 U.S.C. 7913, and 43 CFR 8364.1, a Notice of Intent was published in the *St. George Spectrum* newspaper on June 18, 2020, notifying the public of the concurrent comment period for the proposed permanent recreational shooting closure within the proposed Reserve Zone 6 area southwest of St. George, Utah.

Substantive public comments and ongoing agency coordination led to several changes from the Draft EIS, including the addition of: (1) Data and analysis associated with wildfires that occurred within Washington County in 2020, (2) additional conservation measures proposed by UDOT, the County, the BLM, and others to address potential project impacts, (3) preliminary cost estimates for each highway alternative, (4) updates related to lands acquired under the Land and Water Conservation Fund Act, and (5) a distinction between planning-level and implementation-level management actions in the Proposed Amendments to the St. George Field Office RMP. The BLM and FWS responded to substantive comments and made appropriate revisions in the Final EIS or explained why a comment did not warrant a change, as documented in Appendix O of the Final EIS.

The Final EIS considers the impacts of the proposed action, four other alternative highway alignments, and a no action alternative. Under Alternative 1, the No Action Alternative, the BLM would deny UDOT's application for a ROW across the Red Cliffs NCA for the Northern Corridor and would not amend either the Red Cliffs NCA or St. George Field Office RMP. The FWS would deny the County's application for an ITP. The No Action alternative provides a baseline against which to compare the action alternatives in the EIS.

Under Alternative 2, the T-Bone Mesa Alignment, the BLM would issue a ROW grant to UDOT for the Northern Corridor across the NCA skirting the southern edge of T-Bone Mesa. The Red Cliffs NCA RMP would be amended to allow for the ROW and consider designation of a utility corridor along the same route. The ITP would be issued subject to the conservation measures in the amended HCP. The St. George Field Office RMP would be amended to support the conservation

measures outlined for Reserve Zone 6 in the amended HCP.

Under Alternative 3, the preferred alternative, the UDOT Application Alignment, the BLM would issue a ROW grant to UDOT across the Red Cliffs NCA for the Northern Corridor for the alignment included in UDOT's ROW application. The Red Cliffs NCA RMP would be amended to allow for the ROW and consider a utility corridor along the same route. The ITP would be issued subject to the conservation measures in the amended HCP. The St. George Field Office RMP would be amended to support the conservation measures outlined for Reserve Zone 6 in the revised HCP.

Under Alternative 4, the Southern Alignment, the BLM would issue a ROW grant to UDOT across the NCA for the Northern Corridor on the Southern Alignment. Under this alternative, the Northern Corridor would more closely follow the southern border of the NCA. The Red Cliffs NCA RMP would be amended to allow for the ROW and to consider a utility corridor along the same route. The ITP would be issued subject to the conservation measures in the amended HCP. The St. George Field Office RMP would be amended to support the conservation measures outlined for Reserve Zone 6 in the revised HCP.

Under Alternative 5, the Red Hills Parkway Expressway Alignment, the BLM would grant necessary ROW amendments to the existing ROW for the Red Hills Parkway to convert Red Hills Parkway into a grade-separate expressway between Highland Drive and Bluff Street. The ITP would be issued subject to the conservation measures in the amended HCP, but the changed circumstance for the Northern Corridor and associated conservation measures would not be implemented. The Red Cliffs NCA and the St. George Field Office RMPs would not be amended because Reserve Zone 6 would not be needed to mitigate for impacts to desert tortoises.

Under Alternative 6, the St. George Boulevard/100 South One-Way Couplet, the BLM would deny UDOT's application for a ROW across the Red Cliffs NCA for the Northern Corridor. Rather, this alternative analyzes a scenario where the City of St. George would convert St. George Boulevard and 100 South to one-way streets. If the City implemented Alternative 6, the two roadways would be converted between I–15 and Bluff Street and the existing interchange with I–15 at St. George Boulevard would be reconfigured and combined with a new interchange at 100 South to provide a split interchange between these two roadways connected by one-way ramps. The ITP would be issued subject to the conservation measures in the amended HCP, but the changed circumstance for the Northern Corridor and associated conservation measures would not be implemented. The Red Cliffs NCA RMP and the St. George Field Office RMP would not be amended.

The BLM and FWS have identified Alternative 3 as the agencies' preferred ROW alignment and ITP issuance alternative, with Alternative B identified as the Proposed Amendments to the Red Cliffs NCA and St. George Field Office RMPs. Identification of these alternatives, however, does not represent a final agency decision.

Authority: Consistent with 40 CFR 1506.13 (2020), this Notice and the EIS are issued under previous NEPA regulations: 40 CFR 1502.9; 40 CFR 1506.6; 40 CFR 1506.10; 43 CFR 46.435; and 43 CFR 1610.2. The BLM also provides this Notice under 43 CFR 8364.1 and 16 U.S.C. 7913. The FWS also provides this Notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations for ITPs (50 CFR 17.22).

Gregory Sheehan,

State Director.

Noreen Walsh,

Regional Director.

[FR Doc. 2020–24999 Filed 11–12–20; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; National Longitudinal Survey of Youth 1997

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 14, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Anthony May by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The BLS seeks Office of Management and Budget approval to conduct interim supplement interviews between rounds 19 and 20 of the NLSY97. Respondents of the NLSY97 will undergo an interview of approximately 12 minutes on average, during which they will answer questions about labor market experiences, health, and income. The interim supplemental survey will be a conducted by internet and by telephone. We anticipate that approximately one-third of interviews will be self-administered by internet, with the remaining interviews being interviewer-administered by telephone. The BLS plans to record randomly selected segments of the interviews collected by telephone. Recording interviews helps the BLS and its contractors to ensure that the interviews actually took place and interviewers are reading the questions exactly as worded and entering the responses properly. Recording also helps to identify parts of the interview that might be causing problems or misunderstanding for interviewers or respondents. Each respondent will be informed that the interview may be recorded for quality control, testing, and training purposes. If the respondent objects to the recording of the interview, the interviewer will confirm to the respondent that the interview will not be recorded and then proceed with the interview. The interim supplemental survey will consist of approximately 35 questions. Similar questions have appeared in previous rounds of the NLSY97, the Current Population

Survey, or the Census Household Pulse survey. The content covers household composition, current employment for the respondent and spouse/partner, changes in employment/earnings during the past 12 months due to the coronavirus pandemic, time spent teaching children under age 18, health, health insurance, having contracted the coronavirus, medical care deferred due to the coronavirus pandemic, mental health, income, and earnings. During the fielding period for the interim supplemental interviews, no more than 2 percent of respondents will be asked to participate in a brief validation interview a few weeks after the initial interview. The purpose of the validation interview is to verify that the initial interview took place as the interviewer reported and to assess the data quality of selected questionnaire items. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 31, 2020 (85 FR 46187).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for the remainder of the current clearance period (expiring on August 31, 2022).

Agency: DOL–BLS.

Title of Collection: National Longitudinal Survey of Youth 1997.

OMB Control Number: 1220–0157.

Affected Public: Individuals and households.

Total Estimated Number of Respondents: 5,275.

Total Estimated Number of Responses: 5,380.

Total Estimated Annual Time Burden: 1,058 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: November 6, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020–25151 Filed 11–12–20; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Report on Current Employment Statistics

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before December 14, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Anthony May by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Current Employment Statistics (CES) program provides current monthly statistics on employment, hours, and earnings, by industry and geography. CES estimates are among the most visible and widely-used Principal Federal Economic Indicators (PFEIs). CES data are also among the timeliest of the PFEIs, with their release each month by the BLS in the Employment Situation, typically on the first Friday of each month. The statistics are fundamental inputs in economic decision processes at all levels of government, private enterprise, and organized labor.

The CES monthly estimates of employment, hours, and earnings are based on a sample of U.S. nonagricultural establishments. Information is derived from approximately 295,000 reports (from a sample of 150,000 employers with State Unemployment Insurance (UI) accounts comprised of 697,000 individual worksites), as of April 2020. Each month, firms report their employment, payroll, and hours on forms identified as the BLS–790. The sample is collected under a probability-based design. Puerto Rico and the Virgin Islands collect an additional 8,500 reports.

A list of all form types currently used appears in the table below. Respondents receive variations of the basic collection forms, depending on their industry. The CES program is a voluntary program under Federal statute. Reporting to the State agencies is voluntary in all but three States (New Mexico, Oregon, and South Carolina), Puerto Rico, and the Virgin Islands. To our knowledge, the States that do have mandatory reporting rarely exercise their authority. The collection form's confidentiality statement cites the Confidential Information Protection and Statistical Efficiency Act and mentions the State mandatory reporting authority. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 20, 2020 (85 FR 43878).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–BLS.

Title of Collection: Report on Current Employment Statistics.

OMB Control Number: 1220–0011.

Affected Public: Businesses or other for-profits institutions; Not-for-profit institutions; Individuals and households; State, local, and tribal governments.

Total Estimated Number of Respondents: 295,548.

Total Estimated Number of Responses: 1,875,612.

Total Estimated Annual Time Burden: 277,763 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: November 6, 2020.

Anthony May,

Management and Program Analyst.

[FR Doc. 2020–25150 Filed 11–12–20; 8:45 am]

BILLING CODE 4510–24–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 four 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 14, 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–2020–021–C.

Petitioner: Marion County Coal Resources, Inc., 151 Johnny Cake Rd., Metz, West Virginia 26585.

Mine: Marion County Mine, MSHA I.D. No. 46–01433, located in Marion County, West Virginia.

Regulation Affected: 30 CFR 75.1700 (Oil and gas wells).

Modification Request: The petitioner requests a modification of the existing standard, 30 CFR 75.1700, as it relates to vertical oil and gas wells at the mine. The operator is petitioning in order to plug and mine through wells in the Marcellus and Utica shales as well as other unconventional shale oil and gas wells.

The petitioner states that:

(a) The Marion County Mine produces 25,000 tons of coal each day during production and approximately 9,000,000 cubic feet of methane is liberated at the mine each day.

(b) The petitioner is petitioning to mine through wells in the Marcellus and Utica shale and other unconventional shales oil and gas wells within the mine's projected operations.

(c) Two Marcellus wells are within the projected mine, which are known as 83263, Esther Clark 1H and 833083, Esther Clark 3H. It is expected that these two wells will have to be mined through.

The petitioner proposes the following alternative method:

(a) District Manager Approval:

(1) The petition applies to unconventional wells including the Marcellus and Utica shale and other unconventional shales oil and gas wells. These unconventional wells include wells that have been depleted of oil or gas production, wells that have not produced oil/gas and may have been plugged, or active wells not producing oil/gas. Potential oil and gas producing formations that have not produced in commercial quantities (*e.g.,* exploratory wells, wildcat wells, and dry holes) are also included in this petition.

(2) A 300 foot safety barrier will be built and maintained around the oil and gas wells, until the MSHA District Manager has approved mining in that area. The petitioner defines oil and gas wells as active, inactive, abandoned, shut-in, previously plugged wells, water injection wells, and carbon dioxide sequestration wells.

(3) Before mining inside the safety barrier around any well that the mine will intersect, the petitioner will give the MSHA District Manager a sworn affidavit or declaration by a company official, stating the required procedures for cleaning out, preparing, and plugging each gas or oil well have been completed.

(4) The affidavit or declaration will include the logs described below in (b)(viii), as well as any other records that the District Manager requires. If the well intersection is not planned, the petitioner will request a permit reducing the 300 foot barrier to remove the part not included in the well intersection.

(5) Where the total depth of the well is unknown, the petitioner must contact MSHA to create a communications protocol notifying the District Manager outside normal working hours.

(6) This petition applies to all underground coal mining at the mine.

(b) The petitioner proposes to use the following procedures when cleaning out and preparing oil and gas wells prior to plugging and replugging;

(1) For cleaning out and preparing vertical oil and gas wells prior to plugging and replugging, the petitioner will test for gas emissions before cleaning out, preparing, plugging, and replugging oil and gas wells. If gas is detected, the MSHA District Manager will be contacted. The following procedures will be conducted:

(i) The petitioner will remove casings and clean the borehole to 200 feet below the coal seam being mined, or the

lowest mineable seam (whichever is lower). For wells over 4,000 feet below the seam, the well will be cleaned to 400 feet below the seam, or the lowest mineable seam, whichever is lower.

(ii) If the well is less than 4,000 feet deep, the petitioner will clean out the well from the surface to at least 200 feet below the lowest mineable coal seam base, unless the MSHA District Manager requires cleaning below that based on the geological strata or well pressure data. The petitioner will provide to the District Manager all the information they have on the geology, strata, and pressure of the well. If the well depth is equal to or greater than 4,000 feet, the petitioner will clean out the well from the surface to at least 400 feet below the lowest mineable coal seam base. The petitioner will remove all materials that are within the well, throughout the entire diameter of the well, from wall to wall. If the depth is unknown, and there is no historical data, the District Manager will be contacted before continuing. In active, non-producing wells being prepared according to this petition, the petitioner will (1) attempt to remove all casings using diligent effort; or (2) if the casings cannot be removed, fill with cement from the lowest possible depth to 200 feet below the seam being mined or to the lowest mineable seam, whichever is lower for wells less than 4,000 feet, or 400 feet below the seam mine, whichever is lower, for wells 4,000 feet or more, (3) casings unable to be removed will be perforated 200 feet below the seam to be mined, or lowest minable seam whichever is lower, or 400 feet below the seam to be mined if wells are 4,000 feet or deeper, and the well ring (annuli) will be cemented or filled.

(iii) Casings unable to be removed will be cut, milled, perforated or ripped at a spacing to help remove remaining casing in the seam by mining equipment. Remaining casing will be perforated or ripped to permit the injection of cement into voids within and around the casing. Any remaining casing will be perforated or ripped every 5 feet from 10 feet below the seam to 10 feet above the seam.

(iv) The petitioner will pull at least 150 percent casing string weight or make at least 3 attempts to spear or overshot to grip the casing for the pull effort. A 3,000 foot casing string will be assumed when the casing string length is unknown. Records of these efforts, including additional measures required by the District Manager, and casing length and weight, will be kept for MSHA to review. The petitioner will perforate or rip at every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or deeper) below the base of the coal seam to be mined or the lowest mineable coal seam, whichever is lower, up to 100 feet above the uppermost mineable coal seam that is being mined. The petitioner will ensure that the annulus between the casings and the well walls are filled with expanding cement, with a minimum of 0.5 percent after setting, and contain no voids.

(v) Jet/sand cutting will be used for ripping or perforating casing with three or more strings of casing in the seam. This uses compressed nitrogen gas and sand to cut well casings. Active wells start 200 feet above the bottom of the coal seam at 200 foot intervals, to 200 feet below the bottom of the seam.

(vi) If unable to remove all casings, the petitioner will contact the District Manager. If unable to clean out casings, the petitioner will prepare the well from the surface to a minimum of 200 feet below the base of the lowest mineable seam for wells less than 4,000 feet deep, and 400 feet below the lowest mineable seam for wells 4,000 feet or deeper (unless the MSHA District Manager requires a greater distance).

(vii) If the petitioner, with a casing bond log, can show to the satisfaction of the District Manager that the annuli in the well are properly sealed with cement, then the petitioner will not perforate or rip casings at that well. Any casings remaining when multiple casing and tubing strings exist in coal horizon(s) will be ripped or perforated and filled with cement. A casing bond log for each casing and tubing string will be required if used instead of perforating multiple strings.

(viii) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(ix) A journal will be kept to describe the depth and nature of materials encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place; any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(x) If all casing can be removed (or there is no casing), the operator will prepare the well for plugging, and use seals described below. For wells less than 4,000 feet deep to seal to 200 feet below the coal seam to be mined, or the lowest mineable seam (whichever is lower), or for wells that are 4,000 feet or deeper, seal to 400 feet below the coal seam to be mined, or the lowest mineable seam, whichever is lower. In the event that the cleaned-out well produces excessive gas, a mechanical bridge plug will be placed in the borehole in a competent stratum at least 200 feet (at least 400 feet if the well is 4,000 feet or deeper) below the base of the lowest mineable coalbed, but above the top of the uppermost hydrocarbon-producing stratum, unless the MSHA District Manager requires a larger distance. The petitioner will give the District Manager any geological information possessed on strata and pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer may be used in place of the mechanical bridge plug.

(xi) If the uppermost hydrocarbon-producing stratum is within 300 feet of the base of the lowest mineable coalbed, a properly placed mechanical bridge plug, described in paragraph (vii) above, will be used to isolate the hydrocarbon-producing stratum from the expanding cement plug. A minimum of 200 feet (400 feet if the well is 4,000 feet or deeper) of expanding cement will be placed below the lowest mineable coalbed unless the MSHA District Manager requires a greater distance, based on judgement, geological strata, or well pressure.

(c) For plugging or replugging oil and gas wells to the surface:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the l coal seam, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure, using Portland cement or another lightweight cement mixture to fill from 100 feet above the top of the uppermost mineable coal seam (or higher, if determined by the District Manager) to the surface.

(ii) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 40 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing (if not marked

physically, high-resolution GPS coordinates will be provided).

(d) Procedures for plugging or replugging oil and gas wells to use as degasification wells:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells to be used as degasification wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure. The top of the cement will extend at least 50 feet above the top of the seam unless more is required by the District Manager.

(ii) The bedrock of the upper portion of the well will be grouted with a casing to protect it. The rest of the well can be cased or uncased.

(iii) The top of the degasification casing will be fitted with wellhead equipment, as required by the District Manager in the approved ventilation plan, this equipment can include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(iv) Degasification operations will be included in the approved ventilation plan, including methane level tests and limits on methane concentrations.

(v) Once the mine area is degassed by a well and sealed, or the mine is abandoned, the petitioner will plug degasification wells: (1) A tube will be inserted to the bottom of the well (or if not possible, within 100 feet above the seam), blockage will be removed to make sure the tube can be inserted to the required depth; (2) a cement plug will be set into the well using Portland cement or another lightweight cement down the tubing until the well is filled to the surface; (3) steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing; and (4) this does not apply to degasification holes not intersecting the mined seam, do not commercially produce gas, and have no API number.

(e) Alternative procedures for preparing or replugging oil and gas wells.

(1) If it is agreed upon by the District Manager, that a well cannot be cleaned out completely due to damage to the well because of subsidence, caving, or anther factor:

(i) A hole will be drilled adjacent and parallel to the well to a depth of at at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the lowest mineable coal seam, unless more is required by the District Manager.

(ii) A geophysical sensing device will be used to locate casings remaining in the well.

(iii) If there are casing(s) present in the well, the petitioner will access the well from a parallel hole and will perforate or rip all casings at intervals of at least 5 feet, from 10 feet below the coal seam to 10 feet above the coal seam. After that, the petitioner will perforate or rip at least every 50 feet from 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or below base of the lowest mineable coal seam, whichever is lower, or up to 100 feet above the seam mined, unless more is required by the District Manager.

(iv) The annulus between casings and the well wall will be filled with expanding cement (at a minimum 0.5 percent expansion upon setting), with no voids. If the petitioner, using a casing bond, can demonstrate that the annulus of the well is adequately sealed with cement, the petitioner will not perforate or rip casing for that well. When there are multiple casings and tubing strings in the coal horizon, remaining casing will be ripped or perforated and filled with expanding cement. A casing bond log for each casing and tubing string will be used instead of ripping or perforating multiple strings.

(v) If the petitioner and MSHA determine that there is not enough casing in the well, a horizontal hydraulic fracturing technique can be used to intercept the original well. The petitioner will fracture at least six places at intervals agreed to by the District Manager. These fractures will be from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the coal seam to be mined, or lowest mineable coal seam, whichever is lowest, or to at least 50 feet above the seam mined. Expanding cement will be pumped into the fractured well to intercept voids.

(vi) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(vii) A journal will be kept describing the depth and nature of materials encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place, any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(viii) After plugging the wells as described above, the petitioner will plug the adjacent hole, from the bottom to the surface, using Portland cement or another lightweight cement.

(ix) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level

(x) The petitioner and District Manager will discuss each hole, a combination of methods outlined in (d)(1)(iii) and (d)(1)(iv) will be used on a single well, depending on conditions. The petitioner will use a registered petroleum engineer to provide additional documents and certificates to support alternative methods if requested by the District Manager.

(f) The petitioner will use the following procedures for mining within a 100-foot diameter barrier around a well:

(i) Before intersecting any plugged or replugged wells, a conference before intersecting any plugged or replugged well may be requested by any of the following: The petitioner (or its representative), a representative of miners, a State agency, or the MSHA District Manager. The requester will let the other parties know of the conference with a reasonable amount of time before the conference, allowing for an opportunity to participate. The focus of the conference is to review, evaluate, and accommodate any abnormal or unusual circumstances that relate to the condition of the well or surrounding strata.

(ii) The intersection of a well by the petitioner will be conducted on a shift approved by the MSHA District Manager. The petitioner will notify the MSHA District Manager and the miners' representative prior to the intersection so that representatives can be present.

(iii) For continuous mining, drivage sites will be installed by the petitioner, at the last open crosscut near the area to be mined to ensure intersection of the well. The drivage sites will not be more than 50 feet from the well. For longwall-mining, distance markers will be installed on 5-foot centers 50 feet ahead

of the well in the headgate and tailgate entry.

(iv) Firefighting equipment, including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the mining-through will be available when either the conventional or continuous mining method is used. The fire hose will be located in the last open crosscut of the entry or room. The petitioner will maintain the water line to be able to reach the farthest point of penetration on the section. A hose to the longwall water supply is sufficient if longwall mining.

(v) Sufficient supplies of roof support and ventilation materials will be available and located at the last open crosscut. In addition, an emergency plug and/or plugs will be available in the immediate area of the mine-through.

(vi) Equipment will be checked for permissibility and serviced on the shift prior to mining-through the well. Water sprays, water pressures and water flow rates will be checked and any issues will be corrected.

(vii) The methane monitor on the longwall, continuous mining machine, or cutting machine and loading machine will be calibrated on the shift prior to mining-through the well.

(viii) When mining is in progress, tests for methane will be made with a hand-held methane detector at least every 10 minutes from the time that mining with the continuous mining machine or longwall face is within 30 feet of the well until the well is intersected and immediately prior to well intersection. During the actual intersection process, no individual will be allowed on the return side until mining-through has been completed and the area has been examined and declared safe. Workplace examinations on the return side of the shearer will be done while the machine is idle. The approved ventilation plan will be followed at all times unless otherwise determined by the District Manager due to a need for more air velocity for intersection.

(ix) When using continuous or conventional mining methods, the working place will be free from accumulations of coal dust and coal spillages, and rock dust will be placed on the roof, rib and floor within 20 feet of the face when intersecting near the well on the shift or shifts during which it will occur. For longwall sections, rock dusting will be done on roof, rib, and floor up to the headgate and tailgate gob.

(x) When the wellbore is intersected, all equipment will be de-energized and the area thoroughly examined and determined safe before mining is resumed.

(xi) After a well has been intersected and the working place determined safe, mining will continue inby the well at a sufficient distance to permit adequate ventilation around the area of the wellbore.

(xii) When a torch is necessary for poorly cut or milled casings, no open flames will be permitted in the area until adequate ventilation has been established around the wellbore and methane levels of less than 1 percent are present in all areas affected by flames or sparks from the torch. Before using a torch, a thick layer of rock dust will be applied to any roof, face, floor, ribs or exposed coal within 20 feet of the casing.

(xiii) Non-sparking (brass) tools will be used only to expose and examine cased wells. These tools will be located on the working section.

(xiv) No person will be permitted in the area of the mining-through operation except for those actually engaged in the operation, company personnel, representatives of the miners, personnel from MSHA, and personnel from the appropriate State agency.

(xv) The petitioner will alert all personnel in the mine of a planned intersection of the well before going underground if it is to occur during the shift. The warning will be continuously repeated until the well is mined through.

(xvi) The mining-through operation will be under the direct supervision of a certified official. Instructions concerning the mining-through operation will be issued only by the certified official in charge.

(xvii) If the petitioner cannot find the well in the longwall panel or if the intersection is missed, the petitioner will cease mining and examine the area for hazardous conditions at the projected well location, notify the District Manager, and make a reasonable attempt to locate the well using visual observation and inspection of the survey data. Mining may resume if the well is located and hazardous conditions do not exist. The petitioner will work with the District Manager to resolve issues before mining is resumed.

(xviii) If the well is not plugged to the total depth of the minable coal seams identified with the core hole logs, coal seams below the lowest plug will remain subject to 30 CFR 75.1700 barrier requirements if developed in the future.

(xix) The petitioner will follow all safety precautions required by MSHA and State regulatory agencies having jurisdiction over the plugging site to provide protection to miners.

(xx) Miners involved in plugging/replugging will be trained on the operations of this petition before starting the process. The petition will be posed at well sites until plugging/replugging is complete.

(xxi) When using mechanical bridge plugs, the peitioner should use the best technology required or recognized by the State or oil/gas industries.

(xxii) The petitioner will notify the District Manager as set forth in the cut through procedures for each well.

(xxiii) Within 30 days after the Proposed Decision and Order (PDO) becomes final, the petitioner will submit proposed revisions to be approved by the MSHA District Manager, as part of the 30 CFR 48 training plan. This will include initial and refresher training. The revisions are to include training on the above terms for all miners involved in well intersection prior to mining within 150 feet of the well which is to be mined through.

(xxiv) The required person under 30 CFR 75.1501 Emergency Evacuations is responsible for emergencies relating to the intersection and this person will review intersection procedures before the intersection occurs.

(xxv) Within 30 days of when this PDO is finalized, the petitioner will submit a revised emergency evacuation and firefighting training program, required by 30 CFR 75.1502. The petitioner will revise the program to incorporate hazards and evacuation plans used for well intersection. All underground miners will be trained in the above plan revisions within 30 days of submittal.

(xxvi) The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection from the potential hazards against which the existing standard for 30 CFR 75.1700 is intended to guard.

Docket Number: M–2020–026–C.

Petitioner: Harrison County Coal Resources, Inc., 46116 National Rd., Saint Clairsville, OH 43950.

Mine: Harrison County Mine, MSHA I.D. No. 46–01318, located in Harrison County, West Virginia.

Regulation Affected: 30 CFR 75.1700 (Oil and gas wells).

Modification Request: The petitioner requests a modification of the existing standard, 30 CFR 75.1700, as it relates to vertical oil and gas wells at the Harrison County Mine. The operator is petitioning in order to plug and mine through wells in the Marcellus and Utica shales as well as other unconventional shale oil and gas wells.

The petitioner states that:

(a) The Harrison County Mine produces approximately 27,000 tons of coal each day and 1,922,000 cubic feet of methane is liberated at the mine each day.

(b) There are unconventional wells within the projected mining operations, which includes a group of 5 wells and another group of 8 wells, which will have to be mined through. The petitioner does not own gas rights where the mine is located; more drilled wells may need to be addressed.

(c) The petitioner is applying to mine through the wells in Marcellus and Utica shales, and other unconventional shale oil and gas wells within the mine's projected operations.

The petitioner proposes the following alternative method:

(a) District Manager Approval:

(1) The petition applies to unconventional wells including the Marcellus and Utica shales and other unconventional shale oil and gas wells. These unconventional wells include wells that have been depleted of oil or gas production, wells that have not produced oil/gas and may have been plugged, or active wells not producing oil/gas. Potential oil and gas producing formations that have not produced in commercial quantities (*e.g.,* exploratory wells, wildcat wells, and dry holes), are also included in this petition.

(2) A 300 foot safety barrier will be built and maintained around the oil and gas wells, until the MSHA District Manager has approved mining in that area. The petitioner defines oil and gas wells as active, inactive, abandoned, shut-in, previously plugged wells, water injection wells, and carbon dioxide sequestration wells.

(3) Before mining inside the safety barrier around any well that the mine will intersect, the petitioner will give the MSHA District Manager a sworn affidavit or declaration by a company official, stating the required procedures for cleaning out, preparing, and plugging each gas or oil well have been completed.

(4) The affidavit or declaration will include the logs described below in (b)(viii), as well as any other records that the District Manager requires. If the well intersection is not planned, the petitioner will request a permit reducing the 300 foot barrier to remove the part not included in the well intersection.

(5) Where the total depth of the well is unknown, the petitioner must contact MSHA to create a communications protocol notifying the District Manager outside normal working hours.

(6) This petition applies to all underground coal mining at the mine.

(b) The petitioner proposes to use the following procedures when cleaning out and preparing oil and gas wells prior to plugging and replugging;

(1) For cleaning out and preparing vertical oil and gas wells prior to plugging and replugging, the petitioner will test for gas emissions before cleaning out, preparing, plugging, and replugging oil and gas wells. If gas is detected, the MSHA District Manager will be contacted. The following procedures will be conducted:

(i) The petitioner will remove casings and clean the borehole to 200 feet below the coal seam being mined, or the lowest mineable seam (whichever is lower). For wells over 4,000 feet below the seam, the well will be cleaned to 400 feet below the seam, or the lowest mineable seam, whichever is lower.

(ii) If the well is less than 4,000 feet deep, the petitioner will clean out the well from the surface to at least 200 feet below the lowest mineable coal seam base, unless the MSHA District Manager requires cleaning below that based on the geological strata or well pressure data. The petitioner will provide to the District Manager all the information they have on the geology, strata, and pressure of the well. If the well depth is equal to or greater than 4,000 feet, the petitioner will clean out the well from the surface to at least 400 feet below the lowest mineable coal seam base. The petitioner will remove all materials that are within the well, throughout the entire diameter of the well, from wall to wall. If the depth is unknown, and there is no historical data, the District Manager will be contacted before continuing. In active, non-producing wells being prepared according to this petition, the petitioner will (1) attempt to remove all casings using diligent effort; or (2) if the casings cannot be removed, fill with cement from the lowest possible depth to 200 feet below the seam being mined or to the lowest mineable seam, whichever is lower for wells less than 4,000 feet, or 400 feet below the seam mine, whichever is lower, for wells 4,000 feet or more, (3) casings unable to be removed will be perforated 200 feet below the seam to be mined, or lowest minable seam whichever is lower, or 400 feet below the seam to be mined if wells are 4,000 feet or deeper, and the well ring (annuli) will be cemented or filled.

(iii) Casings unable to be removed will be cut, milled, perforated or ripped at a spacing to help remove remaining casing in the seam by mining equipment. Remaining casing will be perforated or ripped to permit the injection of cement into voids within and around the casing. Any remaining casing will be perforated or ripped every 5 feet from 10 feet below the seam to 10 feet above the seam.

(iv) The petitioner will pull at least 150 percent casing string weight or make at least 3 attempts to spear or overshot to grip the casing for the pull effort. A 3,000 foot casing string will be assumed when the casing string length is unknown. Records of these efforts, including additional measures required by the District Manager, and casing length and weight, will be kept for MSHA to review.

(v) The petitioner will perforate or rip at every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or deeper) below the base of the coal seam to be mined or the lowest mineable coal seam, whichever is lower, up to 100 feet above the uppermost mineable coal seam that is being mined. The petitioner will ensure that the annulus between the casings and the well walls are filled with expanding cement, with a minimum of 0.5 percent after setting, and contain no voids.

(vi) Jet/sand cutting will be used for ripping or perforating casing with three or more strings of casing in the seam. This uses compressed nitrogen gas and sand to cut well casings. Active wells start 200 feet above the bottom of the coal seam at 200 foot intervals, to 200 feet below the bottom of the seam.

(vii) If unable to remove all casings, the petitioner will contact the District Manager. If unable to clean out casings, the petitioner will prepare the well from the surface to a minimum of 200 feet below the base of the lowest mineable seam for wells less than 4,000 feet deep, and 400 feet below the lowest mineable seam for wells 4,000 feet or deeper (unless the MSHA District Manager requires a greater distance).

(viii) If the petitioner, with a casing bond log, can show to the satisfaction of the District Manager that the annuli in the well are properly sealed with cement, then the petitioner will not perforate or rip casings at that well. Any casings remaining when multiple casing and tubing strings exist in coal horizon(s) will be ripped or perforated and filled with cement. A casing bond log for each casing and tubing string will be required if used instead of perforating multiple strings.

(ix) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(x) A journal will be kept to describe the depth and nature of materials

encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place; any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(xi) If all casing can be removed (or there is no casing), the operator will prepare the well for plugging, and use seals described below. For wells less than 4,000 feet deep to seal to 200 feet below the coal seam to be mined, or the lowest mineable seam (whichever is lower), or for wells that are 4,000 feet or deeper, seal to 400 feet below the coal seam to be mined, or the lowest mineable seam, whichever is lower.

(xii) In the event that the cleaned-out well produces excessive gas, a mechanical bridge plug will be placed in the borehole in a competent stratum at least 200 feet (at least 400 feet if the well is 4,000 feet or deeper) below the base of the lowest mineable coalbed, but above the top of the uppermost hydrocarbon-producing stratum, unless the MSHA District Manager requires a larger distance. The petitioner will give the District Manager any geological information possessed on strata and pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer may be used in place of the mechanical bridge plug.

(xiii) If the uppermost hydrocarbon-producing stratum is within 300 feet of the base of the lowest mineable coalbed, a properly placed mechanical bridge plug, described in paragraph (vii) above, will be used to isolate the hydrocarbon-producing stratum from the expanding cement plug. A minimum of 200 feet (400 feet if the well is 4,000 feet or deeper) of expanding cement will be placed below the lowest mineable coalbed unless the MSHA District Manager requires a greater distance, based on judgement, geological strata, or well pressure.

(c) For plugging or replugging oil and gas wells to the surface:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the coal seam, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure, using Portland cement or another lightweight cement mixture to fill from 100 feet above the top of the uppermost mineable coal seam (or higher, if determined by the District Manager) to the surface.

(ii) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing (if not marked physically, high-resolution GPS coordinates will be provided).

(d) Procedures for plugging or replugging oil and gas wells to use as degasification wells:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells to be used as degasification wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure. The top of the cement will extend at least 50 feet above the top of the seam unless more is required by the District Manager.

(ii) The bedrock of the upper portion of the well will be grouted with a casing to protect it. The rest of the well can be cased or uncased.

(iii) The top of the degasification casing will be fitted with wellhead equipment, as required by the District Manager in the approved ventilation plan, this equipment can include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(iv) Degasification operations will be included in the approved ventilation plan, including methane level tests and limits on methane concentrations.

(v) Once the mine area is degassed by a well and sealed, or the mine is abandoned, the petitioner will plug degasification wells: (1) A tube will be inserted to the bottom of the well (or if not possible, within 100 feet above the seam), blockage will be removed to make sure the tube can be inserted to the required depth; (2) a cement plug will be set into the well using Portland cement or another lightweight cement down the tubing until the well is filled to the surface; (3) steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing; and (4) this does not apply to degasification holes not intersecting the mined seam, do not commercially produce gas, and have no API number.

(e) Alternative procedures for preparing or replugging oil and gas wells.

(1) If it is agreed upon by the District Manager, that a well cannot be cleaned out completely due to damage to the well because of subsidence, caving, or another factor:

(i) A hole will be drilled adjacent and parallel to the well to a depth of at at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the lowest mineable coal seam, unless more is required by the District Manager.

(ii) A geophysical sensing device will be used to locate casings remaining in the well.

(iii) If there are casing(s) present in the well, the petitioner will access the well from a parallel hole and will perforate or rip all casings at intervals of at least 5 feet, from 10 feet below the coal seam to 10 feet above the coal seam. After that, the petitioner will perforate or rip at least every 50 feet from 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or below the base of the lowest mineable coal seam, whichever is lower, or up to 100 feet above the seam mined, unless more is required by the District Manager.

(iv) The annulus between casings and the well wall will be filled with expanding cement (at a minimum 0.5 percent expansion upon setting), with no voids. If the petitioner, using a casing bond, can demonstrate that the annulus of the well is adequately sealed with cement, the petitioner will not perforate or rip casing for that well. When there are multiple casings and tubing strings in the coal horizon, remaining casing will be ripped or perforated and filled with expanding cement. A casing bond log for each casing and tubing string will be used instead of ripping or perforating multiple strings.

(v) If the petitioner and MSHA determine that there is not enough casing in the well, a horizontal hydraulic fracturing technique can be used to intercept the original well. The petitioner will fracture at least six places at intervals agreed to by the District Manager. These fractures will be from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the coal seam to be mined, or the lowest mineable coal seam, whichever

is lowest, or to at least 50 feet above the seam mined. Expanding cement will be pumped into the fractured well to intercept voids.

(vi) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(vii) A journal will be kept describing the depth and nature of materials encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place, any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(viii) After plugging the wells as described above, the petitioner will plug the adjacent hole, from the bottom to the surface, using Portland cement or another lightweight cement.

(ix) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level

(x) The petitioner and District Manager will discuss each hole, a combination of methods outlined in (d)(1)(iii) and (d)(1)(iv) will be used on a single well, depending on conditions. The petitioner will use a registered petroleum engineer to provide additional documents and certificates to support alternative methods if requested by the District Manager.

(2) The petitioner will use the following procedures for mining within a 100-foot diameter barrier around a well:

(i) Before intersecting any plugged or replugged wells, a conference before intersecting any plugged or replugged well may be requested by any of the following: the petitioner (or its representative), a representative of miners, a State agency, or the MSHA District Manager. The requester will let the other parties know of the conference with a reasonable amount of time before the conference, allowing for an opportunity to participate. The focus of the conference is to review, evaluate, and accommodate any abnormal or unusual circumstances that relate to the condition of the well or surrounding strata.

(ii) The intersection of a well by the petitioner will be conducted on a shift approved by the MSHA District Manager. The petitioner will notify the MSHA District Manager and the miners' representative prior to the intersection so that representatives can be present.

(iii) For continuous mining, drivage sites will be installed by the petitioner at the last open crosscut near the area to be mined to ensure intersection of the well. The drivage sites will not be more than 50 feet from the well. For longwall-mining, distance markers will be installed on 5-foot centers 50 feet ahead of the well in the headgate and tailgate entry.

(iv) Firefighting equipment, including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the mining-through will be available when either the conventional or continuous mining method is used. The fire hose will be located in the last open crosscut of the entry or room. The petitioner will maintain the water line to be able to reach the farthest point of penetration on the section. A hose to the longwall water supply is sufficient if longwall mining.

(v) Sufficient supplies of roof support and ventilation materials will be available and located at the last open crosscut. In addition, an emergency plug and/or plugs will be available in the immediate area of the mine-through.

(vi) Equipment will be checked for permissibility and serviced on the shift prior to mining-through the well. Water sprays, water pressures and water flow rates will be checked and any issues will be corrected.

(vii) The methane monitor on the longwall, continuous mining machine, or cutting machine and loading machine will be calibrated on the shift prior to mining-through the well.

(viii) When mining is in progress, tests for methane will be made with a hand-held methane detector at least every 10 minutes from the time that mining with the continuous mining machine or longwall face is within 30 feet of the well until the well is intersected and immediately prior to well intersection. During the actual cutting through process, no individual will be allowed on the return side until mining-through has been completed and the area has been examined and declared safe. Workplace examinations on the return side of the shearer will be done while the machine is idle. The approved ventilation plan will be followed at all times unless otherwise determine by the District Manager due to a need for more air velocity for intersection.

(ix) When using continuous or conventional mining methods, the working place will be free from accumulations of coal dust and coal spillages, and rock dust will be placed on the roof, rib and floor within 20 feet of the face when intersecting near the well on the shift or shifts during which it will occur. For longwall sections, rock dusting will be done on roof, rib, and floor up to the headgate and tailgate gob.

(x) When the wellbore is intersected, all equipment will be de-energized and the area thoroughly examined and determined safe before mining is resumed.

(xi) After a well has been intersected and the working place determined safe, mining will continue inby the well at a sufficient distance to permit adequate ventilation around the area of the wellbore.

(xii) When a torch is necessary for poorly cut or milled casings, no open flames will be permitted in the area until adequate ventilation has been established around the wellbore and methane levels of less than 1 percent are present in all areas affected by flames or sparks from the torch. Before using a torch, a thick layer of rock dust will be applied to any roof, face, floor, ribs or exposed coal within 20 feet of the casing.

(xiii) Non-sparking (brass) tools will be used only to expose and examine cased wells. These tools will be located on the working section.

(xiv) No person will be permitted in the area of the mining-through operation except for those actually engaged in the operation, company personnel, representatives of the miners, personnel from MSHA, and personnel from the appropriate State agency.

(xv) The petitioner will alert all personnel in the mine of a planned intersection of the well before going underground if it is to occur during the shift. The warning will be continuously repeated until the well is mined through.

(xvi) The mining-through operation will be under the direct supervision of a certified official. Instructions concerning the mining-through operation will be issued only by the certified official in charge.

(xvii) If the petitioner cannot find the well in the longwall panel or if the intersection is missed, the petitioner will cease mining and examine the area for hazardous conditions at the projected well location, notify the District Manager, and make a reasonable attempt to locate the well using visual observation and inspection of the survey data. Mining may resume if the well is located and hazardous conditions do

not exist. The petitioner will work with the District Manager to resolve issues before mining is resumed.

(xviii) If the well is not plugged to the total depth of the minable coal seams identified with the core hole logs, coal seams below the lowest plug will remain subject to 30 CFR 75.1700 barrier requirements if developed in the future.

(xix) The petitioner will follow all safety precautions required by MSHA and State regulatory agencies having jurisdiction over the plugging site to provide protection to miners.

(xx) Miners involved in plugging/replugging will be trained on the operations of this petition before starting the process. The petition will be posed at well sites until plugging/replugging is complete.

(xxi) When using mechanical bridge plugs, the petitioner should use the best technology required or recognized by the State or oil/gas industries.

(xxii) The petitioner will notify the District Manager as set forth in the cut through procedures for each well.

(xxiii) Within 30 days after the Proposed Decision and Order (PDO) becomes final, the petitioner will submit proposed revisions to be approved by the MSHA District Manager, as part of the 30 CFR 48 training plan. This will include initial and refresher training. The revisions are to include training on the above terms for all miners involved in well intersection prior to mining within 150 feet of the well which is to be mined through.

(xxiv) The required person under 30 CFR 75.1501 Emergency Evacuations is responsible for emergencies relating to the intersection and this person will review intersection procedures before the intersection occurs.

(xxv) Within 30 days of when this PDO is finalized, the petitioner will submit a revised emergency evacuation and firefighting training program, required by 30 CFR 75.1502. The petitioner will revise the program to incorporate hazards and evacuation plans used for well intersection. All underground miners will be trained in the above plan revisions within 30 days of submittal.

(xxvi) The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection from the potential hazards against which the existing standard for 30 CFR 75.1700 is intended to guard.

Docket Number: M–2020–027–C.

Petitioner: Ohio County Coal Resources, Inc., 46226 National Rd., Saint Clairsville, OH 43950.

Mine: Ohio County Mine, MSHA I.D. No. 46–01436, located in Marion County, West Virginia.

Regulation Affected: 30 CFR 75.1700 (Oil and gas wells).

Modification Request: The petitioner requests a modification of the existing standard, 30 CFR 75.1700, as it relates to vertical oil and gas wells at the Ohio County Mine. The operator is petitioning in order to plug and mine through wells in the Marcellus and Utica shales as well as other unconventional shale oil and gas wells.

The petitioner states that:

(a) The Harrison County Mine produces approximately 25,856 tons of coal each day and 5,735,891 cubic feet of methane is liberated at the mine each day.

(b) There are unconventional wells within the projected mining operations, which the petitioner is applying to plug.

(c) The petitioner is applying to plug wells in the Marcellus, Utica shales, and all other unconventional shale oil and gas wells within the mine's projected operations.

The petitioner proposes the following alternative method:

(a) District Manager Approval:

(1) The petition applies to unconventional wells including the Marcellus and Utica shales and other unconventional shale oil and gas wells. These unconventional wells include wells that have been depleted of oil or gas production, wells that have not produced oil/gas and may have been plugged, or active wells not producing oil/gas. Potential oil and gas producing formations that have not produced in commercial quantities (*e.g.,* exploratory wells, wildcat wells, and dry holes), are also included in this petition.

(2) A 300 foot safety barrier will be built and maintained around the oil and gas wells, until the MSHA District Manager has approved mining in that area. The petitioner defines oil and gas wells as active, inactive, abandoned, shut-in, previously plugged wells, water injection wells, and carbon dioxide sequestration wells.

(3) Before mining inside the safety barrier around any well that the mine will intersect, the petitioner will give the MSHA District Manager a sworn affidavit or declaration by a company official, stating the required procedures for cleaning out, preparing, and plugging each gas or oil well have been completed.

(4) The affidavit or declaration will include the logs described below in (b)(viii), as well as any other records that the District Manager requires. If the well intersection is not planned, the petitioner will request a permit reducing the 300 foot barrier to remove the part not included in the well intersection.

(5) Where the total depth of the well is unknown, the petitioner must contact MSHA to create a communications protocol notifying the District Manager outside normal working hours.

(6) This petition applies to all underground coal mining at the mine.

(b) The petitioner proposes to use the following procedures when cleaning out and preparing oil and gas wells prior to plugging and replugging;

(1) For cleaning out and preparing vertical oil and gas wells prior to plugging and replugging, the petitioner will test for gas emissions before cleaning out, preparing, plugging, and replugging oil and gas wells. If gas is detected, the MSHA District Manager will be contacted. The following procedures will be conducted:

(i) The petitioner will remove casings and clean the borehole to 200 feet below the coal seam being mined, or the lowest mineable seam (whichever is lower). For wells over 4,000 feet below the seam, the well will be cleaned to 400 feet below the seam, or the lowest mineable seam, whichever is lower.

(ii) If the well is less than 4,000 feet deep, the petitioner will clean out the well from the surface to at least 200 feet below the lowest mineable coal seam base, unless the MSHA District Manager requires cleaning below that based on the geological strata or well pressure data. The petitioner will provide to the District Manager all the information they have on the geology, strata, and pressure of the well. If the well depth is equal to or greater than 4,000 feet, the petitioner will clean out the well from the surface to at least 400 feet below the lowest mineable coal seam base. The petitioner will remove all materials that are within the well, throughout the entire diameter of the well, from wall to wall. If the depth is unknown, and there is no historical data, the District Manager will be contacted before continuing. In active, non-producing wells being prepared according to this petition, the petitioner will (1) attempt to remove all casings using diligent effort; or (2) if the casings cannot be removed, fill with cement from the lowest possible depth to 200 feet below the seam being mined or to the lowest mineable seam, whichever is lower for wells less than 4,000 feet, or 400 feet below the seam mine, whichever is lower, for wells 4,000 feet or more, (3) casings unable to be removed will be perforated 200 feet below the seam to be mined, or lowest minable seam whichever is lower, or 400 feet below the seam to be mined if wells are 4,000

feet or deeper, and the well ring (annuli) will be cemented or filled.

(iii) Casings unable to be removed will be cut, milled, perforated or ripped at a spacing to help remove remaining casing in the seam by mining equipment. Remaining casing will be perforated or ripped to permit the injection of cement into voids within and around the casing. Any remaining casing will be perforated or ripped every 5 feet from 10 feet below the seam to 10 feet above the seam.

(iv) The petitioner will pull at least 150 percent casing string weight or make at least 3 attempts to spear or overshot to grip the casing for the pull effort. A 3,000 foot casing string will be assumed when the casing string length is unknown. Records of these efforts, including additional measures required by the District Manager, and casing length and weight, will be kept for MSHA to review.

(v) The petitioner will perforate or rip at every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or deeper) below the base of the coal seam to be mined or the lowest mineable coal seam, whichever is lower, up to 100 feet above the uppermost mineable coal seam that is being mined. The petitioner will ensure that the annulus between the casings and the well walls are filled with expanding cement, with a minimum of 0.5 percent after setting, and contain no voids.

(vi) Jet/sand cutting will be used for ripping or perforating casing with three or more strings of casing in the seam. This uses compressed nitrogen gas and sand to cut well casings. Active wells start 200 feet above the bottom of the coal seam at 200 foot intervals, to 200 feet below the bottom of the seam.

(vii) If unable to remove all casings, the petitioner will contact the District Manager. If unable to clean out casings, the petitioner will prepare the well from the surface to a minimum of 200 feet below the base of the lowest mineable seam for wells less than 4,000 feet deep, and 400 feet below the lowest mineable seam for wells 4,000 feet or deeper (unless the MSHA District Manager requires a greater distance).

(viii) If the petitioner, with a casing bond log, can show to the satisfaction of the District Manager that the annuli in the well are properly sealed with cement, then the petitioner will not perforate or rip casings at that well. Any casings remaining when multiple casing and tubing strings exist in coal horizon(s) will be ripped or perforated and filled with cement. A casing bond log for each casing and tubing string will be required if used instead of perforating multiple strings.

(ix) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(x) A journal will be kept to describe the depth and nature of materials encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place; any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(xi) If all casing can be removed (or there is no casing), the operator will prepare the well for plugging, and use seals described below. For wells less than 4,000 feet deep to seal to 200 feet below the coal seam to be mined, or the lowest mineable seam (whichever is lower), or for wells that are 4,000 feet or deeper, seal to 400 feet below the coal seam to be mined, or the lowest mineable seam, whichever is lower.

(xii) In the event that the cleaned-out well produces excessive gas, a mechanical bridge plug will be placed in the borehole in a competent stratum at least 200 feet (at least 400 feet if the well is 4,000 feet or deeper) below the base of the lowest mineable coalbed, but above the top of the uppermost hydrocarbon-producing stratum, unless the MSHA District Manager requires a larger distance. The petitioner will give the District Manager any geological information possessed on strata and pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer may be used in place of the mechanical bridge plug.

(xiii) If the uppermost hydrocarbon-producing stratum is within 300 feet of the base of the lowest mineable coalbed, a properly placed mechanical bridge plug, described in paragraph (vii) above, will be used to isolate the hydrocarbon-producing stratum from the expanding cement plug. A minimum of 200 feet (400 feet if the well is 4,000 feet or deeper) of expanding cement will be placed below the lowest mineable coalbed unless the MSHA District Manager requires a greater distance, based on judgement, geological strata, or well pressure.

(c) For plugging or replugging oil and gas wells to the surface:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the coal seam, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure, using Portland cement or another lightweight cement mixture to fill from 100 feet above the top of the uppermost mineable coal seam (or higher, if determined by the District Manager) to the surface.

(ii) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing (if not marked physically, high-resolution GPS coordinates will be provided).

(d) Procedures for plugging or replugging oil and gas wells to use as degasification wells:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells to be used as degasification wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure. The top of the cement will extend at least 50 feet above the top of the seam unless more is required by the District Manager.

(ii) The bedrock of the upper portion of the well will be grouted with a casing to protect it. The rest of the well can be cased or uncased.

(iii) The top of the degasification casing will be fitted with wellhead equipment, as required by the District Manager in the approved ventilation plan, this equipment can include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(iv) Degasification operations will be included in the approved ventilation plan, including methane level tests and limits on methane concentrations.

(v) Once the mine area is degassed by a well and sealed, or the mine is abandoned, the petitioner will plug degasification wells: (1) A tube will be inserted to the bottom of the well (or if

not possible, within 100 feet above the seam), blockage will be removed to make sure the tube can be inserted to the required depth; (2) a cement plug will be set into the well using Portland cement or another lightweight cement down the tubing until the well is filled to the surface; (3) steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing; and (4) this does not apply to degasification holes not intersecting the mined seam, do not commercially produce gas, and have no API number.

(e) Alternative procedures for preparing or replugging oil and gas wells.

(1) If it is agreed upon by the District Manager, that a well cannot be cleaned out completely due to damage to the well because of subsidence, caving, or another factor:

(i) A hole will be drilled adjacent and parallel to the well to a depth of at at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the lowest mineable coal seam, unless more is required by the District Manager.

(ii) A geophysical sensing device will be used to locate casings remaining in the well.

(iii) If there are casing(s) present in the well, the petitioner will access the well from a parallel hole and will perforate or rip all casings at intervals of at least 5 feet, from 10 feet below the coal seam to 10 feet above the coal seam. After that, the petitioner will perforate or rip at least every 50 feet from 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or below the base of the lowest mineable coal seam, whichever is lower, or up to 100 feet above the seam mined, unless more is required by the District Manager.

(iv) The annulus between casings and the well wall will be filled with expanding cement (at a minimum 0.5 percent expansion upon setting), with no voids. If the petitioner, using a casing bond, can demonstrate that the annulus of the well is adequately sealed with cement, the petitioner will not perforate or rip casing for that well. When there are multiple casings and tubing strings in the coal horizon, remaining casing will be ripped or perforated and filled with expanding cement. A casing bond log for each casing and tubing string will be used instead of ripping or perforating multiple strings.

(v) If the petitioner and MSHA determine that there is not enough casing in the well, a horizontal hydraulic fracturing technique can be used to intercept the original well. The petitioner will fracture at least six places at intervals agreed to by the District Manager. These fractures will be from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the coal seam to be mined, or the lowest mineable coal seam, whichever is lowest, or to at least 50 feet above the seam mined. Expanding cement will be pumped into the fractured well to intercept voids.

(vi) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(vii) A journal will be kept describing the depth and nature of materials encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place, any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(viii) After plugging the wells as described above, the petitioner will plug the adjacent hole, from the bottom to the surface, using Portland cement or another lightweight cement.

(ix) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level.

(x) The petitioner and District Manager will discuss each hole, a combination of methods outlined in (d)(1)(iii) and (d)(1)(iv) will be used on a single well, depending on conditions. The petitioner will use a registered petroleum engineer to provide additional documents and certificates to support alternative methods if requested by the District Manager.

(2) The petitioner will use the following procedures for mining within a 100-foot diameter barrier around a well:

(i) Before intersecting any plugged or replugged wells, a conference before intersecting any plugged or replugged well may be requested by any of the following: The petitioner (or its representative), a representative of miners, a State agency, or the MSHA District Manager. The requester will let the other parties know of the conference with a reasonable amount of time before the conference, allowing for an opportunity to participate. The focus of the conference is to review, evaluate, and accommodate any abnormal or unusual circumstances that relate to the condition of the well or surrounding strata.

(ii) The intersection of a well by the petitioner will be conducted on a shift approved by the MSHA District Manager. The petitioner will notify the MSHA District Manager and the miners' representative prior to the intersection so that representatives can be present.

(iii) For continuous mining, drivage sites will be installed by the petitioner at the last open crosscut near the area to be mined to ensure intersection of the well. The drivage sites will not be more than 50 feet from the well. For longwall-mining, distance markers will be installed on 5-foot centers 50 feet ahead of the well in the headgate and tailgate entry.

(iv) Firefighting equipment, including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the mining-through will be available when either the conventional or continuous mining method is used. The fire hose will be located in the last open crosscut of the entry or room. The petitioner will maintain the water line to be able to reach the farthest point of penetration on the section. A hose to the longwall water supply is sufficient if longwall mining.

(v) Sufficient supplies of roof support and ventilation materials will be available and located at the last open crosscut. In addition, an emergency plug and/or plugs will be available in the immediate area of the mine-through.

(vi) Equipment will be checked for permissibility and serviced on the shift prior to mining-through the well. Water sprays, water pressures and water flow rates will be checked and any issues will be corrected.

(vii) The methane monitor on the longwall, continuous mining machine, or cutting machine and loading machine will be calibrated on the shift prior to mining-through the well.

(viii) When mining is in progress, tests for methane will be made with a hand-held methane detector at least every 10 minutes from the time that mining with the continuous mining machine or longwall face is within 30 feet of the well until the well is intersected and immediately prior to well intersection. During the actual cutting through process, no individual will be allowed on the return side until

mining-through has been completed and the area has been examined and declared safe. Workplace examinations on the return side of the shearer will be done while the machine is idle. The approved ventilation plan will be followed at all times unless otherwise determine by the District Manager due to a need for more air velocity for intersection.

(ix) When using continuous or conventional mining methods, the working place will be free from accumulations of coal dust and coal spillages, and rock dust will be placed on the roof, rib and floor within 20 feet of the face when intersecting near the well on the shift or shifts during which it will occur. For longwall sections, rock dusting will be done on roof, rib, and floor up to the headgate and tailgate gob.

(x) When the wellbore is intersected, all equipment will be de-energized and the area thoroughly examined and determined safe before mining is resumed.

(xi) After a well has been intersected and the working place determined safe, mining will continue inby the well at a sufficient distance to permit adequate ventilation around the area of the wellbore.

(xii) When a torch is necessary for poorly cut or milled casings, no open flames will be permitted in the area until adequate ventilation has been established around the wellbore and methane levels of less than 1 percent are present in all areas affected by flames or sparks from the torch. Before using a torch, a thick layer of rock dust will be applied to any roof, face, floor, ribs or exposed coal within 20 feet of the casing.

(xiii) Non-sparking (brass) tools will be used only to expose and examine cased wells. These tools will be located on the working section.

(xiv) No person will be permitted in the area of the mining-through operation except for those actually engaged in the operation, company personnel, representatives of the miners, personnel from MSHA, and personnel from the appropriate State agency.

(xv) The petitioner will alert all personnel in the mine of a planned intersection of the well before going underground if it is to occur during the shift. The warning will be continuously repeated until the well is mined through.

(xvi) The mining-through operation will be under the direct supervision of a certified official. Instructions concerning the mining-through operation will be issued only by the certified official in charge.

(xvii) If the petitioner cannot find the well in the longwall panel or if the intersection is missed, the petitioner will cease mining and examine the area for hazardous conditions at the projected well location, notify the District Manager, and make a reasonable attempt to locate the well using visual observation and inspection of the survey data. Mining may resume if the well is located and hazardous conditions do not exist. The petitioner will work with the District Manager to resolve issues before mining is resumed.

(xviii) If the well is not plugged to the total depth of the minable coal seams identified with the core hole logs, coal seams below the lowest plug will remain subject to 30 CFR 75.1700 barrier requirements if developed in the future.

(xix) The petitioner will follow all safety precautions required by MSHA and State regulatory agencies having jurisdiction over the plugging site to provide protection to miners.

(xx) Miners involved in plugging/replugging will be trained on the operations of this petition before starting the process. The petition will be posed at well sites until plugging/replugging is complete.

(xxi) When using mechanical bridge plugs, the petitioner should use the best technology required or recognized by the State or oil/gas industries.

(xxii) The petitioner will notify the District Manager as set forth in the cut through procedures for each well.

(xxiii) Within 30 days after the Proposed Decision and Order (PDO) becomes final, the petitioner will submit proposed revisions to be approved by the MSHA District Manager, as part of the 30 CFR 48 training plan. This will include initial and refresher training. The revisions are to include training on the above terms for all miners involved in well intersection prior to mining within 150 feet of the well which is to be mined through.

(xxiv) The required person under 30 CFR 75.1501 Emergency Evacuations is responsible for emergencies relating to the intersection and this person will review intersection procedures before the intersection occurs.

(xxv) Within 30 days of when this PDO is finalized, the petitioner will submit a revised emergency evacuation and firefighting training program, required by 30 CFR 75.1502. The petitioner will revise the program to incorporate hazards and evacuation plans used for well intersection. All underground miners will be trained in the above plan revisions within 30 days of submittal.

(xxvi) The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection from the potential hazards against which the existing standard for 30 CFR 75.1700 is intended to guard.

Docket Number: M–2020–028–C.

Petitioner: Marshall County Coal Resources, Inc., 57 Goshorn Woods Rd., Cameron, WV 26033.

Mine: Marshall County Mine, MSHA I.D. No. 46–01437, located in Marion County, West Virginia.

Regulation Affected: 30 CFR 75.1700 (Oil and gas wells).

Modification Request: The petitioner requests a modification of the existing standard, 30 CFR 75.1700, as it relates to vertical oil and gas wells at the Marshall County Mine. The operator is petitioning in order to plug and mine through wells in the Marcellus and Utica shales as well as other unconventional shale oil and gas wells.

The petitioner states that:

(a) The Harrison County Mine produces approximately 50,000 tons of coal each day and 11,659,131 cubic feet of methane is liberated at the mine each day.

(b) There are nine Marcellus wells and six Utica Shale wells within the mining projections, which the petitioner is applying to plug. The operator does not own the gas wells on the property and other wells may be drilled in the future.

(c) The petitioner is applying to plug vertical to horizontal oil and gas shale wells within the mine's projected operations so that they can be mined through.

The petitioner proposes the following alternative method:

(a) District Manager Approval:

(1) The petition applies to unconventional wells including the Marcellus and Utica shales and other unconventional shale oil and gas wells. These unconventional wells include wells that have been depleted of oil or gas production, wells that have not produced oil/gas and may have been plugged, or active wells not producing oil/gas. Potential oil and gas producing formations that have not produced in commercial quantities (*e.g.,* exploratory wells, wildcat wells, and dry holes), are also included in this petition.

(2) A 300 foot safety barrier will be built and maintained around the oil and gas wells, until the MSHA District Manager has approved mining in that area. The petitioner defines oil and gas wells as active, inactive, abandoned, shut-in, previously plugged wells, water injection wells, and carbon dioxide sequestration wells.

(3) Before mining inside the safety barrier around any well that the mine will intersect, the petitioner will give the MSHA District Manager a sworn affidavit or declaration by a company official, stating the required procedures for cleaning out, preparing, and plugging each gas or oil well have been completed.

(4) The affidavit or declaration will include the logs described below in (b)(viii), as well as any other records that the District Manager requires. If the well intersection is not planned, the petitioner will request a permit reducing the 300 foot barrier to remove the part not included in the well intersection.

(5) Where the total depth of the well is unknown, the petitioner must contact MSHA to create a communications protocol notifying the District Manager outside normal working hours.

(6) This petition applies to all underground coal mining at the mine.

(b) The petitioner proposes to use the following procedures when cleaning out and preparing oil and gas wells prior to plugging and replugging;

(1) For cleaning out and preparing vertical oil and gas wells prior to plugging and replugging, the petitioner will test for gas emissions before cleaning out, preparing, plugging, and replugging oil and gas wells. If gas is detected, the MSHA District Manager will be contacted. The following procedures will be conducted:

(i) The petitioner will remove casings and clean the borehole to 200 feet below the coal seam being mined, or the lowest mineable seam (whichever is lower). For wells over 4,000 feet below the seam, the well will be cleaned to 400 feet below the seam, or the lowest mineable seam, whichever is lower.

(ii) If the well is less than 4,000 feet deep, the petitioner will clean out the well from the surface to at least 200 feet below the lowest mineable coal seam base, unless the MSHA District Manager requires cleaning below that based on the geological strata or well pressure data. The petitioner will provide to the District Manager all the information they have on the geology, strata, and pressure of the well. If the well depth is equal to or greater than 4,000 feet, the petitioner will clean out the well from the surface to at least 400 feet below the lowest mineable coal seam base. The petitioner will remove all materials that are within the well, throughout the entire diameter of the well, from wall to wall. If the depth is unknown, and there is no historical data, the District Manager will be contacted before continuing. In active, non-producing wells being prepared according to this petition, the petitioner will (1) attempt to remove all casings using diligent effort; or (2) if the casings cannot be removed, fill with cement from the lowest possible depth to 200 feet below the seam being mined or to the lowest mineable seam, whichever is lower for wells less than 4,000 feet, or 400 feet below the seam mine, whichever is lower, for wells 4,000 feet or more, (3) casings unable to be removed will be perforated 200 feet below the seam to be mined, or lowest minable seam whichever is lower, or 400 feet below the seam to be mined if wells are 4,000 feet or deeper, and the well ring (annuli) will be cemented or filled.

(iii) Casings unable to be removed will be cut, milled, perforated or ripped at a spacing to help remove remaining casing in the seam by mining equipment. Remaining casing will be perforated or ripped to permit the injection of cement into voids within and around the casing. Any remaining casing will be perforated or ripped every 5 feet from 10 feet below the seam to 10 feet above the seam.

(iv) The petitioner will pull at least 150 percent casing string weight or make at least 3 attempts to spear or overshot to grip the casing for the pull effort. A 3,000 foot casing string will be assumed when the casing string length is unknown. Records of these efforts, including additional measures required by the District Manager, and casing length and weight, will be kept for MSHA to review.

(v) The petitioner will perforate or rip at every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or deeper) below the base of the coal seam to be mined or the lowest mineable coal seam, whichever is lower, up to 100 feet above the uppermost mineable coal seam that is being mined. The petitioner will ensure that the annulus between the casings and the well walls are filled with expanding cement, with a minimum of 0.5 percent after setting, and contain no voids.

(vi) Jet/sand cutting will be used for ripping or perforating casing with three or more strings of casing in the seam. This uses compressed nitrogen gas and sand to cut well casings. Active wells start 200 feet above the bottom of the coal seam at 200 foot intervals, to 200 feet below the bottom of the seam.

(vii) If unable to remove all casings, the petitioner will contact the District Manager. If unable to clean out casings, the petitioner will prepare the well from the surface to a minimum of 200 feet below the base of the lowest mineable seam for wells less than 4,000 feet deep, and 400 feet below the lowest mineable seam for wells 4,000 feet or deeper (unless the MSHA District Manager requires a greater distance).

(viii) If the petitioner, with a casing bond log, can show to the satisfaction of the District Manager that the annuli in the well are properly sealed with cement, then the petitioner will not perforate or rip casings at that well. Any casings remaining when multiple casing and tubing strings exist in coal horizon(s) will be ripped or perforated and filled with cement. A casing bond log for each casing and tubing string will be required if used instead of perforating multiple strings.

(ix) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(x) A journal will be kept to describe the depth and nature of materials encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place; any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(xi) If all casing can be removed (or there is no casing), the operator will prepare the well for plugging, and use seals described below. For wells less than 4,000 feet deep to seal to 200 feet below the coal seam to be mined, or the lowest mineable seam (whichever is lower), or for wells that are 4,000 feet or deeper, seal to 400 feet below the coal seam to be mined, or the lowest mineable seam, whichever is lower.

(xii) In the event that the cleaned-out well produces excessive gas, a mechanical bridge plug will be placed in the borehole in a competent stratum at least 200 feet (at least 400 feet if the well is 4,000 feet or deeper) below the base of the lowest mineable coalbed, but above the top of the uppermost hydrocarbon-producing stratum, unless the MSHA District Manager requires a larger distance. The petitioner will give the District Manager any geological information possessed on strata and pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer may be used in place of the mechanical bridge plug.

(xiii) If the uppermost hydrocarbon-producing stratum is within 300 feet of the base of the lowest mineable coalbed, a properly placed mechanical bridge plug, described in paragraph (vii) above,

will be used to isolate the hydrocarbon-producing stratum from the expanding cement plug. A minimum of 200 feet (400 feet if the well is 4,000 feet or deeper) of expanding cement will be placed below the lowest mineable coalbed unless the MSHA District Manager requires a greater distance, based on judgement, geological strata, or well pressure.

(c) For plugging or replugging oil and gas wells to the surface:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the coal seam, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure, using Portland cement or another lightweight cement mixture to fill from 100 feet above the top of the uppermost mineable coal seam (or higher, if determined by the District Manager) to the surface.

(ii) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing (if not marked physically, high-resolution GPS coordinates will be provided).

(d) Procedures for plugging or replugging oil and gas wells to use as degasification wells:

(1) Once the well has been completely cleaned out, as specified above, the following will be done to plug or replug wells to be used as degasification wells:

(i) A cement plug will be set by pumping an expanding cement slurry down the well from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or lowest mineable seam, depending on which is lower, or lower if determined by the District Manager. It will be pumped under 200 pounds per square inch of pressure. The top of the cement will extend at least 50 feet above the top of the seam unless more is required by the District Manager.

(ii) The bedrock of the upper portion of the well will be grouted with a casing to protect it. The rest of the well can be cased or uncased.

(iii) The top of the degasification casing will be fitted with wellhead equipment, as required by the District Manager in the approved ventilation plan, this equipment can include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(iv) Degasification operations will be included in the approved ventilation plan, including methane level tests and limits on methane concentrations.

(v) Once the mine area is degassed by a well and sealed, or the mine is abandoned, the petitioner will plug degasification wells: (1) A tube will be inserted to the bottom of the well (or if not possible, within 100 feet above the seam), blockage will be removed to make sure the tube can be inserted to the required depth; (2) a cement plug will be set into the well using Portland cement or another lightweight cement down the tubing until the well is filled to the surface; (3) steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level with the API well number engraved or welded on the casing; and (4) this does not apply to degasification holes not intersecting the mined seam, do not commercially produce gas, and have no API number.

(e) Alternative procedures for preparing or replugging oil and gas wells.

(1) If it is agreed upon by the District Manager, that a well cannot be cleaned out completely due to damage to the well because of subsidence, caving, or another factor:

(i) A hole will be drilled adjacent and parallel to the well to a depth of at at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the lowest mineable coal seam, unless more is required by the District Manager.

(ii) A geophysical sensing device will be used to locate casings remaining in the well.

(iii) If there are casing(s) present in the well, the petitioner will access the well from a parallel hole and will perforate or rip all casings at intervals of at least 5 feet, from 10 feet below the coal seam to 10 feet above the coal seam. After that, the petitioner will perforate or rip at least every 50 feet from 200 feet (400 feet if the well is 4,000 feet or deeper) below the coal seam to be mined, or below the base of the lowest mineable coal seam, whichever is lower, or up to 100 feet above the seam mined, unless more is required by the District Manager.

(iv) The annulus between casings and the well wall will be filled with expanding cement (at a minimum 0.5 percent expansion upon setting), with no voids. If the petitioner, using a casing bond, can demonstrate that the annulus of the well is adequately sealed with cement, the petitioner will not perforate or rip casing for that well. When there are multiple casings and tubing strings in the coal horizon, remaining casing will be ripped or perforated and filled with expanding cement. A casing bond log for each casing and tubing string will be used instead of ripping or perforating multiple strings.

(v) If the petitioner and MSHA determine that there is not enough casing in the well, a horizontal hydraulic fracturing technique can be used to intercept the original well. The petitioner will fracture at least six places at intervals agreed to by the District Manager. These fractures will be from at least 200 feet (400 feet if the well is 4,000 feet or deeper) below the base of the coal seam to be mined, or the lowest mineable coal seam, whichever is lowest, or to at least 50 feet above the seam mined. Expanding cement will be pumped into the fractured well to intercept voids.

(vi) Down-hole logs will be prepared for each well consisting of caliper survey logs, a bond log if available, a deviation survey, and a gamma survey suitable for determining the top, bottom, and thickness of all coal seams and potential hydrocarbon producing strata and the location for the bridge plug.

(vii) A journal will be kept describing the depth and nature of materials encountered; the bit size and type used to drill each portion of the hole; the length and type of material for plugging the well; the length of casing removed, perforated or ripped or left in place, any sections where casing was cut or milled; or any other information for cleaning and sealing the well. Invoices, work-orders, and other related records will be maintained and available to MSHA at request.

(viii) After plugging the wells as described above, the petitioner will plug the adjacent hole, from the bottom to the surface, using Portland cement or another lightweight cement.

(ix) Steel turnings or small magnetic particles will be embedded in the top of the cement near the surface as a permanent magnetic monument of the well, or alternatively, a 4.0 inch or larger casing set in cement will be set extended 36 inches above ground level

(x) The petitioner and District Manager will discuss each hole, a combination of methods outlined in (d)(1)(iii) and (d)(1)(iv) will be used on a single well, depending on conditions. The petitioner will use a registered petroleum engineer to provide

additional documents and certificates to support alternative methods if requested by the District Manager.

(2) The petitioner will use the following procedures for mining within a 100-foot diameter barrier around a well:

(i) Before intersecting any plugged or replugged wells, a conference before intersecting any plugged or replugged well may be requested by any of the following: the petitioner (or its representative), a representative of miners, a State agency, or the MSHA District Manager. The requester will let the other parties know of the conference with a reasonable amount of time before the conference, allowing for an opportunity to participate. The focus of the conference is to review, evaluate, and accommodate any abnormal or unusual circumstances that relate to the condition of the well or surrounding strata.

(ii) The intersection of a well by the petitioner will be conducted on a shift approved by the MSHA District Manager. The petitioner will notify the MSHA District Manager and the miners' representative prior to the intersection so that representatives can be present.

(iii) For continuous mining, drivage sites will be installed by the petitioner at the last open crosscut near the area to be mined to ensure intersection of the well. The drivage sites will not be more than 50 feet from the well. For longwall-mining, distance markers will be installed on 5-foot centers 50 feet ahead of the well in the headgate and tailgate entry.

(iv) Firefighting equipment, including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the mining-through will be available when either the conventional or continuous mining method is used. The fire hose will be located in the last open crosscut of the entry or room. The petitioner will maintain the water line to be able to reach the farthest point of penetration on the section. A hose to the longwall water supply is sufficient if longwall mining.

(v) Sufficient supplies of roof support and ventilation materials will be available and located at the last open crosscut. In addition, an emergency plug and/or plugs will be available in the immediate area of the mine-through.

(vi) Equipment will be checked for permissibility and serviced on the shift prior to mining-through the well. Water sprays, water pressures and water flow rates will be checked and any issues will be corrected.

(vii) The methane monitor on the longwall, continuous mining machine, or cutting machine and loading machine will be calibrated on the shift prior to mining-through the well.

(viii) When mining is in progress, tests for methane will be made with a hand-held methane detector at least every 10 minutes from the time that mining with the continuous mining machine or longwall face is within 30 feet of the well until the well is intersected and immediately prior to well intersection. During the actual cutting through process, no individual will be allowed on the return side until mining-through has been completed and the area has been examined and declared safe. Workplace examinations on the return side of the shearer will be done while the machine is idle. The approved ventilation plan will be followed at all times unless otherwise determine by the District Manager due to a need for more air velocity for intersection.

(ix) When using continuous or conventional mining methods, the working place will be free from accumulations of coal dust and coal spillages, and rock dust will be placed on the roof, rib and floor within 20 feet of the face when intersecting near the well on the shift or shifts during which it will occur. For longwall sections, rock dusting will be done on roof, rib, and floor up to the headgate and tailgate gob.

(x) When the wellbore is intersected, all equipment will be de-energized and the area thoroughly examined and determined safe before mining is resumed.

(xi) After a well has been intersected and the working place determined safe, mining will continue inby the well at a sufficient distance to permit adequate ventilation around the area of the wellbore.

(xii) When a torch is necessary for poorly cut or milled casings, no open flames will be permitted in the area until adequate ventilation has been established around the wellbore and methane levels of less than 1 percent are present in all areas affected by flames or sparks from the torch. Before using a torch, a thick layer of rock dust will be applied to any roof, face, floor, ribs or exposed coal within 20 feet of the casing.

(xiii) Non-sparking (brass) tools will be used only to expose and examine cased wells. These tools will be located on the working section.

(xiv) No person will be permitted in the area of the mining-through operation except for those actually engaged in the operation, company personnel, representatives of the miners, personnel from MSHA, and personnel from the appropriate State agency.

(xv) The petitioner will alert all personnel in the mine of a planned intersection of the well before going underground if it is to occur during the shift. The warning will be continuously repeated until the well is mined through.

(xvi) The mining-through operation will be under the direct supervision of a certified official. Instructions concerning the mining-through operation will be issued only by the certified official in charge.

(xvii) If the petitioner cannot find the well in the longwall panel or if the intersection is missed, the petitioner will cease mining and examine the area for hazardous conditions at the projected well location, notify the District Manager, and make a reasonable attempt to locate the well using visual observation and inspection of the survey data. Mining may resume if the well is located and hazardous conditions do not exist. The petitioner will work with the District Manager to resolve issues before mining is resumed.

(xviii) If the well is not plugged to the total depth of the minable coal seams identified with the core hole logs, coal seams below the lowest plug will remain subject to 30 CFR 75.1700 barrier requirements if developed in the future.

(xix) The petitioner will follow all safety precautions required by MSHA and State regulatory agencies having jurisdiction over the plugging site to provide protection to miners.

(xx) Miners involved in plugging/replugging will be trained on the operations of this petition before starting the process. The petition will be posed at well sites until plugging/replugging is complete.

(xxi) When using mechanical bridge plugs, the petitioner should use the best technology required or recognized by the State or oil/gas industries.

(xxii) The petitioner will notify the District Manager as set forth in the cut through procedures for each well.

(xxiii) Within 30 days after the Proposed Decision and Order (PDO) becomes final, the petitioner will submit proposed revisions to be approved by the MSHA District Manager, as part of the 30 CFR 48 training plan. This will include initial and refresher training. The revisions are to include training on the above terms for all miners involved in well intersection prior to mining within 150 feet of the well which is to be mined through.

(xxiv) The required person under 30 CFR 75.1501 Emergency Evacuations is responsible for emergencies relating to the intersection and this person will

review intersection procedures before the intersection occurs.

(xxv) Within 30 days of when this PDO is finalized, the petitioner will submit a revised emergency evacuation and firefighting training program, required by 30 CFR 75.1502. The petitioner will revise the program to incorporate hazards and evacuation plans used for well intersection. All underground miners will be trained in the above plan revisions within 30 days of submittal.

(xxvi) The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection from the potential hazards against which the existing standard for 30 CFR 75.1700 is intended to guard.

Roslyn Fontaine,

Deputy Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2020–25103 Filed 11–12–20; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Agency Information Collection Activities; Comment Request; Federal Employees' Compensation Act Medical Reports and Compensation Claims

AGENCY: Office of Workers' Compensation, DOL.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL), is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Medical Forms and Claim for Compensation.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by January 12, 2021.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free by contacting Anjanette Suggs by telephone at 202–354–9660 or by email at *suggs.anjanette@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Office of Workers' Compensation Programs, Room S3323, 200 Constitution Avenue NW, Washington, DC 20210; by email: *suggs.anjanette@dol.gov*.

FOR FURTHER INFORMATION CONTACT: Anjanette Suggs by telephone at 202–354–9660 or by email at *suggs.anjanette@dol.gov.*

SUPPLEMENTARY INFORMATION: The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Background: The Office of Worker's Compensation Programs (OWCP) administers the Federal Employees' Compensation Act (FECA). 5 U.S.C. 8149, Congress gives the Secretary of Labor authority to prescribe the rules and regulations necessary for the administration and enforcement of the FECA. 5 U.S.C. 8102, the FECA requires the United States to provide compensation to individuals who sustain an injury while in the course of federal employment. 5 U.S.C. 8103, authorizes FECA to provide medical and initial medical and other benefits.

5 U.S.C. 8102, Compensation for Disability or Death of Employee

(a) The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is—

(1) caused by willful misconduct of the employee;

(2) caused by the employee's intention to bring about the injury or death of himself or of another; or

(3) proximately caused by the intoxication of the injured employee.

(b) Disability or death from a war-risk hazard or during or as a result of capture, detention, or other restraint by a hostile force or individual, suffered by an employee who is employed outside the continental United States or in Alaska or in the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements (as described in section 3(a) of the Panama Canal Act of 1979), is deemed to have resulted from personal injury sustained while in the performance of his duty, whether or not the employee was engaged in the course of employment when the disability or disability resulting in death occurred or when he was taken by the hostile force or individual. This subsection does not apply to an individual—

(1) whose residence is at or in the vicinity of the place of his employment and who was not living there solely because of the exigencies of his employment, unless he was injured or taken while engaged in the course of his employment; or

(2) who is a prisoner of war or a protected individual under the Geneva Conventions of 1949 and is detained or utilized by the United States.

5 U.S.C. 8103, Medical Services and Initial Medical and Other Benefits

(a) The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation. These services, appliances, and supplies shall be furnished—

(1) whether or not disability has arisen;

(2) notwithstanding that the employee has accepted or is entitled to receive benefits under subchapter III of chapter 83 of this title or another retirement system for employees of the Government; and

(3) by or on the order of United States medical officers and hospitals, or, at the employee's option, by or on the order of physicians and hospitals designated or approved by the Secretary. The employee may initially select a physician to provide medical services, appliances, and supplies, in accordance with such regulations and instructions as the Secretary considers necessary, and may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances, and supplies. These expenses, when authorized or approved by the Secretary, shall be paid from the Employees' Compensation Fund.

The following forms and letters are the standard forms and letters for the collection of this information: Claim for Compensation (CA–7); Authorization for Examination and/or Treatment (CA–16); Duty Status Report (CA–17); Attending

Physician's Report (CA–20); Request for the Services of an Attendant (CA–1090); Referral to a Medical Specialist (CA–1305); OWCP Requirements for Audiological Examination (CA–1087); Referral for a Complete Audiologic and Otologic Examination (CA–1331); Outline for Audiologic Examination (CA–1332); Work Capacity Evaluation, Psychiatric/Psychological Conditions (OWCP–5a); Work Capacity Evaluation, Cardiovascular/Pulmonary Conditions (OWCP–5b); and Work Capacity Evaluation, Musculoskeletal Conditions (OWCP–5c). This information collection is currently approved for use through March 31, 2021. This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB under the PRA approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Written comments will receive consideration, and summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB Number 1240–0046.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and • Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL-Office of Workers' Compensation Programs.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title of Collection: FECA medical Reports, Claim for Compensation.

Form: CA–7; CA–16; CA–17; CA–20; CA–1090; CA–1305; CA–1087; CA–1331; CA–1332; OWCP–5a; OWCP–5b; and OWCP–5c.

OMB Number: 1240–0046.

Affected Public: Individuals or households.

Estimated Number of Respondents: 282, 353.

Frequency: As needed.

Total Estimated Annual Responses: 282, 353.

Estimated Average Time per Response: 5–30 minutes.

Estimated Total Annual Burden Hours: Hours 25,605.

Total Estimated Annual Other Cost Burden: $110,118.

Authority: 44 U.S.C. 3506(c)(2)(A).

Anjanette Suggs,

Agency Clearance Officer.

[FR Doc. 2020–25149 Filed 11–12–20; 8:45 am]

BILLING CODE 4510–CH–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: [20–093]]

Name of Information Collection: NASA STEM Gateway Performance Management and Third-Party Experience

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of new information collection.

SUMMARY: The National Aeronautics and Space Administration has submitted for OMB review a request regarding this information collection under the provisions of the Paperwork Reduction Act.

DATES: Comments are due by December 14, 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 30-day Review-Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, at 202–358–1351 or *Lori.Parker@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The NASA STEM Gateway (NASA's universal registration and data management system) is a comprehensive tool designed to allow learners (*i.e.,* students and educators) to apply to NASA STEM engagement opportunities (*e.g.,* internships, fellowships, challenges, educator professional development, experiential learning activities, etc.) in a single location. NASA personnel manage the selection of applicants and implementation of engagement opportunities within the NASA STEM Gateway. In addition to supporting student selection, student-level data will enable NASA Office of STEM Engagement (OSTEM) to fulfill federally mandated performance and evaluation reporting on its STEM engagement activities and report relevant demographic information as needed for Agency performance goals and success criteria (annual performance indicators). Information collected will be used by the NASA OSTEM to establish better defined goals, outcomes, and standards for measuring progress and also to evaluate the outcomes of NASA's STEM Engagement programs and activities. This process of improvement will enhance NASA's strategic planning, performance planning, and performance reporting efforts as required by the GPRA Modernization Act of 2010 and Evidence-Based Policymaking Act of 2018.

II. Methods of Collection

Online/Web-Based

III. Data

Title: NASA STEM Gateway Performance Management and Third Party Experience.

OMB Number: New Collection.

Type of Review: Request for a new OMB Control Number.

Affected Public: Third-Party (Principal Investigators and Evaluators).

Estimated Annual Number of Activities: 4.

Estimated Number of Respondents per Activity: 250.

Annual Responses: 1,000.

Estimated Time per Response: 60 minutes.

Estimated Total Annual Burden Hours: 1,000.

Estimated Total Annual Cost: $25,090.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Roger Kantz,

NASA PRA Clearance Officer.

[FR Doc. 2020–25134 Filed 11–12–20; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (20–095)]

NASA Advisory Council; Science Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Science Committee of the NASA Advisory Council (NAC). This Committee reports to the NAC. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Tuesday, December 1, 2020, 1:00–5:00 p.m. ET; Wednesday, December 2, 2020, 1:00–5:00 p.m. ET; and Thursday, December 3, 2020, 1:00–5:00 p.m. ET. *Note:* All times listed are Eastern Time (ET).

FOR FURTHER INFORMATION CONTACT: Ms. KarShelia Henderson, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *khenderson@nasa.gov*.

SUPPLEMENTARY INFORMATION: This meeting will be a virtual meeting open to the public via Webex and telephonically. Webex connectivity information for each day is provided below. For audio, when you join the Webex event, you may use your computer or provide your phone number to receive a call back, otherwise, call the U.S. toll conference number listed for each day.

On Tuesday, December 1, the event address for attendees is: https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=ec9f04af53099d097214a64cf178fc2ed. The event number is 199 056 0375 and the event password is wfSEe8uH5*3. If needed, the U.S. toll conference number is 1–415–527–5035 and access code is 199 056 0375.

On Wednesday, December 2, the event address for attendees is: https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=e51f38c7ac92a01577c5f697d7d1b4c5f. The event number is 199 748 1916 and the event password is EswGXYZ@742. If needed, the U.S. toll conference number is 1–415–527–5035 and access code is 199 748 1916.

On Thursday, December 3, the event address for attendees is: https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=e78aa801796224781c837dcaaa61c7d1b. The event number is 199 864 2555 and the event password is XxNKcqr8$77. If needed, the U.S. toll conference number is 1–415–527–5035 and access code is 199 864 2555.

The agenda for the meeting includes the following topics:

—Science Mission Directorate (SMD) Missions, Programs and Activities

It is imperative that the meeting be held on these dates due to the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2020–25104 Filed 11–12–20; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 20–094]

Notice of Information Collection: Identify Management System (IdMAX)

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Claire Little, National Aeronautics and Space Administration, 300 E Street SW, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Claire Little, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, (202) 358–2225.

SUPPLEMENTARY INFORMATION:

I. Abstract

Homeland Security Presidential Directive 12 (HSPD–12) established a mandatory requirement for a Government-wide identify verification standard. In compliance with HSPD–12 and the National Institute of Standards and Technology (NIST) Federal Information Processing Standard (FIPS) 201: Personal Identity Verification of Federal Employees and Contractors, and OMB Policy memorandum M–05–24 Implementation of Homeland Security Presidential Directive 12, NASA must collect information from members of the public to: (1) Validate identity and (2) issue secure and reliable federal credentials to enable access to NASA facilities/sites and NASA information systems. Information collected is consistent with background investigation data to include but not limited to name, date of birth, citizenship, social security number (SSN), address, employment history, biometric identifiers (*e.g.* fingerprints), signature, digital photograph.

NASA collects information from U.S. Citizens requiring access 30 or more days in a calendar year. NASA also collects information from foreign nationals regardless of their affiliation time.

NASA collects, stores, and secures information from individuals identified above in the NASA Identify Management System (IdMAX) in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a.)

Information is collected via a combination of electronic and paper

processes and stored in the NASA Identify Account Exchange (IdMAX) System.

II. Method of Collection

Electronic (90%) and Paper (10%)

III. Data

Title: Personal Identity Validation for Routine and Intermittent Access to NASA Facilities, Sites, and Information Systems.

OMB Number: 2700–0158.

Type of review: Extension without change of a currently approved information collection.

Affected Public: Individuals.

Estimated Number of Respondents: 52,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Public Burden Hours: 8,667.

Estimated Total Annual Government Cost: $1,189,350.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Roger Kantz,

NASA PRA Clearance Officer.

[FR Doc. 2020–25135 Filed 11–12–20; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2021–006]

Advisory Committee on the Records of Congress; Meeting

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: We are announcing a meeting of the Advisory Committee on the Records of Congress. The committee advises NARA on the full range of programs, policies, and plans for the Center for Legislative Archives in the Office of Legislative Archives, Presidential Libraries, and Museum Services (LPM).

DATES: The meeting will be on December 7, 2020, from 1:00 p.m. to 3:00 p.m.

ADDRESSES: This meeting will be held virtually. You must register in advance through the Webex link at *https://senate.webex.com/senate/onstage/g.php?MTID=e3d4cf066791bb98871f2bdd8fac2f252* if you wish to attend.

FOR FURTHER INFORMATION CONTACT: Sharon Shaver, Congressional Relations Specialist at the Center for Legislative Archives, by email at *Sharon.shaver@nara.gov* or at 202.357.6802. Please use the email contact method during the current COVID remote work situation. Contact the event host, Amy Camilleri at the Secretary of the Senate Office, by email at *amy_camilleri@sec.senate.gov.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public in accordance with the Federal Advisory Committee Act (5 U.S.C. app 2) and implementing regulations.

Agenda

(1) Chair's Opening Remarks—Secretary of the U.S. Senate
(2) Recognition of Co-chair—Clerk of the U.S. House of Representatives
(3) Recognition of the Archivist of the United States
(4) Approval of the minutes of the last meeting
(5) Senate Archivist's report
(6) House Archivist's report
(7) Center for Legislative Archives update
(8) Other current issues and new business

Miranda Andreacchio,

Committee Management Officer.

[FR Doc. 2020–25096 Filed 11–12–20; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

Meeting of Humanities Panel

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: The National Endowment for the Humanities (NEH) will hold seven meetings, by videoconference, of the Humanities Panel, a federal advisory committee, during December 2020. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates. The meetings will open at 8:30 a.m. and will adjourn by 5:00 p.m. on the dates specified below.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given of the following meetings:

1. *Date:* December 1, 2020

This video meeting will discuss applications on the topic of U.S. History (Pre-1900), for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

2. *Date:* December 1, 2020

This video meeting will discuss applications for the Dialogues on the Experience of War grant program, submitted to the Division of Education Programs.

3. *Date:* December 2, 2020

This video meeting will discuss applications for the Dialogues on the Experience of War grant program, submitted to the Division of Education Programs.

4. *Date:* December 3, 2020

This video meeting will discuss applications on the topic of U.S. History (Regional, State, and Local), for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

5. *Date:* December 4, 2020

This video meeting will discuss applications for the Dialogues on the Experience of War grant program, submitted to the Division of Education Programs.

6. *Date:* December 8, 2020

This video meeting will discuss applications for the Documenting Endangered Languages Fellowships, submitted to the Division of Research Programs.

7. *Date:* December 10, 2020

This video meeting will discuss applications for Fellowship Programs at Independent Research Institutions,

submitted to the Division of Research Programs.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: November 6, 2020.

Caitlin Cater,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2020–25095 Filed 11–12–20; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0257]

Information Collection: Nondiscrimination in Federally Assisted Programs or Activities Receiving Assistance From the Commission

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment; extension of comment period.

SUMMARY: On October 14, 2020, the U.S. Nuclear Regulatory Commission (NRC) solicited comments on ''Information Collection: Nondiscrimination in Federally Assisted Programs or Activities Receiving Assistance from the Commission.'' The public comment period was originally scheduled to close on November 13, 2020. The NRC has decided to extend the public comment period to allow more time for members of the public to develop and submit their comments, including comments on the NRC Form 782, ''Complaint Form.'' The form has been revised to include an updated Privacy Act Statement.

DATES: The due date of comments requested in the document published on October 14, 2020 (85 FR 65080) is extended. Comments should be filed no later than December 14, 2020. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Cullison, Office of the Chief Information Officer, telephone: 301–415–2084, email: *Infocollects.Resource@nrc.gov,* U.S. Nuclear Regulatory Commission, Washington DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0257 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0257.
- *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 supporting statement, burden spreadsheet, and NRC Forms 781, and revised NRC Form 782 are available in ADAMS under Accession Nos. ML20224A170, ML20224A168, ML20224A166, and ML20308A433.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2019–0257 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

On October 14, 2020 (85 FR 65080), the NRC solicited comments on ''Information Collection: Nondiscrimination in Federally Assisted Programs or Activities Receiving Assistance from the Commission.'' Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a renewal of an existing collection of information to OMB for review entitled, 10 CFR part 4, ''Nondiscrimination in Federally Assisted Programs or Activities Receiving Assistance from the Commission.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The public comment period was originally scheduled to close on November 13, 2020. The NRC has decided to extend the public comment period on this document until December 14, 2020, to allow more time for members of the public to submit their comments because the NRC Form 782, ''Complaint Form'' has been updated to include a revised Privacy Act Statement.

Dated: November 9, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–25158 Filed 11–12–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8907; NRC–2019–0026]

United Nuclear Corporation Church Rock Project

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft environmental impact statement; request for comment and public comment meetings.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft Environmental Impact Statement (EIS) for United Nuclear Corporation (UNC) license amendment request. UNC is requesting authorization to amend its license (SUA–1475) to excavate approximately 1 million cubic yards of mine waste from the Northeast Church Rock Mine Site and dispose of it at the existing mill site in McKinley County, New Mexico.

DATES: The NRC staff will hold two public meeting through online webinars on the draft EIS at 4:00 p.m. (EST) on December 2, 2020 and at 4:00 p.m. (EST) December 9, 2020. The staff will present the preliminary findings and receive public comments during these transcribed public meetings. Members of the public are invited to submit comments by December 28, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2019–0026. Address questions about Docket IDs to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, ATTN: Program Management, Announcements and Editing Staff, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Email comments to: UNC-ChurchRockEIS.resource@nrc.gov.*
- *Leave comments by voicemail at:* 888–672–3425.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ashley Waldron, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7317; email: *Ashley.Waldron@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0026 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this action by the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0026.
- *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.'' The draft EIS can be found by searching for ADAMS Accession No. ML20289A621. For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.
- *Project Website:* Information related to the UNC Church Rock project can be accessed on the NRC's project website at: *https://www.nrc.gov/info-finder/decommissioning/uranium/united-nuclear-corporation-unc-.html.*
- *Public Library:* A copy of the draft EIS can be accessed at the Octavia Fellin Public Library, 110 West Aztec Avenue, Gallup, NM 87301

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2019–0026 in your comment submission. Written comments may be submitted during the draft EIS comment period as described in the **ADDRESSES** section of the document.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *https://www.regulations.gov* and enters all comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission because the NRC does not routinely edit comment submissions before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Meeting Information

The NRC is announcing that staff will hold two public meetings as online webinars to receive comments on the draft EIS. A court reporter will record and transcribe all comments received during the webinar and the transcript of the meeting will be made publicly available. The dates and times for the public webinars are as follow:

Meeting	Date	Time	Location
Public Webinar	December 2, 2020	4:00 p.m.–7:00 p.m. (EST)	Webinar Information: *https://usnrc.webex.com.* Event number: 199 946 2983. Telephone bridge line: 888–454–7496. Participant passcode: 7838183.

Meeting	Date	Time	Location
Public Webinar	December 9, 2020	4:00 p.m.–7:00 p.m. (EST)	Webinar Information: *https://usnrc.webex.com.* Event number: 199 047 2797. Telephone bridge line: 888–454–7496. Participant passcode: 7838183.

Persons interested in attending these meetings should monitor the NRC's Public Meeting Schedule website at *https://www.nrc.gov/pmns/mtg* for additional information, agendas for the meetings, and access information for the webinar and telephone bridge line.

III. Discussion

The NRC is issuing for public comment the draft EIS for the proposed United Nuclear Corporation (UNC) license amendment to excavate approximately 1 million cubic yards of mine waste from the Northeast Church Rock Mine Site and dispose of it at the existing mill site in McKinley County, New Mexico.

The draft EIS for UNC's license amendment application includes the NRC's preliminary analysis that evaluates the environmental impacts of the proposed action and alternatives to the proposed action. After comparing the impacts of the proposed action to the No-Action alternative, the NRC staff, in accordance with the requirements in part 51 of title 10 of the *Code of Federal Regulations,* preliminarily recommends that the NRC proceed with the proposed action, which would be to authorize UNC to transfer and dispose of the Northeast Church Rock (NECR) mine waste on top of the UNC tailings impoundment. This recommendation is based on (i) the license application request, which includes the Environmental Report (ER) and supplemental documents and the licensee's responses to the NRC staff's requests for additional information; (ii) consultation with Federal, State, Tribal, and local agencies and input from other stakeholders; and (iii) independent NRC staff review as documented in the assessments summarized in this EIS.

Dated: November 6, 2020.

For the Nuclear Regulatory Commission.

Jessie M. Quintero,

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

[FR Doc. 2020–25048 Filed 11–12–20; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2021–25; Order No. 5750]

Mail Classification Schedule

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is recognizing a recently filed Postal Service notice concerning minor classification changes to the Mail Classification Schedule related to International Mail. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 20, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Summary of Changes
III. Notice of Commission Action
IV. Ordering Paragraphs

I. Introduction

On November 5, 2020, the Postal Service filed a notice of minor classification changes governing international mail in the Mail Classification Schedule (MCS) pursuant to 39 CFR 3040.212.[1] The Postal Service seeks to revise the size limits for international small packets as they appear in the MCS. Notice at 1. The changes are intended to take effect on January 24, 2021, in conjunction with the implementation of the Competitive product price change filed in Docket No. CP2021–15. *Id.* at 2.

[1] Notice of the United States Postal Service of Minor Classification Changes Concerning the Minimum Size Limit for International Small Packet, November 5, 2020 (Notice).

II. Summary of Changes

39 CFR 3040.212 requires the Postal Service to ''notify the Commission of updates to size and weight limitations for [C]ompetitive mail matter'' pursuant to 39 CFR 3040, subpart E. The Postal Service maintains that the Notice satisfies the requirements of 39 CFR 3040, subpart E because ''the changes described should result in the MCS more accurately representing the Postal Service's current offerings.'' *Id.; see* 39 CFR 3040.190(a). The Postal Service states that the Notice is filed at least 15 days before the intended effective date, and the changes merely revise size limits for international small packets as they appear in the MCS without otherwise changing product offerings or the prices or price groups applicable to such products and countries. Notice at 2–3; 39 CFR 3040.190(b) and (c). The Postal Service concludes that ''these minor classification changes do not constitute material changes, to the product descriptions of the products that might be affected.'' Notice at 3. The Notice includes a copy of the affected sections of the MCS with the proposed changes in legislative format as required by 39 CFR 3040.190(c)(3). *Id.* Attachment 1.

III. Notice of Commission Action

Pursuant to 39 CFR 3040.191, the Commission has posted the Notice on its website and invites comments on whether the Postal Service's filings are consistent with title 39 of the United States Code and 39 CFR part 3040, subparts E and F. Comments are due no later than November 20, 2020. The filing can be accessed via the Commission's website (*http://www.prc.gov*).

The Commission appoints Richard A. Oliver to represent the interests of the general public (Public Representative) in this docket.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. MC2021–25 to consider matters raised by the Notice.

2. Comments by interested persons are due by November 20, 2020.

3. Pursuant to 39 U.S.C. 505, Richard A. Oliver is appointed to serve as an officer of the Commission (Public Representative) to represent the

interests of the general public in this proceeding.

4. The Commission directs the Secretary of the Commission to arrange for prompt publication of this notice in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2020–25108 Filed 11–12–20; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 29, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 176 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–23, CP2021–24.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–25065 Filed 11–12–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 23, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 679 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–22, CP2021–23.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–25064 Filed 11–12–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 13, 2020.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 30, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 177 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2021–24, CP2021–25.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–25066 Filed 11–12–20; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Wednesday, November 18, 2020.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topic:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: November 10, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–25214 Filed 11–10–20; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90372; File No. SR–DTC–2020–011]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving a Proposed Rule Change To Amend Rule 4

November 6, 2020

I. Introduction

On September 9, 2020, The Depository Trust Company (''DTC'') filed with the Securities and Exchange

Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] proposed rule change SR–DTC–2020–011. The proposed rule change was published for comment in the **Federal Register** on September 28, 2020.[3] The Commission did not receive any comment letters on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Background

DTC is the central securities depository (''CSD'') for substantially all corporate and municipal debt and equity securities available for trading in the United States.[4] As a covered clearing agency that provides CSD services,[5] DTC provides a central location in which securities may be immobilized, and interests in those securities are reflected in accounts maintained for its Participants, which are financial institutions such as brokers or banks.[6] DTC does not provide central counterparty services and therefore does not become party to its Participants' transactions or guarantee settlement on behalf of its Participants.[7]

DTC provides settlement services for virtually all broker-to-broker equity and listed corporate and municipal debt securities transactions in the U.S., as well as institutional trades, money market instruments and other financial obligations. For end-of-day net funds settlement, the DTC settlement system records money debits and credits to Participant settlement accounts throughout a Business Day.[8] At the end of a Business Day, a Participant's settlement account will have a net debit (*i.e.,* the sum of all money charges to a Participant's account exceeds the sum of all money credits), net credit (*i.e.,* the sum of all money credits to a Participant's account exceeds the sum of all money charges), or zero balance. This final balance will determine whether the Participant has an obligation to pay or to be paid as part of the process of DTC completing settlement on that Business Day. A Participant that fails to pay its net debit balance and therefore defaults on its settlement obligations on a Business Day will not have paid for the securities processed for delivery versus payment, and the securities will not be credited to its account.

DTC represents that there may be circumstances in which the amount of settlement payments received or available to DTC on a Business Day is not sufficient to pay all Participants with an end-of-day net credit balance on that Business Day (a ''settlement gap'').[9] A settlement gap could occur on a Business Day as a result of a Participant Default, where a Participant fails to pay its settlement obligation (a ''default gap''). A settlement gap could also occur on a Business Day as a result of causes other than a Participant Default (a ''non-default gap''). Examples of a non-default gap could include a scenario in which the funds required to complete settlement are not available to DTC due to an operational or data issue arising at DTC or at a Participant or Settling Bank, a cyber incident, or other business disruption.[10] According to DTC, its failure to complete settlement on a given Business day could cause significant market-wide effects.[11]

B. The Participants Fund and Rule 4

The Participants Fund is prefunded and represents the aggregate of the deposits that each DTC Participant is required to make under DTC's Rules.[12] The Rules provide for a minimum deposit to the Participants Fund, and Participants with higher levels of activity that impose greater liquidity risk to the DTC settlement system have proportionally larger required deposits.[13] DTC has stated that the Participants Fund is a mutualized pre-funded liquidity and loss resource, and that DTC does not have an obligation to repay the Participants Fund and the application of the Participants Fund does not convert to a loss.[14] Once DTC applies the Participants Fund, the Participants are required, upon the demand of DTC, to replenish their shares of the Participants Fund to satisfy

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 89952 (September 22, 2020), 85 FR 60847 (September 28, 2020) (SR–DTC–2020–011) (''Notice'').

[4] Each capitalized term not otherwise defined herein has its respective meaning as set forth in DTC's rules, including, but not limited to, the Rules, By-Laws and Organization Certificate of DTC (the ''Rules'') and the DTC Settlement Service Guide (the ''Settlement Guide''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.* The Settlement Guide is a Procedure of DTC filed with the Commission that, among other things, operationalizes and supplements the DTC Rules that relate to settlement.

[5] A covered clearing agency is defined as a registered clearing agency that provides the services of a central counterparty (''CCP'') or CSD. *See* 17 CFR 240.17Ad–22(a)(5). CSD services means services of a clearing agency that is a securities depository as described in Section 3(a)(23)(A) of the Exchange Act. *See* 17 CFR 240.17Ad–22(a)(3). Specifically, the definition of a clearing agency includes, in part, ''any person, such as a securities depository that (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.'' 15 U.S.C. 78c(a)(23)(A).

[6] *See, e.g.,* Securities Exchange Act Release No. 20221 (September 23, 1983), 48 FR 45167, 45168 (October 3, 1983) (File No. 600–1) (''A securities depository is a ''custodial'' clearing agency that operates a centralized system for the handling of securities certificates. Depositories accept deposits of securities from broker-dealers, banks, and other financial institutions; credit those securities to the depositing participants *(sic)* accounts; and, pursuant to participant's *(sic)* instructions, effect book-entry movements of securities. The physical securities deposited with a depository are held in a fungible bulk; each participant or pledgee having an interest in securities of a given issue credited to its account has a pro rata interest in the physical securities of the issue held in custody by the securities depository in its nominee name. Depositories collect and pay dividends and interest to participants for securities held on deposit. Depositories also provide facilities for payment by participants to other participants in connection with book-entry deliveries of securities. . . .'').

[7] A clearing agency that provides central counterparty services interposes itself between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer. 17 CFR 240.17Ad–22(a)(2).

[8] Credits to a Participant settlement account arise from deliveries versus payment, receipt of payment orders, principal and interest distributions in respect of securities held, intraday settlement progress payments and any other items or transactions that give rise to a credit. Debits to a Participant settlement account are primarily due to receives versus payment, as well as other types of charges to the account permitted under the Rules. *See* Notice, *supra* note 3, 85 FR at 60848.

[9] *See id.*

[10] DTC is subject to a number of regulatory requirements related to its operational and cyber risks, including Rule 17Ad–22(e)(17) and Regulation Systems Compliance and Integrity. DTC's overall approach to operational risk is summarized in its Disclosure Framework, available at *https://www.dtcc.com/legal/policy-and-compliance.* Among other things, DTC manages its operational risk pursuant to the Clearing Agency Operational Risk Management Framework, which the Commission approved in a separate rule filing. *See* Securities Exchange Act Release No. 81745 (September 28, 2017), 82 FR 46332 (October 4, 2017) (SR–DTC–2017–014).

[11] *See* Notice, *supra* note 3, 85 FR at 60848–49 (citing, *e.g.,* Rule 9(B), *supra* note 4, which states: ''Each Participant and the Corporation shall settle the balance of the Settlement Account of the Participant on a daily basis in accordance with these Rules and the Procedures. Except as provided in the Procedures, the Corporation shall not be obligated to make any settlement payments to any Participants until the Corporation has received all of the settlement payments that Settling Banks and Participants are required to make to the Corporation.'').

[12] *See* Rule 4 (Participants Fund and Participants Investment), *supra* note 4.

[13] *See id.*

[14] Securities Exchange Act Release No. 83950 (August 27, 2018), 83 FR 44393 (August 30, 2018) (SR–DTC–2017–804).

their minimum deposits.[15] DTC further represents that the principal purpose of the Participants Fund is to be one of the foundational liquidity resources available to DTC to fund a shortfall in order to complete settlement on a Business Day.[16]

Currently, Section 4 of Rule 4 provides that, if there is a Defaulting Participant and the amount charged to the Actual Participants Fund Deposit of the Defaulting Participant pursuant to Section 3 of Rule 4 [17] is not sufficient to complete settlement, DTC may apply the Actual Participants Fund Deposits of Participants other than the Defaulting Participant (each, a ''non-defaulting Participant''), and apply such other liquidity resources as may be available to DTC, including, but not limited to, the End-of-Day Credit Facility.[18] DTC recognizes that currently, certain provisions of Rule 4 might be construed to narrow the scope of use of the Participants Fund (and any other liquidity resources) for settlement to a default gap only.[19] In order to ensure that DTC may use the Participants Fund and other liquidity resources to fund a settlement gap regardless of its cause, DTC has proposed revising Rule 4, as discussed below.

C. Description of Proposed Changes

DTC states that Section 4 of Rule 4 does not address the use of the Participants Fund to complete settlement when there is a non-default gap and could be construed as limiting the pro rata application of the Participants Fund to fund a settlement gap to default scenarios.[20] DTC further represents that, on each Business Day, settlement occurs during a tight timeframe, in conjunction with the Federal Reserve's National Settlement Service and Fedwire.[21] If there is a delay with the receipt or disbursement of funds for settlement, DTC would need to address those problems quickly in order to complete settlement on that Business Day.[22]

In the Notice, DTC describes the proposed changes to address this situation and expressly ensure that the Participants Fund could be used to complete settlement in the event of a non-default gap. First, DTC proposes to amend Section 4 of Rule 4 to state that (i) the Participants Fund, (ii) the existing retained earnings or undivided profits of DTC, and (iii) any other liquidity resources as may be available (including, but not limited to, the End-of-Day Credit Facility), would be available to DTC as liquidity resources to fund settlement on a Business Day, regardless of whether the settlement gap is a default gap or a non-default gap. The proposal would state that DTC may apply its available resources to fund settlement, in such order and in such amounts as it determines, in its sole discretion. Second, DTC proposes to provide that a determination to apply the Participants Fund shall be made by either the Chief Executive Officer, Chief Risk Officer, Chief Financial Officer, a member of any management committee, Treasurer or any Managing Director as may be designated by the Chief Risk Officer from time to time. The proposal also states that the Board of Directors (or an authorized Committee thereof) shall be promptly informed of the determination.[23] Third, DTC proposes to make certain clarifying and conforming changes, including to clarify that a Participant's pro rata share of an application of the Participants Fund would be the same whether there is a default gap or a non-default gap, and to make minor changes for conformity and readability.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [24] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. After carefully considering the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC. In particular, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act and Rules 17Ad–22(e)(1) and (e)(2)(i) promulgated under the Act,[25] for the reasons described below.

A. Consistency With Section 17A(b)(3)(F)

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency, such as DTC, be designed to promote the prompt and accurate clearance and settlement of securities transactions.[26]

DTC proposes to amend Section 4 of Rule 4 to provide expressly for the pro rata application of the Participants Fund, retained earnings, and any other liquidity resources, including DTC's credit facility, to any settlement gap, including a non-default gap. As noted above, settlement occurs during a tight timeframe on each Business Day. If there is a delay with the receipt or disbursement of funds for settlement, it would need to be addressed quickly in order to complete settlement on that Business Day. The proposal would clarify which resources DTC can access and use in the most time-efficient and effective manner to ensure settlement.[27] The proposal is designed to allow DTC to take timely and effective action to fund a settlement gap, regardless of whether it is a default or non-default gap, and therefore complete settlement, by identifying and applying appropriate liquidity resources, which is consistent with the promotion of robust risk management. By improving DTC's ability take timely action to fund a settlement gap and, thereby, reducing DTC's settlement risk at the end of a Business Day, the Commission believes that DTC should improve DTC's ability to provide prompt and accurate clearance and settlement of securities

[15] *See* Section 4 of Rule 4 (Participants Fund and Participants Investment), *supra* note 4.

[16] *See* Notice, *supra* note 3, 85 FR at 60849 (citing DTC's Settlement Guide which provides that the Participants Fund creates liquidity and collateral resources to support the business of DTC and to cover losses and liabilities incident to that business).

[17] Section 3 of Rule 4 provides that if a Participant is obligated to DTC pursuant to the Rules and the Procedures and fails to satisfy any such obligation, DTC shall, to the extent necessary to eliminate such obligation, apply some or all of the Actual Participants Fund Deposit of such Participant to such obligation to satisfy the Participant Default. *See* Section 3 of Rule 4, *supra* note 4.

[18] Section 2 of Rule 4 provides that ''End-of-Day Credit Facility'' is any credit facility maintained by DTC for the purpose of funding the end-of-day settlement of transactions processed through the facilities of DTC. *See* Section 2 of Rule 4, *supra* note 4. *Also see* Securities Exchange Act Release No. 80605 (May 5, 2017), 82 FR 21850 (May 10, 2017) (SR–DTC–2017–802; NSCC–2017–802) (renewing the committed revolving credit facility of DTC and National Securities Clearing Corporation).

[19] *See* Notice, *supra* note 3, 85 FR at 60852.

[20] *See* Notice, *supra* note 3, 85 FR at 60850.

[21] *See id.; see also,* Settlement Guide at 19–20, *supra* note 4.

[22] *See* Notice, *supra* note 3, 85 FR at 60849.

[23] The requirement that DTC would also promptly notify the Commission in the event that the Participants Fund were used to complete settlement would remain unchanged.

[24] 15 U.S.C. 78s(b)(2)(C).

[25] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(e)(1) and (e)(2)(i).

[26] *Id.*

[27] The Commission further believes that use of the Participants Fund may be the most efficient method of completing settlement at the end of a Business Day on a tight timeframe, as it generally consists of cash which, pursuant to DTC's Investment Policy, must be held in demand deposit, savings or checking bank accounts that provide same day access to funds. *See* Exchange Act Release No. 88513 (March 30, 2020), 85 FR 19047, 19048 (April 3, 2020). The Commission observes that, as a general matter, it likely could take more time to access retained earnings or draw down on the credit facility.

transactions that are processed and settled through DTC's system.

The proposal would also make other clarifying and conforming changes to provide enhanced transparency with respect to use of the Participants Fund and other resources for settlement. Further, the proposal would specify the particular DTC personnel whose approval could authorize the use of the Participants Fund to finance a settlement gap. By making such changes, the Commission believes that the proposal is designed to provide clear and consistent Rules, by expressly addressing the scope and manner of DTC's use of the Participants Fund and other available resources to complete settlement on a given Business Day, thereby allowing DTC to provide prompt and accurate clearance and settlement of securities transactions.

B. Consistency With Rule 17Ad–22(e)(1)

Rule 17Ad–22(e)(1) under the Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[28]

As discussed above, current Section 4 of Rule 4 does not address the use of the Participants Fund or other liquidity resources to complete settlement when there is a non-default gap, and DTC is concerned that it could be construed as limiting the pro rata application of the Participants Fund to fund a settlement gap to default scenarios. The proposal would amend Rule 4 to expressly state that the Participants Fund, DTC's retained earnings, and other liquidity resources may be used by DTC to fund a settlement gap to complete settlement on a Business Day, whether the settlement gap is the result of a Participant Default or otherwise. In addition, the proposal makes clarifying and conforming changes and provides governance regarding the application of the Participants Fund.

The Commission believes that the above changes are designed to ensure greater certainty in the Rules regarding what resources would be available to DTC to complete settlement in the event of a settlement gap. The proposal would provide a clear, transparent and enforceable legal basis for DTC to apply the Participants Fund, retained earnings, or other liquidity resources to any settlement gap. It would also clarify that a Participant's pro rata share of an application of the Participants Fund would be the same whether there is a default gap or a non-default gap, and expressly state that DTC may apply its available resources to fund settlement, in such order and in such amounts as it determines, in its sole discretion.

Therefore, the Commission believes the proposal is designed to help ensure that DTC's Rules remain well-founded, transparent, and legally enforceable in all relevant jurisdictions, consistent with Rule 17Ad–22(e)(1) under the Act.[29]

C. Consistency With Rule 17Ad–22(e)(2)(i) and (v)

Rule 17Ad–22(e)(2) under the Act requires, in part, that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that (i) are clear and transparent, and (v) specify clear and direct lines of responsibility.[30]

As discussed above, the proposal would provide that a determination to apply the Participants Fund shall be made by either the Chief Executive Officer, Chief Risk Officer, Chief Financial Officer, a member of any management committee, Treasurer or any Managing Director as may be designated by the Chief Risk Officer from time to time. The proposal would also provide that the Board of Directors (or an authorized Committee thereof) shall be promptly informed of the determination. With this proposal, the Rules would expressly define who would be responsible for making the determination to apply the Participants Fund to a settlement gap and would require that the Board of Directors (or its authorized Committee) would be informed of such determination promptly.

Therefore, the Commission believes the proposal is designed to provide for governance arrangements regarding the use of the Participants Fund to complete settlement that are clear and transparent and specify clear and direct lines of responsibility, consistent with Rule 17Ad–22(e)(2)(i) and (v) under the Act.[31]

D. Consistency With Rule 17Ad–22(e)(7)(i)

Rule 17Ad–22(e)(7)(i) under the Act requires, in part, that a covered clearing agency, like DTC, establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively measure, monitor, and manage the liquidity risk that arises in or is borne by the covered clearing agency, including measuring, monitoring, and managing its settlement and funding flows on an ongoing and timely basis, and its use of intraday liquidity, by maintaining sufficient liquid resources to effect same-day settlement of payment obligations with a high degree of confidence under a wide range of foreseeable stress scenarios.[32]

As described above, the proposal would clarify that the Participants Fund and other resources may be applied by DTC to fund settlement in the event of a default or non-default gap. The proposed change is designed to help ensure that DTC is able to manage its settlement and funding flows on a timely basis and effect same day settlement of payment obligations in certain foreseeable stress scenarios.

Therefore, the Commission believes that the proposal is reasonably designed to help DTC effectively manage liquidity risk in a timely manner to complete settlement, and accordingly is consistent with Rule 17Ad–22(e)(7)(i).[33]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, with the requirements of Section 17A of the Act[34] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[35] that proposed rule change SR–DTC–2020–011, be, and hereby is, approved.[36]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25060 Filed 11–12–20; 8:45 am]

BILLING CODE 8011–01–P

[28] 17 CFR 240.17Ad–22(e)(1).

[29] *Id.*

[30] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[31] *Id.*

[32] 17 CFR 240.17Ad–22(e)(7)(i).

[33] *Id.*

[34] 15 U.S.C. 78q–1.

[35] 15 U.S.C. 78s(b)(2).

[36] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34087; 812–15070]

Invesco Capital Management LLC, et al.; Notice of Application

November 6, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for exemptive relief.

Summary of Application: Applicants request an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act. If granted, the requested order would permit registered open-end investment companies that are exchange-traded funds (''ETFs'') and are actively managed to operate without being subject to a daily portfolio transparency condition.

Applicants: Invesco Capital Management LLC (''Invesco''), Invesco Distributors, Inc. (the ''Distributor'') and Invesco Actively Managed Exchange-Traded Fund Trust (the ''Trust'').

Filing Dates: The application was filed on September 25, 2019, and amended on February 28, 2020, May 29, 2020, July 20, 2020, August 26, 2020, and November 6, 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 to the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on December 1, 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 to the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, *Secretarys-Office@sec.gov;* Applicants: Anna Paglia, Esq., Invesco Capital Management LLC, *anna.paglia@invesco.com.*

FOR FURTHER INFORMATION CONTACT: Kay M. Vobis, Senior Counsel, at (202) 551–6728 or Trace W. Rakestraw, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

I. Introduction

1. Applicants seek to operate actively-managed ETFs that would not be required to disclose its portfolio holdings on a daily basis (each, a ''Fund''). Since the Funds would not disclose their portfolio holdings on a daily basis they would not be able to operate in reliance on rule 6c–11 under the Act, which requires that ETFs disclose their portfolio holdings on a daily basis.[1] Accordingly, Applicants seek an order: Under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 thereunder; and under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and 17(a)(2) of the Act. The requested order would permit: (a) The Funds to issue shares (''Shares'') redeemable in large aggregations only (''creation units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; and (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of creation units.

2. In 2019 the Commission began issuing orders granting relief to actively managed ETFs that, like the Funds, do not disclose their complete portfolio holdings on a daily basis.[2] In issuing this relief, the Commission recognized that an arbitrage mechanism alternative to full portfolio transparency can work in an efficient manner to maintain secondary market prices at or close to the NAV of an ETF.[3]

II. The Application[4]

A. The Applicants

3. The Trust is organized as a statutory trust under the laws of the State of Delaware and is registered with the Commission as an open-end management investment company. Invesco is a Delaware limited liability corporation registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''), and would serve as the investment adviser to the initial Fund. The Distributor, a Delaware corporation, is a registered broker-dealer under the Securities Exchange Act of 1934, as amended (''Exchange Act''), and will act as distributor and principal underwriter of the Funds.

B. The Funds

4. Applicants seek exemptive relief under section 6(c) to operate actively-managed Funds that would not disclose their portfolio holdings on a daily basis.[5] Applicants maintain that operating the Funds as fully-transparent actively-managed ETFs would make the Funds susceptible to ''front running'' and ''free riding'' by other investors and/or managers, which can harm the Funds and their shareholders. Applicants believe that the Funds would allow investors to access active

[1] *See* rule 6c–11(c)(1)(i) (requiring an ETF to disclose prominently on its website, publicly available and free of charge, the portfolio holdings that will form the basis for each calculation of NAV per share). *See generally* Exchange Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019) (''ETF Rule Adopting Release'').

[2] *See, e.g.,* T. Rowe Price Associates, Inc. and T. Rowe Price Equity Series, Investment Company Act Release Nos. 33685 (Nov. 14, 2019) (notice) (''T. Rowe Price Notice'') and 33713 (Dec. 10, 2019) (order) (''T. Rowe Price Order''); Natixis ETF Trust II, *et al.,* Investment Company Act Release Nos. 33684 (Nov. 14, 2019) (notice) and 33711 (Dec. 10, 2019) (order); Fidelity Beach Street Trust, *et al.,* Investment Company Act Release Nos. 33683 (Nov. 14, 2019) (notice) and 33712 (Dec. 10, 2019) (order); Blue Tractor ETF Trust and Blue Tractor Group, LLC, Investment Company Act Release Nos. 33682 (Nov. 14, 2019) (notice) and 33710 (Dec. 10, 2019) (order). *See also* Precidian ETFs Trust, *et al.,* Investment Company Act Release No. 33440 (Apr. 8, 2019) and 33477 (May 20, 2019) (order).

[3] *See, e.g.,* T. Rowe Price Notice, *supra* note 2, at n.32 and accompanying discussion.

[4] Capitalized terms not otherwise defined herein shall have the same meaning as in the application.

[5] Applicants request that the order apply to the series of the Trust identified and described in the application as well as to additional series of the Trust and any other open-end management investment company or series thereof that seek to rely on the relief requested in the application, each of which will operate as an actively-managed ETF. Any Fund will: (a) Be advised by Invesco or an investment adviser controlling, controlled by, or under common control with Invesco (each such entity and any successor thereto collectively referred to as the ''Adviser'') and (b) comply with the terms and conditions of the application. The Adviser may retain one or more subadvisers (each a ''Subadviser'') for the Funds. Any Subadviser will be registered under the Advisers Act. For purposes of the requested order, the term ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

investment strategies while also taking advantage of the traditional benefits of ETFs (*e.g.,* lower fund costs, tax efficiencies and intraday liquidity).

a. *Substitute Basket.* Each day a Fund would publish a basket of securities and cash that, while different from the Fund's portfolio, is designed to closely track its daily performance (the ''Substitute Basket'').[6] In addition, every day the Fund would disclose the percentage weight overlap between the holdings of the prior Business Day's Substitute Basket compared to the holdings of the Fund that formed the basis for the Fund's calculation of NAV at the end of the prior Business Day (the ''Basket Overlap'').[7] Such number would help market participants evaluate the risk that the performance of the Substitute Basket may deviate from the performance of the portfolio holdings of a Fund.

Applicants state that the Substitute Basket would serve as a pricing and hedging tool for market participants to identify and take advantage of arbitrage opportunities. Because the Substitute Basket would be designed to closely track the daily performance of the Fund's holdings, the Substitute Basket would serve to estimate the value of those holdings. For the same reason, trading the Substitute Basket would allow market participants to get exposure to the performance of the Fund's holdings, so that a Fund's Substitute Basket could serve to hedge a position in the Fund's Shares. Further, the Substitute Basket would generally serve as the creation/redemption basket when Authorized Participants exchange creation units with the Fund.[8] Also in order to facilitate arbitrage, each Fund's portfolio and Substitute Basket will only include certain securities that trade on an exchange contemporaneously with the Fund's Shares.[9] Because the securities would be exchange traded, market participants would be able to accurately price and readily trade the securities in the Substitute Basket for purposes of assessing the intraday value of the Fund's portfolio holdings and to hedge their positions in the Fund's shares.

b. *Arbitrage Transactions in the Funds.* Applicants state that, given the correlation between a Fund's Substitute Basket and its portfolio holdings, the Substitute Basket would serve as a pricing signal to identify arbitrage opportunities when its value and the secondary market price of the Shares diverge. If Shares began trading at a discount to the Substitute Basket, an Authorized Participant could purchase the Shares in secondary market transactions and, after accumulating enough Shares to comprise a creation unit, redeem them from the Fund in exchange for a redemption basket reflecting the NAV per share of the Fund's portfolio holdings.[10] The purchases of Shares would reduce the supply of Shares in the market, and thus tend to drive up the Shares' market price closer to the Fund's NAV.[11] Alternatively, if Shares are trading at a premium, the transactions in the arbitrage process are reversed. Applicants further state that, like with traditional ETFs, market participants also can engage in arbitrage without using the creation or redemption processes. For example, if a Fund is trading at a premium to the Substitute Basket, the market participant may sell Shares short and take a long position in the Substitute Basket securities, wait for the trading prices to move toward parity, and then close out the positions in both the Shares and the securities, to realize a profit from the relative movement of their trading prices. Similarly, a market participant could buy Shares and take a short position in the Substitute Basket securities in an attempt to profit when Shares are trading at a discount to the Substitute Basket.

c. *Protective Conditions.* First, the Funds will provide certain public disclosures to explain to investors how they differ from traditional ETFs and inform investors that the Funds' bid-ask spreads and premiums/discounts may be larger than those for traditional ETFs due to the lack of transparency, thus making trading in the Funds' Shares more expensive. The Funds will also disclose that market participants may attempt to reverse engineer a Fund's trading strategy, which, if successful, could increase opportunities for trading practices that may disadvantage the Fund and its shareholders. Each Fund will include a legend (the ''Legend'') in a prominent location on the outside cover page of its prospectus, as well as on its website and any marketing materials, that will highlight for investors the differences between the Funds and fully transparent actively managed ETFs and the above costs and risk. Unless otherwise requested by the staff of the Commission, the Legend will read as follows:

This ETF is different from traditional ETFs.

Traditional ETFs tell the public what assets they hold each day. This ETF will not. This may create additional risks for your investment. For example:

- You may have to pay more money to trade the ETF's shares. This ETF will provide less information to traders, who tend to charge more for trades when they have less information.
- The price you pay to buy ETF shares on an exchange may not match the value of the ETF's portfolio. The same is true when you sell shares. These price differences may be greater for this ETF compared to other ETFs because it provides less information to traders.
- These additional risks may be even greater in bad or uncertain market conditions.
- The ETF will publish on its website each day a ''Substitute Basket'' designed

[6] The Funds would, at a minimum, provide the quarterly portfolio disclosures required for mutual funds. *See* rule 30b1–9 under the Act and Form N–PORT.

[7] Applicants state that each Fund may strike and publish its NAV additional times during each Business Day at intervals determined by the Adviser in order to further reduce market participants' risk and to provide intraday price certainty. For example, the Fund may strike a NAV once during normal trading at 12:00 p.m. Eastern Time (''Intra-Day NAV'') and again at the close of trading at 4:00 p.m. Eastern Time (''End of Day NAV'').

[8] Large broker-dealers that have contractual arrangements with an ETF (each, an ''Authorized Participant'') purchase and redeem ETF shares directly from the ETF, but only in blocks called ''creation units.'' After purchasing a creation unit, the Authorized Participant may sell the component ETF shares in secondary market transactions. The redemption process is the reverse of the purchase process.

[9] Each fund may invest only in ETFs, Exchange-trade noted, Exchange-traded common stocks, common stocks listed on a foreign exchange that trade on such exchange synchronously with the Shares, Exchange-traded preferred stocks, Exchange-traded American depositary receipts, Exchange-traded real estate investments trusts, Exchange-traded commodity pools, Exchange-traded metals trusts, Exchange-traded currency trusts, and exchange-traded futures that trade contemporaneously with the Shares, as well as cash and cash equivalents. For purposes of the application, exchange-traded futures are U.S. listed futures contracts where the futures contract's reference asset is an asset that the Fund could invest in directly. All futures contracts that a Fund may invest in will be traded on a U.S. futures exchange. For these purposes, an ''Exchange'' is a national securities exchange as defined in section 2(a)(26) of the Act. No Fund will invest in a ''penny stock'' as defined in Exchange Act Rule 3a51–1, borrow for investment purposes, hold short positions, or purchase any security that is illiquid at the time of purchase. The Substitute Basket will be subject to the same limitations.

[10] In addition to purchasing Shares, Applicants assert an Authorized Participant also would likely hedge its intraday risk by shorting the securities in the Substitute Basket (the same as in the redemption basket) in an amount corresponding to its long position in Shares. After the Authorized Participant returns a creation unit to the Fund in exchange for a redemption basket, the Authorized Participant can use the basket securities to cover its short positions.

[11] Applicants assert the purchase of the Shares in the secondary market, combined with the sale of the redemption basket securities, may also drive the market price of Shares and the value of the Fund's portfolio holdings closer together.

to help trading in shares of the ETF. While the Substitute Basket includes some of the ETF's holdings, it is not the ETF's actual portfolio.

The differences between this ETF and other ETFs may also have advantages. By keeping certain information about the ETF secret, this ETF may face less risk that other traders can predict or copy its investment strategy. This may improve the ETF's performance. If other traders are able to copy or predict the ETF's investment strategy, however, this may hurt the ETF's performance.

For additional information regarding the unique attributes and risks of the ETF, see section [ ] below.

5. Second, Applicants will comply with the requirements of Regulation Fair Disclosure (''Reg. FD'') as if it applied to them, thus prohibiting the Fund's selective disclosure of any material nonpublic information.[12] Applicants note that because the Funds will not publicly disclose their portfolio holdings daily, the selective disclosure of material nonpublic information, including information other than portfolio information, would be more likely to provide an unfair advantage to the recipient than in the context of other ETFs.

6. Third, the Funds and their Adviser will take remedial actions as necessary if the Funds do not function as anticipated. For at least the first three years after launch, a Fund will establish certain thresholds for its level of Tracking Error,[13] premiums/discounts, and spreads, so that, upon the Fund's crossing a threshold, the Adviser will promptly call a meeting of the Fund's board of directors, and will present the board with recommendations for appropriate remedial measures.[14] The board would then consider the continuing viability of the Fund, whether shareholders are being harmed, and what, if any, action would be appropriate.[15] In addition, Applicants have agreed to provide to Commission staff on a periodic basis certain metrics and other such information as the staff may request in order to facilitate the staff's ongoing monitoring of the Funds.[16]

III. Requested Exemptive Relief

7. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.[17]

8. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general purposes of the Act.

A. Overview of Requested Relief

9. *Sections 5(a)(1) and 2(a)(32) of the Act.* Because the Shares will not be individually redeemable, Applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue Shares that are redeemable in creation units only.

10. *Sections 17(a)(1) and (2) of the Act.* Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are affiliated persons, or second-tier affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of creation units and the redemption procedures for in-kind redemptions of creation units will be the same for all purchases and redemptions and basket securities will be valued in the same manner as those portfolio securities currently held by the Funds.

11. *Section 22(d) of the Act and rule 22c–1 thereunder.* Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through a principal underwriter other than at a current public offering price described in the fund's prospectus. Rule 22c–1 under the Act requires open-end funds, their principal underwriters, and dealers in fund shares (and certain others) to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to buy or redeem.

12. Together, section 22(d) and rule 22c–1 are designed to: (i) Prevent dilution caused by certain riskless trading practices of principal underwriters and dealers; (ii) prevent unjust discrimination or preferential treatment among investors purchasing and redeeming fund shares; and (iii) preserve an orderly distribution of investment company shares.[18]

13. Applicants believe that none of these concerns will be raised by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and to the extent different prices for Shares exist during a given trading day, or from day to day, such variances occur as a

[12] *See* 17 CFR 243. ETFs are not otherwise subject to Reg. FD. Reg. FD's Rule 100(b)(2)(iii) exempts from Reg. FD certain communications made in connection with a securities offering registered under the Securities Act. Applicants would not rely on this exemption; as the Funds will be continuously offered, this exemption would likely make the condition requiring Applicants to comply with Reg. FD meaningless.

[13] ''Tracking Error'' is the standard deviation over the past three months of the daily proxy spread (*i.e.,* the difference, in percentage terms, between the Substitute Basket's per share NAV and that of the Fund at the end of the trading day).

[14] For at least the first three years after launch of a Fund, its board would promptly meet (1) if the Tracking Error exceeds 1%; or (2) if, for 30 or more days in any quarter or 15 days in a row (a) the absolute difference between either the market closing price or Bid/Ask Price, on one hand, and End of Day NAV, on the other, exceeds no more than 2%, or (b) the bid/ask spread exceeds no more than 2%. A Fund may adopt additional or lower (*i.e.,* less than the 1% and 2% upper limits) thresholds to the extent deemed appropriate and approved by the Fund's board. The Board will also consider information provided by the Adviser reflecting how the Fund's Intra-Day NAV compares to the Bid/Ask Price of Shares at the time as of which the Intra-Day NAV is calculated, and will evaluate such information in the context of its oversight of the Fund.

[15] For at least three years after launch of each Fund, the board will also undertake these considerations on an annual basis, regardless of whether the Fund's preset thresholds have been crossed. Potential actions may include, but are not limited to, changing lead market makers, listing the Fund on a different Exchange, changing the size of creation units, changing the construction of the Substitute Basket, changing the Fund's investment objective or strategy, and liquidating the Fund.

[16] *See* condition 7.

[17] Applicants request that the terms and conditions of the requested order apply to other registered open-end management investment companies or series thereof not advised by the Adviser (''Authorized Funds''). Applicants anticipate that the Adviser or an affiliate thereof may in the future enter into agreements concerning Applicant's intellectual property rights in the Funds with the registered investment advisers advising the Authorized Funds (together with the Authorized Funds, ''Future Applicants''). Applicants further expect that Future Applicants would apply for a separate exemptive order that incorporates by reference all the terms and conditions of the requested order and any amendments thereto.

[18] *See* ETF Rule Adopting Release, *supra* note 1, at text accompanying note 116.

result of third-party market forces, such as supply and demand. Therefore, Applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, Applicants state that the proposed distribution system will be orderly because anyone will be able to sell or acquire Shares on an exchange and arbitrage activity should ensure that secondary market transactions occur at prices at or close to the Fund's NAV.

14. *Section 22(e) of the Act.* Applicants seek relief from section 22(e) to permit Funds to satisfy redemption requests more than seven days from the tender of Shares for redemption with respect to foreign securities where the settlement cycle, coupled with local holiday schedules, would not permit a Fund to satisfy redemption requests within the seven days required under section 22(e) of the Act. A Fund would deliver the foreign securities as soon as practicable, but in no event later than 15 days after the tender of Shares.

B. Considerations Relating to the Requested Relief

15. In support of the requested exemptive relief, the Applicants also believe the proposed terms and conditions sufficiently address possible concerns regarding the relief, as discussed below.

16. *Proposed Arbitrage Mechanism.* Applicants believe that the proposed arbitrage mechanism can work in an efficient manner to maintain secondary market prices of Shares close to their NAV while providing investors with the opportunity to invest in active strategies through a vehicle that offers the traditional benefits of ETFs. In addition, to the extent that the Funds do not function as anticipated, Applicants have undertaken to take remedial actions as appropriate.

17. *Use of Substitute Baskets.* Applicants believe they have addressed possible concerns of using a Substitute Basket as an arbitrage mechanism. First, Applicants note that a Fund's Substitute Basket would not misrepresent the Fund's holdings and that they will take steps to avoid investor confusion. To that effect, the Funds would provide disclosures in their prospectus, marketing materials and website clearly indicating the Substitute Basket's purpose and that it is not the Fund's portfolio holdings.[19] Second, Applicants state that they have structured their arbitrage mechanism so that arbitrageurs' trading will not have a significant market impact on the securities in the Substitute Basket and other Creation Baskets, in particular those that a Fund does not hold for investment purposes.[20]

18. *Reverse Engineering.* Applicants indicate they have addressed possible concerns that other market participants may be able to reverse engineer current activity in a Fund's holdings and use such information to the disadvantage of the Fund and its shareholders. Applicants have represented that they will operate the Funds in a manner designed to minimize the risk of reverse engineering and, for the reasons set forth in the Application, believe successful front-running or free-riding is highly unlikely.

IV. Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

1. As long as a Fund operates in reliance on the requested order, the Shares of the Fund will be listed on an Exchange.

2. The website for the Funds, which will be publicly accessible at no charge, will contain, on a per Share basis for each Fund, the prior Business Day's Intra-Day NAV and End of Day NAV and Closing Price or Bid/Ask Price of the Shares, a calculation of the premium or discount of the Closing Price or Bid/Ask Price against such End of Day NAV, and any other information regarding premiums and discounts as may be required for other ETFs under rule 6c–11 under the Act, as amended. The website will also disclose any information regarding the bid-ask spread for each Fund as may be required for other ETFs under rule 6c–11 under the Act, as amended.

3. Each Fund will include the Legend in a prominent location on the outside cover page of its prospectus, as well as on its website and any marketing materials.

4. On each Business Day, before the commencement of trading of Shares, each Fund will publish on its website the Substitute Basket and the Basket Overlap for that day.

5. No Adviser or Subadviser, directly or indirectly, will cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for a Fund through a transaction in which the Fund could not engage directly.

6. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively managed ETFs that disclose a proxy portfolio on each Business Day, without fully disclosing the ETF's entire portfolio at the same time.

7. Each Fund will provide the Commission staff with periodic reports (for which confidential treatment may be requested) containing such information as the Commission staff may request.

8. Each Fund and each person acting on behalf of a Fund [21] will comply with and agree to be subject to the requirements of Regulation Fair Disclosure as if it applied to them (except that the exemptions provided in Rule 100(b)(2)(iii) therein shall not apply).

9. Each Fund will maintain and preserve, for a period of not less than five years, in an easily accessible place, (i) all written agreements (or copies thereof) between an Authorized Participant and the Fund or one of its service providers that allows the Authorized Participant to place orders for the purchase or redemption of Creation Units; (ii) a copy of the Substitute Basket published on the Fund's website for each Business Day; and (iii) a list of all creation or redemption baskets exchanged with an Authorized Participant where cash was included in the basket *in lieu* of some or all of the Substitute Basket securities (except for cash included because the securities are not eligible for trading by the Authorized Participant or the investor on whose behalf the Authorized Participant is acting), the amount of any such cash *in lieu* and the identity of the Authorized Participant conducting the transaction.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

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[19] In addition, every day the Funds would disseminate the Basket Overlap, which would inform market participants as to the degree to which the Substitute Basket and the Fund's portfolio actually differ.

[20] Specifically, the Funds expect to include in the Substitute Basket only assets that are liquid and have a high trading volume. Further, Applicants note that their proposed arbitrage mechanism is not novel in this respect. Currently, arbitrageurs for fully-transparent ETFs may use securities that are not in the ETFs' portfolio to hedge their positions in the ETFs' shares.

[21] For purposes of this condition, ''person acting on behalf of a Fund'' shall have the same meaning as ''person acting on behalf of an issuer'' for a closed-end investment company under 17 CFR 243.101(c).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90366; File No. SR–CboeEDGA–2020–028]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Rule 14.10, Requirements for Securities Issued by the Exchange or Its Affiliates

November 6, 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 30, 2020, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 Rule 14.10 (Requirements for Securities Issued by the Exchange or its Affiliates) regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. The Exchange notes that the changes proposed herein are substantively identical to changes adopted on Cboe BZX Exchange, Inc. (''BZX'').[3]

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), 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 Rule 14.10 (Requirements for Securities Issued by the Exchange or its Affiliates) regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. The Exchange notes that the changes proposed herein are substantively identical to changes adopted on Cboe BZX Exchange, Inc. (''BZX'').[4]

Rule 14.10 sets forth certain monitoring requirements that must be met throughout the continued listing and trading of securities issued by the Exchange or its affiliates. More specifically, Rule 14.10(b) and (c) provide that:

- Throughout the continued listing and trading of an Affiliate Security[5] on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee (''ROC'') of the Exchange's Board of Directors that describes the Exchange's monitoring of the Affiliate Security's compliance with the Exchange's listing standards (the ''Quarterly Listing Report'');
- once a year, an independent accounting firm shall review the listing standards for the Affiliate Security to ensure that the issuer is in compliance with the listing requirements (''Annual Report''), and a copy of the Annual Report shall be forwarded promptly to the ROC; and
- throughout the trading of an Affiliate Security on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee of the Exchange's Board of Directors that describes the Exchange's monitoring of the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Exchange Rules, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data used to ensure the Affiliate Security's compliance with the Exchange's listing and trading rules (the ''Quarterly Trading Report'' and, collectively with the Quarterly Listing Report, the ''Quarterly Reports'').

Rule 14.10(d) requires that a copy of all Quarterly Reports and Annual Reports will be forwarded promptly to the Commission.

The Exchange proposes to amend Rule 14.10(d) to remove the requirement that copies of the Quarterly Reports and Annual Reports be forwarded to the Commission and instead providing that the Exchange will forward a copy of the Quarterly Reports and/or Annual Reports to the Commission upon request.

Finally, the Exchange is proposing to make clear that the requirements under Rule 14.10(b)(1),[6] (2),[7] (3),[8] and (4)[9] do not apply to Affiliate Securities that are Exchange-listed options. The Exchange is proposing this change because there is no issuer for options as the term is used in Rule 14.10(b) and each of the requirements under Rule 14.10(b) is implicitly related to equity securities and not to options on such equity securities. The Exchange is not proposing to make any changes to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86623 (August 9, 2019) 84 FR 41771 (August 15, 2019) (SR–CboeBZX–2019–073) (the ''BZX Filing'').

[4] *See* Securities Exchange Act Release No. 86623 (August 9, 2019) 84 FR 41771 (August 15, 2019) (SR–CboeBZX–2019–073) (the ''BZX Filing'').

[5] As defined in Rule 14.10(a)(2), the term ''Affiliate Security'' means any security issued by a EDGA Affiliate or any Exchange-listed option on any such security, with the exception of Portfolio Depository Receipts as defined in Rule 14.8(d) and Investment Company Units as defined in Rule 14.2.

[6] Rule 14.10(b)(1) requires that prior to the initial listing of an Affiliate Security on the Exchange, Exchange personnel shall determine that such security satisfies the Exchange's rules for listing, and such finding must be approved by the Regulatory Oversight Committee of the Exchange's Board of Directors.

[7] Rule 14.10(b)(2) requires that throughout the continued listing of an Affiliate Security on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee of the Exchange's Board of Directors that describes the Exchange's monitoring of the Affiliate Security's compliance with the Exchange's listing standards, including: The Affiliate Security's compliance with the Exchange's minimum share price requirement; and the Affiliate Security's compliance with each of the quantitative continued listing requirements.

[8] Rule 14.10(b)(3) requires that once a year, an independent accounting firm shall review the listing standards for the Affiliate Security to ensure that the issuer is in compliance with the listing requirements and a copy of the report shall be forwarded promptly to the Regulatory Oversight Committee of the Exchange's Board of Directors.

[9] Rule 14.10(b)(4) requires that in the event that the Exchange determines that the EDGA Affiliate is not in compliance with any of the Exchange's listing standards, the Exchange shall notify the issuer of such non-compliance promptly and request a plan of compliance. The Exchange shall file a report with the Commission within five business days of providing such notice to the issuer of its non-compliance. The report shall identify the date of the non-compliance, type of non-compliance, and any other material information conveyed to the issuer in the notice of non-compliance. Within five business days of receipt of a plan of compliance from the issuer, the Exchange shall notify the Commission of such receipt, whether the plan of compliance was accepted by the Exchange or what other action was taken with respect to the plan and the time period provided to regain compliance with the Exchange's listing standards, if any.

requirement for all Affiliate Securities (including options) under Rule 14.10(c) that ''[t]hroughout the trading of an Affiliate Security on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee of the Exchange's Board of Directors that describes the Exchange's monitoring of the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Exchange Rules, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data used to ensure the Affiliate Security's compliance with the Exchange's listing and trading rules.'' As such, the Exchange will continue to prepare reports on all Affiliate Securities (including those that are Exchange-listed options) as required under Rule 14.10(c).

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act [10] in general and Section 6(b)(5) of the Act [11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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, because the proposed changes would reduce the paperwork received by the Commission and ease the burden of submitting the Quarterly Reports and Annual Reports, without changing the information available to the Commission. In discussions with the Commission Staff regarding Rule 14.10, it was determined that the Exchange no longer needed to provide copies of the Quarterly Reports and Annual Reports to the Commission. The Quarterly Reports and Annual Reports would continue to be available to the Commission, as they are subject to Section 17 of the Act [12] and Rule 17a–1 thereunder,[13] pursuant to which the Exchange is required to keep and preserve copies of the Quarterly Reports and Annual Reports, and to promptly furnish to the Commission copies of such Reports upon request of any representative of the Commission.

Finally, the Exchange believes that the clarifying change to exclude options on Affiliate Securities from the requirements of Rule 14.10(b) would promote just and equitable principles of trade and remove impediments to a free and open market by making clear that certain obligations that implicitly did not apply to options on Affiliate Securities do not, in fact, apply. As noted above, the Exchange will continue to prepare reports on all Affiliate Securities that include summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Exchange Rules, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data used to ensure the Affiliate Security's compliance with the Exchange's listing and trading rules (including those that are Exchange-listed options) as required under Rule 14.10(c).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes to eliminate the requirement that the Exchange submit copies of the Quarterly Reports and Annual Reports to the Commission and excluding options on Affiliate Securities from the requirements of Rule 14.10(b) will have no impact on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has 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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6) [16] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[17] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay to allow the Exchange to make the proposed changes to its rules without unnecessary delay in order to be consistent with those already in place on BZX, its affiliate. The Commission notes that the proposed rule change is based on and substantively identical to the rules of BZX.[18] For this reason, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78q.

[13] 17 CFR 240.17a–1.

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] *See supra* note 3.

[19] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–CboeEDGA–2020–028 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2020–028. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGA–2020–028 and should be submitted on or before December 4, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25058 Filed 11–12–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34088; 812–15177]

Upstart Holdings, Inc.

November 9, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application under Section 6(c) of the Investment Company Act of 1940 (the ''Act'').

SUMMARY OF APPLICATION: Applicant requests an order to permit it directly, and through wholly-owned subsidiaries, to operate an artificial intelligence (''AI'')-based lending platform (''Platform'') that facilitates the issuance of small consumer general purpose loans, and conduct related activities, without being subject to the provisions of the Act.

APPLICANT: Upstart Holdings, Inc.

FILING DATES: The application was filed on November 5, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicant with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on November 30, 2020, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request by emailing the Commission's Secretary.

ADDRESSES: The Commission, *Secretarys-Office@sec.gov;* Applicant, 2950 S. Delaware Street, Suite 300, San Mateo, California 94403.

FOR FURTHER INFORMATION CONTACT: Rochelle Plesset, Senior Counsel, or David Marcinkus, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

APPLICANT'S REPRESENTATIONS:

1. Upstart Network Inc. (''UNI''), a Delaware corporation established in 2012, originally began as an internet-based platform that connected graduates with investors who provided funding in return for a portion of the graduate's earnings. As part of its operations, UNI used AI and modelling to assess a graduate's future income. In 2014, UNI adapted its AI model to support the origination of consumer loans and changed its business model to that of operating the Platform and conducting related activities.

2. Applicant states that, pursuant to a restructuring, Applicant was incorporated in December 2013 to become the holding company of UNI, which in turn became its wholly-owned subsidiary. Applicant states that it operates its business, directly and indirectly, through UNI. Accordingly, Applicant's assets consist entirely of its interest in UNI. Applicant has publicly filed a Form S–1 registration statement and intends to effect an initial public offering (''IPO'') of its equity securities.

3. Applicant states that UNI develops AI models that are generally used by partner U.S. banks to quantify the credit risk of potential borrowers and to determine whether to originate a loan if the AI model shows the loan meets applicable underwriting standards. UNI also operates the Platform, which among other things, aggregates consumer demand for the loans, and connects that demand to the banks for purposes of originating the loans. Through the Platform, UNI provides banks a broad range of services, including an application flow interface used to facilitate origination of loans, risk underwriting, verification of borrower information, and support for borrowers during the origination. Banks can use these services either by originating loans on the Platform or by ''white-labelling'' the technology on their own websites.[1]

[20] 17 CFR 200.30–3(a)(12).

[1] Applicant notes that UNI recently began operating a pilot program in which it originates through its Platform a new auto loan product. Applicant states that while it generally prefers to collaborate with a bank partner, in this instance it could test this new product more quickly by originating the auto loans itself. Applicant states that UNI in 2020 (through September 30) has

UNI also services the loans originated through its Platform.

4. Applicant states that to help facilitate the origination and liquidity of the loans originated through the Platform, UNI purchases most of the loans shortly after origination. In 2019, only 23% of the loans originated on the Platform were retained by the originating bank. In contrast, Applicant states that the vast majority of the purchased loans are sold to third parties on the day of purchase from the originating bank,[2] thereby never appearing on the Applicant's consolidated balance sheet.[3] Applicant states that in 2019 loans immediately sold to third parties constituted 70% of all loans originated through the Platform.

5. Applicant states that the loans not retained by the originating bank or immediately sold to third parties are held indirectly by UNI until the loans are eventually sold, placed in securitization vehicles that UNI may be sponsored by UNI or an unaffiliated third party, or held to maturity. Applicant states that in 2019, these loans constituted 7% of the loans originated through the Platform (compared to a high of 20% in 2017, which was the year UNI launched its securitization program). Applicant states that the amount of loans held on its balance sheet has fluctuated because UNI's purchase of these loans generally serves as a backstop for excess loans originated on the Platform. Applicant explains that UNI holds these loans because the Platform supports the origination of more loans than can immediately be sold and that providing banks with such liquidity allows the Applicant to grow its business more quickly. Nevertheless, Applicant states that UNI only holds to maturity those loans that it cannot ultimately sell or securitize. Furthermore, Applicant states that the amount of loans purchased and held depends on the market for the loans, not on any decision regarding whether to purchase particular loans or the amount of loans that should be retained. Applicant explains that the average length of time that loans remained on its consolidated balance sheet was approximately 3.3 months (calculated as weighted average time of loans on the balance sheet as of 1Q 2020).

6. Applicant states that the loans purchased by UNI that are not immediately sold are held by UNI's wholly-owned subsidiaries: Upstart Warehouse Trust (''UWT''), Upstart Loan Trust (''ULT'') and Upstart Loan Trust 2 (''ULT2'').[4] Applicant explains that UWT and ULT hold certain loans originated on the Platform until such loans are sold to third parties or placed in the securitization vehicles. ULT2 holds loans that are purchased or repurchased by UNI, which UNI believes cannot be sold in the future. Such loans are held to maturity unless they are ultimately sold to third parties or securitized.

7. Applicant states that the assets listed on its consolidated balance sheet consist primarily of the loans, certain certificates issued by the securitization vehicles (''ABS''), cash and cash equivalents. Applicant explains that it seeks to hold only the amount of ABS it is required to retain for purposes of compliance with Regulation RR under Section 15G of the Securities Exchange Act of 1934 (''Risk Retention Rules'') and will sell them as soon as Applicant is no longer required to hold all or part of those interests. Applicant states that after the IPO, Applicant intends to invest any proceeds not immediately required in Government securities and Capital Preservation Investments.[5]

8. Applicant states that although loans comprise the vast majority of its assets, Applicant's net revenue[6] is almost exclusively derived from Platform fees, loan servicing fees and loan referral fees. Applicant states that in 2019, 97% of its net revenue was derived from such fees, 71% of which were related to the loans that were immediately sold upon origination. Net interest revenue from the loans in 2019 represented approximately 3% of total net revenues.

APPLICANT'S LEGAL ANALYSIS:

1. Section 3(a)(l)(A) of the Act defines the term ''investment company'' to include an issuer that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities. Section 3(a)(l)(C) of the Act further defines an investment company as an issuer that is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, and owns or proposes to acquire investment securities having a value in excess of 40% of the value of the issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Section 3(a)(2) of the Act defines ''investment securities'' to include all securities except Government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner which (a) are not investment companies and (b) are not relying on the exclusions from the definition of investment company in Section 3(c)(1) or Section 3(c)(7) of the Act.

2. Applicant states that, based on the Applicant's consolidated financial statements for 2019, approximately 87% of assets (of which 76% were in loans), were in investment securities as defined in Section 3(a)(2) of the Act. Accordingly, Applicant states that it may meet the definition of investment company under Section 3(a)(1)(C). Applicant also states that the definition of investment company under Section 3(a)(1)(A) also may be implicated because the loans may be considered to be securities for purposes of the Act.[7]

3. Applicant, however, states that it views itself, and has consistently represented itself publicly, as being

allocated $5 million to the program (compared with $2.2 billion in total loans originated during the same period). If the program is successful, UNI plans to offer the auto loan product to partner banks, and sell the auto loans in the same manner as it sells the consumer loans. Applicant states that UNI may engage in similar pilot programs in the future, consistent with building its AI-based business, but does not currently have any plans to do so. Applicant represents that these pilot programs are expected to represent in the aggregate no more than 5% of the loans originated through the Platform on an annual basis.

[2] Applicant states that these purchases and sales are for exactly the same amount and, accordingly, Applicant does not profit from such sales.

[3] As a holding company, Applicant asserts that its financial data consolidated with its wholly-owned subsidiaries' financial data provides a more accurate picture of its business.

[4] Applicant states that at the time of the application, UWT was in the process of being dissolved. ULT and ULT2 will continue to operate as described in the application.

[5] The term ''Capital Preservation Investments'' refers collectively to Applicant's investments in short-term investment grade and liquid fixed income and money market investments that earn competitive market returns and provide a low level of credit risk.

[6] Applicant states that because it is still operating at a net loss, income may not be the most relevant determinant of its status as an operating company; rather, Applicant states that its current source of revenues provides a more accurate picture of the nature of its business.

[7] Section 3(c)(4) of the Act excepts from the definition of investment company any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses. Section 3(c)(5) of the Act excepts from the definition of investment company, in relevant part, any person who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. Applicant states that it is unable to rely Section 3(c)(4) because it is not in the business of originating loans. Applicant states that it is unable to rely on Section 3(c)(5) because it is not primarily engaged in purchasing or acquiring loans, and the loans are not of the types specified in the exclusion.

primarily engaged in the business of providing technology and related services to financial institutions and not in the business of being an investment company or investing in loans. Applicant explains that most of its 374 employees are devoted to developing the AI models, facilitating the origination and financing of loans through its Platform, performing roles supporting the operations of the Platform and servicing those loans. Applicant states that only 9 employees are engaged in any activities related to managing the loans held on the Applicant's balance sheet. Applicant estimates that these 9 individuals spend a negligible amount of time on activities related to the loans. In addition, Applicant states that substantially all of its net revenues are derived from these business activities. Applicant states that the loans and other investment securities that are held by its wholly-owned subsidiaries are a byproduct of these activities and are acquired not for investment purpose but to support the loan origination by its partner banks by finding financing for those loans. Furthermore, Applicant states that any net investment income derived from such securities is minimal.

4. Applicant states that it, including its wholly-owned subsidiaries, are subject to a range of regulations that cover their business activities. Specifically, Applicant states that UNI maintains state licenses and registrations related to consumer lending, loan brokering and servicing. Applicant also states that the Platform generally has been structured to comply with banking regulations, consistent with UNI's role as a service provider to its bank partners.

5. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction or any class or classes of persons, securities or transactions from any provision of the Act, or from any rule or regulation under the Act, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant requests an order under Section 6(c) to permit the Applicant, directly and through its wholly-owned subsidiaries, to engage in its business activities without being subject to the Act.

6. Applicant states that the requested exemption is necessary and appropriate in the public interest, and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant states that, directly and through its wholly-owned subsidiaries, it is primarily engaged in the business of providing technology and related services to financial institutions to help facilitate the origination of loans to consumers. Applicant states that the structure of its business, including the acquisition of the investment securities, was not established, and is not operated, for the purpose of creating an investment company within the contemplation of the Act, and the Applicant's business activities are not of the type intended to be regulated under the Act.

APPLICANT'S CONDITIONS:

Applicant agrees that any order granting the requested relief will be subject to the following conditions:

1. Applicant will not hold itself out as being engaged in investing, reinvesting or trading in securities other than loans originated through the Platform as described in the Application.

2. Applicant, directly or indirectly, will only hold loans that are originated through the Platform as described in the application.

3. Any loans held to maturity will represent less than 15% of the total volume of loans held, directly or indirectly, by the Applicant on a rolling basis for the last four most recent fiscal quarters combined.

4. Applicant, directly or indirectly, will not hold loans for speculative purposes.

5. Applicant will allocate and use its accumulated cash and any investment securities (other than loans) for *bona fide* business purposes in accordance with a cash-management investment policy adopted by Applicant's board of directors and will refrain from investing or trading in securities for short-term speculative purposes. As of the last date of each last fiscal quarter, at least 90% of investment securities other than the loans or ABS held only for purposes of satisfying the Risk Retention Rules, held by the Applicant on a consolidated basis, will be in Capital Preservation Investments.

6. Net revenue earned from interest on the loans will comprise, on a rolling basis for the last four most recent fiscal quarters combined, in combination with interest on any other investment securities, no more than 10% of Applicant's total net revenue. For purposes of this condition, net revenue excludes (from both the numerator and the denominator) interest generated by cash holdings, Government securities, and risk retention vehicles, as well as fair value adjustments for the loans, and will be calculated net of interest paid on any credit facilities used to purchase the loans.

7. Applicant may continue to rely on the order granting the requested relief so long as the operations that gave rise to the request for the exemptive order do not differ materially from those described in this application.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25160 Filed 11–12–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90371; File No. SR–NYSE–2020–66]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend to NYSE Rule 122 Related to Orders With More Than One Broker

November 6, 2020.

I. Introduction

On August 3, 2020, New York Stock Exchange 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 to NYSE Rule 122 (Orders with More than One Broker). The proposed rule change was published for comment in the **Federal Register** on August 12, 2020.[3] On September 22, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] The Commission has received no comment letters on the proposal. On November 3, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety.[6] The Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89500 (Aug. 6, 2020), 85 FR 48738 (Aug. 12, 2020).

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89962 (Sept. 22, 2020), 85 FR 60854 (Sept. 28, 2020).

[6] In Amendment No. 1, the Exchange added the representation that it will monitor, via examination-based surveillance, member organization compliance with its supervisory obligation

is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

1. Overview

Currently, NYSE Rule 122 (Orders with More than One Floor Broker) provides that a member organization may not maintain orders with more than one Floor broker to purchase the same security at the same price. Because each Floor broker is a separate Participant in a parity allocation,[7] NYSE Rule 122 prevents member organizations from circumventing the parity allocation rules to obtain preferential execution by splitting a single order among multiple Floor brokers.

NYSE Rule 122 currently contains an exception, and the main purpose of the proposed amendment is to clarify this exception. The exception is: if the orders are not for the account of the same principal, then it is permissible for the member organization to maintain such orders with different Floor brokers. This exception reflects the Exchange's understanding that some member organizations, or customers of member organizations, have multiple trading desks that do not coordinate trading strategies and are separated by information barriers. In such circumstances, because there is no coordination between such trading desks, maintaining those separate orders with more than one Floor broker would not be circumventing the parity allocation rules. The proposed amendment to NYSE Rule 122 would add Commentary to add specificity about this exception with respect to both member organizations' proprietary orders and orders that member organizations represent on an agency basis for customers.

Both member organizations and the customers of member organizations may consist of multiple trading units that are separated by information barriers that restrict the trading units from coordinating trading strategies, sharing capital, and sharing profits and losses. The proposed amended rule would provide that, if a member organization has knowledge and can verify that it or its customer is organized in this way, the member organization may route orders for the same security at the same price from its independent units to more than one Floor broker in a manner that is consistent with NYSE Rule 122.

In addition, the Exchange proposes to amend the text of NYSE Rule 122 to remove certain obsolete language and to provide greater specificity to the rule text, without changing its meaning.

2. Proposed Changes to Text of Rule 122

The Exchange proposes to amend NYSE Rule 122 to remove certain obsolete language and to provide greater specificity to the rule text, without changing its meaning.

Because the text of current NYSE Rule 122 addresses two distinct topics, the Exchange proposes to reorganize the existing rule text into new subsections (a) and (b), which the Exchange believes will enhance comprehension of the rule.

The Exchange proposes that new subsection (a) would include the current first sentence of NYSE Rule 122. Because the term ''member'' refers to the natural person associated with a member organization who has been designated by such member organizations to effect transactions on the Floor of the Exchange, *e.g.,* a Floor broker,[8] and Floor brokers do not originate orders,[9] and because the term ''allied member'' no longer exists in Exchange rules,[10] the Exchange proposes to delete the extraneous language ''member'' and ''or any allied member therein.''

The Exchange further proposes to amend new subsection (a) to specify that the rule applies both to orders ''sent to''—as well as those ''maintained with''—more than one Floor broker, and to insert the word ''Floor'' before ''broker'' to enhance the clarity of the sentence. The Exchange also proposes to replace the phrase ''market orders or orders at the same price'' in new subsection (a) with the phrase ''orders that may execute at the same price,'' to specify that the rule applies to multiple orders of any resting order type that may execute at the same price.

The Exchange proposes that new subsection (b) would include the current second and third sentences of Rule 122, relating to how a Floor broker can represent an order that already has a portion transmitted to the Exchange Book. Because this text addresses a different topic than proposed Rule 122(a), the Exchange proposes to delete the extraneous ''However'' at the start of the first sentence of this new subsection. The Exchange also proposes to delete from new subsection (b) several phrases—including ''manually or from a hand-held terminal,'' ''in the auction market or via the Floor broker agency interest file,'' and ''as part of an auction market transaction or automatic execution''—because they are extraneous, use obsolete text, and are not necessary to a clear understanding of the rule. The Exchange believes that making these deletions will have no substantive effect on the meaning of subsection (b).

Finally, the Exchange proposes to delete from new subsection (b) several references to the ''Display Book® system,'' which is an obsolete system formerly used by the Exchange, and to replace them with references to the Exchange's current ''Exchange Book.'' [11]

3. Proposed Rule Commentary

In addition to the proposed amendments to the rule text listed above, the Exchange proposes to amend Rule 122 by adding new Rule Commentary to provide greater specificity as to the rule's application and to enhance comprehension of the rule.

The Exchange proposes to add Rule Commentary .01 to specify that, for the purposes of Rule 122, sending to, maintaining with, or using ''more than one Floor broker'' would mean more than one Floor broker member organization, or two different individual Floor brokers at the same Floor broker member organization. This proposed rule text is not intended to add new functionality, but rather to add clarity regarding the current Rule text.

The Exchange proposes to add Rule Commentary .02 to provide more specificity as to when a member organization's own orders are not presumed to be for the account of the same principal. As proposed, for purposes of Rule 122, when a member organization uses more than one Floor broker, multiple orders originating from the member organization would be presumed not to be for the account of the same principal if each order is from a separate trading unit that is separated by information barriers or other barriers that restrict the trading unit from coordinating trading strategies, sharing capital, and sharing profits and losses with other trading units (an ''Independent Unit''), as defined in proposed Commentary .02(a). Proposed Rule Commentary .02(b) would require a member organization to have supervisory systems and written policies and procedures reasonably

[7] *See* Rule 7.36(a)(5) (defining the term ''Floor Broker Participant'' to mean a Floor Broker trading license).

[8] *See* Rule 2(a) (definition of the term ''member'').

[9] *See* Rule 112(a).

[10] *See* Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR–NYSE–2008–80) (Approval order).

[11] *See* Rule 1.1(k).

designed to ensure that it is not using more than one Floor broker for its orders that are for the account of the same principal.

Proposed Rule Commentary .03 would apply the same concepts to circumstances when a member organization uses more than one Floor broker for multiple orders that it represents on an agency basis. Proposed Rule Commentary .03(a) would specify that orders that the member organization represents on an agency basis from a single customer are presumed not to be for the account of the same principal if the member organization's customer maintains Independent Units and the orders are from Independent Units. Proposed Rule Commentary .03(b) would specify that if a member organization is representing a customer on an agency basis and uses more than one Floor broker for such customer, the member organization's written policies and procedures must be reasonably designed to ensure that the orders it receives from the customer are from Independent Units of the customer. The proposed Rule Commentary would specify that the member organization must: (1) Use reasonable diligence to know and retain the essential facts relating to the operation and supervision of its customer's information barriers to ensure there is a prohibition against the coordination of trading strategies and that there is in fact no coordination of trading strategies, and that the orders are from Independent Units (*see* proposed Rule Commentary .03(b)(1)); (2) review and document such reviews that the orders received from its customers originated from Independent Units (*see* proposed Rule Commentary .03(b)(2)); and (3) obtain an annual written representation, in a form acceptable to the Exchange, from each customer that such orders originate from Independent Units (*see* proposed Rule Commentary .03(b)(3)). The Exchange believes that, taken together, these measures will provide the member organization and the Exchange with reasonable assurance that the orders are not for the account of the same principal, and member organizations are operating in compliance with Rule 122.

The Exchange states that The requirements of proposed Commentary .03(b) are not the first time that the Exchange has imposed obligations on its member organizations with respect to orders that they represent on an agency basis on behalf of their customers. For example, the Exchange states, Rule 7.44(b)(6), relating to the Exchange's Retail Liquidity Program, provides that if the Retail Member Organization does not itself conduct a retail business but instead routes Retail Orders on behalf of another broker-dealer, the Retail Member Organization's supervisory procedures must be reasonably designed to ensure that the orders it receives from such other broker-dealer meet the definition of a Retail Order. According to the Exchange, that Rule further provides that to fulfill this supervisory requirement, the Retail Member Organization must obtain an annual written representation, in a form acceptable to the Exchange, from the broker-dealer sending the orders that the orders comply with Rule 7.44, and by monitoring whether Retail Order flow routed on behalf of such other broker-dealer meets the applicable requirements. Here, the Exchange asserts, the proposed amended rule would require a similar supervisory obligation for member organizations to ensure that orders placed by their customers in fact originate from Independent Units. The Exchange represents that it will monitor member organization compliance with these proposed requirements via examination-based surveillance.[12]

Proposed Rule Commentary .04 would add that notwithstanding Commentary .02(a) and .03(a), that there is a presumption that orders are for the account of the same principal (*i.e.,* not from Independent Units) if the trading strategies are run by the same desk, group, employee(s), or portfolio manager(s); are otherwise overseen or supervised by the same desk, group, employee(s), or portfolio managers; or share capital or roll up to the same profit and loss center.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges.[13] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,[14] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

Generally, NYSE Rule 122 provides that a member organization may not maintain orders with more than one Floor broker to purchase the same security at the same price. The intent of the rule is to prevent member organizations from by splitting a single order among multiple Floor brokers in order to circumvent the Exchange's parity allocation rules and obtain preferential executions. The Exchange has proposed to both (1) clarify the existing exception to NYSE Rule 122 that permits a member organization to maintain separate orders with more than one Floor broker if the member organization has multiple trading desks and there is no coordination between those trading desks, and (2) extend this exception to include customers of member organizations, provided that the orders originate from independent trading desks at the customer that do not coordinate their trading.[15]

The Commission finds that this proposed rule change is reasonably designed to prevent fraudulent and manipulative acts and practices. The Commission believes that the proposed rule change is consistent with the purpose and intent of NYSE Rule 122 to prevent the circumvention of the Exchange's parity allocation rules. Significantly, in extending the ''account of the same principal'' exception to the Independent Units of a member organization's customer, the proposed rule change would require that a member organization accepting such customer orders use reasonable diligence to know and retain essential facts relating to the operation and supervision of its customer's information barriers or other barriers to ensure that there is a prohibition against the coordination of trading strategies, that there is in fact no coordination of trading strategies, and that the orders are from Independent Units of the customer Further, the Exchange has represented that it will monitor member organization compliance with these

[12] The Exchange represents that it and the Financial Industry Regulatory Authority, Inc. (''FINRA'') have entered into a regulatory services agreement pursuant to which FINRA will conduct specified regulatory services on the Exchange's behalf, including examining member organizations' compliance with Exchange rules.

[13] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 U.S.C. 78f(b)(5).

[15] The Exchange has also proposed non-substantive, technical and clarifying changes to the rule text to: (1) Add subsection numbering and (2) remove references that are either extraneous or obsolete.

requirements via examination-based surveillance.[16]

Based on the foregoing, the Commission therefore finds that the proposed rule change is consistent with the Act.

IV. Solicitation of Comments on Amendments No. 1

Interested persons are invited to submit written data, views, and arguments concerning whether Amendments No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2020–66 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2020–66. 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 this filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–66 and should be submitted on or before December 4, 2020.

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of Amendment No. 1 in the **Federal Register**. In Amendment No. 1, the Exchange added to its proposal the representation that it will monitor, via examination-based surveillance, member organization compliance with its supervisory obligation to ensure that orders placed by their customers in fact originate from Independent Units.[17]

The Commission finds that Amendment No. 1 is consistent with the Act in that is designed, among other things, to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[18] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[19] that the proposed rule change SR–NYSE–2020–66, as modified by Amendment No. 1 be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25059 Filed 11–12–20; 8:45 am]

BILLING CODE 8011–01–P

[16] *See* Note 12 and accompanying text, *supra.*

[17] *See* Note 12 and accompanying text, *supra.*

[18] 15 U.S.C. 78s(b)(2).

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90376; File No. 265–33]

Asset Management Advisory Committee

AGENCY: Securities and Exchange Commission.

ACTION: Notice of meeting.

SUMMARY: Notice is being provided that the Securities and Exchange Commission Asset Management Advisory Committee (''AMAC'') will hold a public meeting on December 1, 2020, by remote means. The meeting will begin at 9:00 a.m. (ET) and will be open to the public via webcast on the Commission's website at *www.sec.gov.* Persons needing special accommodations to take part because of a disability should notify the contact person listed below. The public is invited to submit written statements to the Committee. The meeting will include a discussion of matters in the asset management industry relating to the Private Investments Subcommittee; the ESG Subcommittee, including potential recommendations from that Subcommittee; and the Diversity & Inclusion Subcommittee, including a panel discussion on improving diversity and inclusion. The meeting will also include a discussion of AMAC's administrative matters during a portion of the meeting that will not be open to the public.

DATES: The public meeting will be held on December 1, 2020. Written statements should be received on or before November 23, 2020.

ADDRESSES: The meeting will be held by remote means and webcast on *www.sec.gov.* Written statements may be submitted by any of the following methods. To help us process and review your statement more efficiently, please use only one method. At this time, electronic statements are preferred.

Electronic Statements

- Use the Commission's internet submission form (*http://www.sec.gov/rules/other.shtml*); or
- Send an email message to *rule-comments@sec.gov.* Please include File Number 265–33 on the subject line; or

Paper Statements

- Send paper statements to Vanessa Countryman, Federal Advisory Committee Management Officer, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. 265–33. This file number should be included on the subject line if email is used. The Commission will post all statements on the Commission's website at (*http://www.sec.gov/comments/265-33/265-33.htm*).

Statements also will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. For up-to-date information on the availability of the Public Reference Room, please refer to *https://www.sec.gov/fast-answers/*

answerspublicdocshtm.html or call (202) 551–5450.

All statements received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Christian Broadbent, Senior Special Counsel, Angela Mokodean, Branch Chief, or Jay Williamson, Branch Chief, at (202) 551–6720, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C.–App. 1, and the regulations thereunder, Dalia Blass, Designated Federal Officer of the Committee, has ordered publication of this notice.

Dated: November 9, 2020.

Vanessa A. Countryman,

Committee Management Officer.

[FR Doc. 2020–25123 Filed 11–12–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90364; File No. SR–CboeBYX–2020–031]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rule 14.10, Requirements for Securities Issued by the Exchange or its Affiliates

November 6, 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 BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 14.10 (Requirements for Securities Issued by the Exchange or its Affiliates) regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. The Exchange notes that the changes proposed herein are substantively identical to changes adopted on Cboe BZX Exchange, Inc. (''BZX'').[3]

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), 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 Rule 14.10 (Requirements for Securities Issued by the Exchange or its Affiliates) regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. The Exchange notes that the changes proposed herein are substantively identical to changes adopted on Cboe BZX Exchange, Inc. (''BZX'').[4]

Rule 14.10 sets forth certain monitoring requirements that must be met throughout the continued listing and trading of securities issued by the Exchange or its affiliates. More specifically, Rule 14.10(b) and (c) provide that:

- Throughout the continued listing and trading of an Affiliate Security[5] on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee (''ROC'') of the Exchange's Board of Directors that describes the Exchange's monitoring of the Affiliate Security's compliance with the Exchange's listing standards (the ''Quarterly Listing Report'');
- once a year, an independent accounting firm shall review the listing standards for the Affiliate Security to ensure that the issuer is in compliance with the listing requirements (''Annual Report''), and a copy of the Annual Report shall be forwarded promptly to the ROC; and
- throughout the trading of an Affiliate Security on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee of the Exchange's Board of Directors that describes the Exchange's monitoring of the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Exchange Rules, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data used to ensure the Affiliate Security's compliance with the Exchange's listing and trading rules (the ''Quarterly Trading Report'' and, collectively with the Quarterly Listing Report, the ''Quarterly Reports'').

Rule 14.10(d) requires that a copy of all Quarterly Reports and Annual Reports will be forwarded promptly to the Commission.

The Exchange proposes to amend Rule 14.10(d) to remove the requirement that copies of the Quarterly Reports and Annual Reports be forwarded to the Commission and instead providing that the Exchange will forward a copy of the Quarterly Reports and/or Annual Reports to the Commission upon request.

[3] *See* Securities Exchange Act Release No. 86623 (August 9, 2019) 84 FR 41771 (August 15, 2019) (SR–CboeBZX–2019–073) (the ''BZX Filing'').

[4] *See* Securities Exchange Act Release No. 86623 (August 9, 2019) 84 FR 41771 (August 15, 2019) (SR–CboeBZX–2019–073) (the ''BZX Filing'').

[5] As defined in Rule 14.10(a)(2), the term ''Affiliate Security'' means any security issued by a BYX Affiliate or any Exchange-listed option on any such security, with the exception of Portfolio Depository Receipts as defined in Rule 14.8(d) and Investment Company Units as defined in Rule 14.2.

Finally, the Exchange is proposing to make clear that the requirements under Rule 14.10(b)(1),[6] (2),[7] (3),[8] and (4)[9] do not apply to Affiliate Securities that are Exchange-listed options. The Exchange is proposing this change because there is no issuer for options as the term is used in Rule 14.10(b) and each of the requirements under Rule 14.10(b) is implicitly related to equity securities and not to options on such equity securities. The Exchange is not proposing to make any changes to the requirement for all Affiliate Securities (including options) under Rule 14.10(c) that ''[t]hroughout the trading of an Affiliate Security on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee of the Exchange's Board of Directors that describes the Exchange's monitoring of the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Exchange Rules, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data used to ensure the Affiliate Security's compliance with the Exchange's listing and trading rules.'' As such, the Exchange will continue to prepare reports on all Affiliate Securities (including those that are Exchange-listed options) as required under Rule 14.10(c).

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act[10] in general and Section 6(b)(5) of the Act[11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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, because the proposed changes would reduce the paperwork received by the Commission and ease the burden of submitting the Quarterly Reports and Annual Reports, without changing the information available to the Commission. In discussions with the Commission Staff regarding Rule 14.10, it was determined that the Exchange no longer needed to provide copies of the Quarterly Reports and Annual Reports to the Commission. The Quarterly Reports and Annual Reports would continue to be available to the Commission, as they are subject to Section 17 of the Act[12] and Rule 17a–1 thereunder,[13] pursuant to which the Exchange is required to keep and preserve copies of the Quarterly Reports and Annual Reports, and to promptly furnish to the Commission copies of such Reports upon request of any representative of the Commission.

Finally, the Exchange believes that the clarifying change to exclude options on Affiliate Securities from the requirements of Rule 14.10(b) would promote just and equitable principles of trade and remove impediments to a free and open market by making clear that certain obligations that implicitly did not apply to options on Affiliate Securities do not, in fact, apply. As noted above, the Exchange will continue to prepare reports on all Affiliate Securities that include summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Exchange Rules, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data used to ensure the Affiliate Security's compliance with the Exchange's listing and trading rules (including those that are Exchange-listed options) as required under Rule 14.10(c).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes to eliminate the requirement that the Exchange submit copies of the Quarterly Reports and Annual Reports to the Commission and excluding options on Affiliate Securities from the requirements of Rule 14.10(b) will have no impact on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has 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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

[6] Rule 14.10(b)(1) requires that prior to the initial listing of an Affiliate Security on the Exchange, Exchange personnel shall determine that such security satisfies the Exchange's rules for listing, and such finding must be approved by the Regulatory Oversight Committee of the Exchange's Board of Directors.

[7] Rule 14.10(b)(2) requires that throughout the continued listing of an Affiliate Security on the Exchange, the Exchange shall prepare a quarterly report on the Affiliate Security for the Regulatory Oversight Committee of the Exchange's Board of Directors that describes the Exchange's monitoring of the Affiliate Security's compliance with the Exchange's listing standards, including: The Affiliate Security's compliance with the Exchange's minimum share price requirement; and the Affiliate Security's compliance with each of the quantitative continued listing requirements.

[8] Rule 14.10(b)(3) requires that once a year, an independent accounting firm shall review the listing standards for the Affiliate Security to ensure that the issuer is in compliance with the listing requirements and a copy of the report shall be forwarded promptly to the Regulatory Oversight Committee of the Exchange's Board of Directors.

[9] Rule 14.10(b)(4) requires that in the event that the Exchange determines that the BYX Affiliate is not in compliance with any of the Exchange's listing standards, the Exchange shall notify the issuer of such non-compliance promptly and request a plan of compliance. The Exchange shall file a report with the Commission within five business days of providing such notice to the issuer of its non-compliance. The report shall identify the date of the non-compliance, type of non-compliance, and any other material information conveyed to the issuer in the notice of non-compliance. Within five business days of receipt of a plan of compliance from the issuer, the Exchange shall notify the Commission of such receipt, whether the plan of compliance was accepted by the Exchange or what other action was taken with respect to the plan and the time period provided to regain compliance with the Exchange's listing standards, if any.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78q.

[13] 17 CFR 240.17a–1.

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing

Continued

A proposed rule change filed under Rule 19b–4(f)(6) [16] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[17] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay to allow the Exchange to make the proposed changes to its rules without unnecessary delay in order to be consistent with those already in place on BZX, its affiliate. The Commission notes that the proposed rule change is based on and substantively identical to the rules of BZX.[18] For this reason, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–CboeBYX–2020–031 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBYX–2020–031. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBYX–2020–031 and should be submitted on or before December 4, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25056 Filed 11–12–20; 8:45 am]

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of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] *See supra* note 3.

[19] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90378; S7–16–20]

Notice of Substituted Compliance Application Submitted by the Bundesanstalt für Finanzdienstleistungsaufsicht in Connection With Certain Requirements Applicable to Security-Based Swap Entities Subject to Regulation in the Federal Republic of Germany; Proposed Order

AGENCY: Securities and Exchange Commission.

ACTION: Notice of application for substituted compliance determination; proposed order.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is soliciting public comment on an application by the Bundesanstalt für Finanzdienstleistungsaufsicht (''BaFin'') requesting that, pursuant to rule 3a71–6 under the Securities Exchange Act of 1934 (''Exchange Act''), the Commission determine that registered security-based swap dealers and registered major security-based swap participants (''SBS Entities'') that are not U.S. persons and that are subject to certain regulation in the Federal Republic of Germany (''Germany'') may comply with certain requirements under the Exchange Act via compliance with corresponding requirements of Germany and the European Union. The Commission also is soliciting comment on a proposed Order providing for the conditional availability of substituted compliance in connection with the application.

DATES: Submit comments on or before December 8, 2020.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–16–20 on the subject line.

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–16–20. 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/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information

that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Carol M. McGee, Assistant Director or Laura Compton, Senior Special Counsel at 202–551–5870, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is soliciting public comment on an application by BaFin requesting that the Commission determine that SBS Entities that are not U.S. persons and that are subject to certain regulation in Germany may satisfy certain requirements under the Exchange Act by complying with comparable requirements in Germany including relevant European Union (''EU'') requirements. The Commission also is soliciting comment on a proposed Order, set forth in Attachment A, providing for the conditional availability of substituted compliance in connection with that application.

I. Background

A. Substituted Compliance Under Exchange Act Rule 3a71–6

1. Potential Scope of Availability

Exchange Act rule 3a71–6 conditionally provides that non-U.S. SBS Entities may satisfy certain requirements under Exchange Act section 15F by complying with comparable regulatory requirements of a foreign jurisdiction.[1] This substituted compliance framework does not constitute exemptive relief, but instead provides an alternative method by which non-U.S. SBS Entities may comply with applicable U.S. requirements.[2] The non-U.S. SBS Entities accordingly would remain subject to the relevant requirements under section 15F, and the Commission would retain the authority to inspect, examine and supervise those SBS Entities' compliance and take enforcement action as appropriate.[3]

Substituted compliance potentially is available in connection with section 15F requirements regarding: (1) Business conduct and supervision;[4] (2) chief compliance officers; [5] (3) trade acknowledgment and verification; [6] (4) capital; [7] (5) margin; [8] (6) recordkeeping and reporting; [9] and (7) portfolio reconciliation, portfolio compression and trading relationship documentation.[10]

Substituted compliance is not available for antifraud prohibitions and information-related requirements under section 15F.[11] Substituted compliance under rule 3a71–6 also does not extend to certain other provisions of the Exchange Act that apply to security-based swap transactions. [12] SBS Entities in Germany accordingly must comply directly with those requirements, as applicable, regardless of whether the Commission grants the present application.

2. Prerequisites to Substituted Compliance

a. Comparability of Regulatory Outcomes

As a prerequisite to substituted compliance, rule 3a71–6 provides that the Commission must determine that the analogous foreign requirements are ''comparable'' to the applicable requirements under the Exchange Act, after accounting for factors that the Commission determines are appropriate, ''such as the scope and objectives of the relevant foreign regulatory requirements . . . , as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised'' by the foreign authority.[13]

In making those assessments, the Commission has explained that it will ''endeavor to take a holistic approach in considering whether regulatory requirements are comparable . . . and will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.'' [14]

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[1] On August 6, 2021, market participants will begin to count security-based swap positions toward the thresholds for registration with the Commission as a security-based swap dealer or major security-based swap participant. *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, 84 FR 43872, 53954 (Aug. 22, 2019); *see also* Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements, 85 FR 6270, 6345–49 (Feb. 4, 2020).

[2] ''[I]n the Commission's view, the potential for substituted compliance will help to promote the effective application of Title VII requirements, by making it less likely that certain market participants that are complying with comparable foreign requirements will determine that they need to choose between modifying their business conduct systems to reflect the requirements of U.S. rules, or else limiting or ceasing their participation in the U.S. market.'' Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30074 (May 13, 2016) (''Business Conduct Adopting Release'').

[3] The Commission has the authority to bring an enforcement action against a non-U.S. SBS Entity for failure to comply with applicable requirements under the Exchange Act if the firm has failed to comply with the corresponding foreign requirements. *See also* section VII.B.3. of this release.

[4] *See* Exchange Act rule 3a71–6(d)(1) (providing that substituted compliance generally is available in connection with the business conduct and supervision requirements of Exchange Act sections 15F(h) and (j) and Exchange Act rules 15Fh–3 through 15Fh–6). *But see* note 11, *infra* (addressing the fact that substituted compliance does not extend to section 15F antifraud prohibitions and information-related requirements).

[5] *See* Exchange Act rule 3a71–6(d)(2) (providing that substituted compliance is available in connection with the chief compliance officer requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk–1).

[6] *See* Exchange Act rule 3a71–6(d)(3) (providing that substituted compliance is available in connection with the trade acknowledgment and verification requirements of Exchange Act section 15F(i) and Exchange Act rule 15Fi–2).

[7] *See* Exchange Act rule 3a71–6(d)(4)(i) (providing that substituted compliance is available in connection with the security-based swap dealer capital requirements of Exchange Act section 15F(e)).

[8] *See* Exchange Act rule 3a71–6(d)(5)(i) (providing that substituted compliance is available in connection with the security-based swap dealer margin requirements of Exchange Act section 15F(e)).

[9] *See* Exchange Act rule 3a71–6(d)(6) (providing that substituted compliance is available in connection with the recordkeeping and reporting requirements of Exchange Act section 15F and Exchange Act rules 18a–5 through 18a–9).

[10] *See* Exchange Act rule 3a71–6(d)(7) (providing that substituted compliance is available in connection with the portfolio reconciliation, portfolio compression, and trading relationship documentation requirements of Exchange Act section 15F(i) and Exchange Act rules 15Fi–3 through 15Fi–5).

[11] *See* Exchange Act rule 3a71–6(d)(1) (specifying that substituted compliance is not available in connection with the antifraud provisions of Exchange Act section 15F(h)(4)(A) and Exchange Act rule 15Fh–4(a), and the information-related provisions of Exchange Act sections 15F(j)(3) and 15F(j)(4)(B)).

Substituted compliance also is not available for security-based swap dealer registration requirements pursuant to Exchange Act sections 15F(a) and (b).

[12] Substituted compliance under rule 3a71–6 accordingly is not available in connection with security-based swap dealer requirements such as: (a) Additional antifraud prohibitions (*see* Exchange Act section 10(b), Exchange Act rule 10b-5, and Securities Act of 1933 section 17(a)); (b) requirements related to transactions with counterparties that are not eligible contract participants (''ECPs'') (*see* Exchange Act section 6(l); Securities Act of 1933 section 5(e)); (c) segregation of customer assets (*see* Exchange Act section 3E; Exchange Act rule 18a–4); (d) required clearing upon counterparty election (*see* Exchange Act section 3C(g)(5)); (e) regulatory reporting and public dissemination (*see generally* Regulation SBSR, 17 CFR 242.900 *et seq.*); and (f) registration of offerings (*see* Securities Act of 1933 section 5).

[13] Exchange Act rule 3a71–6(a)(2)(i).

[14] *See* Business Conduct Adopting Release, 81 FR at 30078 (further recognizing that ''different regulatory systems may be able to achieve some or all of those regulatory outcomes by using more or fewer specific requirements than the Commission, and that in assessing comparability the Commission may need to take into account the manner in which other regulatory systems are informed by business and market practices in those jurisdictions''). The Commission added that its assessment of a foreign authority's supervisory and enforcement effectiveness—as part of the broader comparability analysis—would be expected to consider not only overall oversight activities, but also oversight

Continued

b. Memorandum of Understanding

Rule 3a71–6 also predicates substituted compliance on the Commission entering into a supervisory and enforcement memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authority ''addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.'' [15] The Commission and BaFin are in the process of negotiating a memorandum of understanding to address cooperation matters related to substituted compliance.[16]

c. ''Adequate Assurances''

Finally, rule 3a71–6 states that a foreign regulatory authority may submit a substituted compliance application only if the authority provides ''adequate assurances'' that no law or policy would impede the ability of any entity that is directly supervised by the authority and that may register with the Commission ''to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.'' [17]

specifically directed at conduct and activity relevant to the substituted compliance determination. ''For example, it would be difficult for the Commission to make a comparability determination in support of substituted compliance if oversight is directed solely at the local activities of foreign security-based swap dealers, as opposed to the cross-border activities of such dealers.'' *Id.* at 30079 (footnote omitted).

[15] Exchange Act rule 3a71–6(a)(2)(ii). The Commission has explained that this prerequisite ''should help ensure that both regulators will cooperate with each other within the substituted compliance framework, such that both regulators have information that will assist them in fulfilling their respective regulatory mandates.'' Business Conduct Adopting Release, 81 FR at 30074–75.

[16] The Commission and BaFin will need to have in place a current memorandum of understanding or other arrangement addressing matters related to substituted compliance before the Commission may issue a final order allowing Covered Entities to use substituted compliance to satisfy obligations under the Exchange Act. The Commission expects to publish any such memorandum of understanding or other arrangement on its website at *www.sec.gov* under the ''Substituted Compliance'' tab located on the ''Security-Based Swap Markets'' page.

[17] Exchange Act rule 3a71–6(c)(3) (also stating that for applications by market participants—rather than by foreign regulatory authorities—each applicant must provide the certification and opinion of counsel related to Commission access that is described in the registration application provisions of Exchange Act rule 15Fb2–4(c)). The Commission has explained that this prerequisite (and its analogue for applications submitted by market participants) should promote efficiency by focusing substituted compliance assessments on those jurisdictions that are capable of allowing the Commission to have the requisite access to registered entities. ''In other words, if a jurisdiction has blocking statutes or other laws or policies that would preclude the registration of such dealers and major participants with the Commission, there would be no purpose to the Commission considering a substituted compliance application in connection with that jurisdiction.'' Business Conduct Adopting Release, 81 FR at 30081.

In the Commission's preliminary view, BaFin has satisfied this prerequisite as of the date of the application.[18]

B. Commission rule 0–13 and publication of notice for comment

Commission rule 0–13 addresses procedures for filing substituted compliance applications, and provides that the Commission will publish notice when a completed application has been submitted. The rule further provides that any person may submit to the Commission ''any information that relates to the Commission action requested in the application.'' [19]

II. Germany's Substituted Compliance Request

BaFin has submitted a completed substituted compliance application to the Commission.[20] Pursuant to rule 0–13, the Commission is publishing notice of the application together with a proposed Order to conditionally grant substituted compliance to certain German SBS Entities in connection with certain requirements under the Exchange Act. The Commission will consider public comments on BaFin's application and the proposed Order.

BaFin's application seeks substituted compliance for German market participants in connection with a number of requirements under Exchange Act section 15F.

A. Relevant Market Participants

The Commission will consider whether to make substituted compliance available to any entity that: (i) Is registered with the Commission as a security-based swap dealer or major security-based swap participant; (ii) is not a U.S. person; (iii) has been authorized by BaFin as an investment firm or credit institution; and (iv) is subject to relevant German and EU financial regulatory requirements and to supervision and enforcement by BaFin in connection with its security-based swap activity.

[18] This took into account information and representations that BaFin provided regarding certain German and EU requirements that are relevant to the Commission's ability to inspect, and access the books and records of, security-based swap dealers in Germany.

[19] *See* Commission rule 0–13(h). That paragraph adds that the Commission may take final action on a substituted compliance application no earlier than 25 days following publication of the notice in the **Federal Register**.

[20] *See* Letter from Elisabeth Roegele, Chief Executive Director of Securities Supervision and Deputy President, BaFin, to Vanessa Countryman, Secretary, Commission, dated Nov. 6, 2020 (''BaFin Application''). The application is available on the Commission's website at: *https://www.sec.gov/files/germany-BaFin-complete-application-substituted-compliance-11062020.pdf.*

B. Relevant Section 15F Requirements

BaFin requests that the Commission issue an order determining that—for substituted compliance purposes—applicable requirements in Germany are comparable with the following requirements under Exchange Act section 15F:

Risk control requirements—Requirements related to internal risk management systems, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression and trading relationship documentation.[21]

Internal supervision, chief compliance officer and additional section 15F(j) requirements—Requirements related to diligent supervision and chief compliance officers, as well as requirements related to conflicts of interest and information gathering under Exchange Act section 15F(j).[22]

Counterparty protection requirements—Requirements related to disclosure of material risks and characteristics and material incentives or conflicts of interest, disclosure of daily marks, fair and balanced communications, disclosure of clearing rights, ''know your counterparty'' and suitability of recommendations.[23]

Recordkeeping, reporting, and notification requirements—Requirements related to making and keeping current certain prescribed records, the preservation of records, reporting, and notification.[24]

C. Comparability Considerations and Proposed Order

Because Germany is a member of the European Union, market participants in

[21] *See* part IV, *infra.*

[22] *See* part V, *infra.*

[23] *See* part VI, *infra.* BaFin is not requesting substituted compliance in connection with: Eligible contract participant (''ECP'') verification requirements (Exchange Act section 15F(h)(3)(A) and Exchange Act rule 15Fh–3(a)(1)); ''special entity'' provisions (Exchange Act sections 15F(h)(4)–(5) and Exchange Act rules 15Fh–3(a)(2)–(3), 15Fh–4(b) and 15Fh–5); and political contribution provisions (Exchange Act rule 15Fh–6).

[24] *See* part VII, *infra.* The application does not seek substituted compliance with respect to capital or margin requirements. The Commission does not administer or oversee capital and margin requirements for prudentially regulated SBS Entities. The Commission has preliminarily determined to focus its analysis on the recordkeeping, reporting, and notification requirements that apply to prudentially regulated SBS entities and is deferring consideration of requirements that apply to non-prudentially regulated SBS Entities until it receives an application seeking substituted compliance for capital and margin requirements. The Commission is seeking commenters' views on this issue below.

Germany are subject to German regulations implemented pursuant to EU directives, and to applicable EU regulations. Those include requirements related to: Organization, compliance and conduct; [25] risk-mitigation; [26] prudential matters; [27] and certain other matters relevant to the application.[28]

In the view of BaFin, German and EU requirements taken as a whole produce regulatory outcomes that are comparable to those of the relevant requirements under the Exchange Act. In support, the application incorporates and relies on a series of European Commission analyses that compare EU requirements with applicable requirements under the Exchange Act, in addition to analyses specific to German law and practices.[29]

In the Commission's preliminary view, requirements under the Exchange Act and German/EU requirements maintain similar approaches with respect to achieving regulatory goals in several respects, but follow differing approaches or incorporate disparate elements in certain other respects. The Commission has considered those similarities and differences when analyzing comparability and developing preliminary views in light of the Commission's holistic, outcomes-oriented framework for assessing comparability.

In this context, the Commission recognizes that other regulatory regimes will have exclusions, exceptions and exemptions that may not align perfectly with the corresponding requirements under the Exchange Act. Where the Commission preliminarily has found that the German regime produces comparable outcomes notwithstanding those particular differences, the Commission proposes to make a positive determination on substituted compliance. Where the Commission preliminarily has found that those exclusions, exemptions and exceptions lead to outcomes that are not comparable, however, the proposal would not provide for substituted compliance.

Accordingly, based on the Commission's analysis of the application and review of relevant German and EU requirements, the Commission is proposing an Order, located at Attachment A, granting substituted compliance subject to specific conditions and limitations. When SBS Entities seek to rely on substituted compliance to satisfy particular requirements under the Exchange Act, non-compliance with the applicable German and EU requirements would lead to a violation of those requirements under the Exchange Act and potential enforcement action by the Commission (as opposed to automatic revocation of the substituted compliance order).

III. Applicable Entities and General Conditions

A. Entities for Which Conditional Substituted Compliance Is Available

Under the proposed Order, substituted compliance would be available to ''Covered Entities''—a term that limits the availability of substituted compliance to SBS Entities that are subject to applicable German and EU requirements and oversight. Consistent with the parameters of substituted compliance under Exchange Act rule 3a71–6, the proposed ''Covered Entity'' definition provides that the relevant entities must be security-based swap dealers or major security-based swap participants registered with the Commission, and that those entities cannot be U.S. persons.[30]

The proposed ''Covered Entity'' definition further would provide that the entities must be investment firms or credit institutions that BaFin has authorized to provide investment services or perform investment activities in Germany.[31] This is intended to help ensure that those entities are subject to relevant German and EU requirements and oversight.

B. General Conditions and Prerequisites

Substituted compliance under the proposed Order would be subject to a number of conditions and other prerequisites, in part to help ensure that the relevant German and EU requirements that form the basis for substituted compliance in practice will apply to the SBS Entity's security-based swap business and activities.

1. ''Subject to and Complies With'' Applicability Provisions

Each relevant section of the proposed Order would be subject to the condition that the Covered Entity ''is subject to and complies with'' the applicable German and EU requirements that are needed to establish comparability.[32] Accordingly, the proposed Order would not provide substituted compliance

[25] Relevant elements of the EU's Markets in Financial Instruments Directive (''MiFID''), Directive 2014/65/EU, have been implemented in Germany via amendments to the Securities Trading Act—Wertpapierhandelsgesetz (''WpHG''). MiFID and WgHG address, *inter alia*, organizational, compliance and conduct requirements applicable to nonbank ''investment firms.'' In significant part, those requirements also apply to credit institutions that provide investment services or perform investment activities. *See* MiFID art. 1(3); WpHG sec. 2(10) (WpHG definition of ''investment services enterprises''). Commission Delegated Regulation (EU) 2017/565 (''MiFID Org Reg'') in part supplements MiFID with respect to organizational requirements for firms. The Markets in Financial Instruments Regulation (''MiFIR''), Regulation (EU) 648/2012, generally addresses trading venues and transparency. Commission Delegated Directive (EU) 2017/593 (''MiFID Delegated Directive'') in part supplements MiFID with regard to safeguarding client property, and in Germany is implemented in relevant part by the WpHG. Directive (EU) 2015/849 (''MLD'') addresses requirements on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and in Germany has been implemented by the Money Laundering Act—Geldwäschegesetz (''GwG'').

[26] The European Market Infrastructure Regulation (''EMIR''), Regulation (EU) 648/2012, in part imposes certain risk-mitigation requirements on counterparties in connection with uncleared OTC transactions. Delegated Regulation (EU) 149/2013 (''EMIR RTS'') supplements EMIR with various regulatory technical standards, including standards addressing confirmations, portfolio reconciliation, portfolio compression and dispute resolution. Delegated Regulation (EU) 2016/2251 (''EMIR Margin RTS'') further supplements EMIR with regulatory technical standards related to risk mitigation techniques.

[27] The EU's Capital Requirements Directive IV (''CRD''), Directive 2013/36/EU has been adopted in Germany via amendments to the Banking Act—Gesetz über das Kreditwesen (''KWG''). CRD and KWG set forth prudential requirements and certain related requirements applicable to credit institutions and certain nonbank investment firms. Certain CRD requirements regarding reporting obligations have been incorporated into German law by the Finanzdienstleistungsaufsichtsgesetz (''FinDAG''). The Capital Requirements Regulation (''CRR''), Regulation (EU) 575/2013 further addresses prudential requirements and related recordkeeping requirements for credit institutions and certain investment firms. Commission Implementing Regulation (EU) 680/2014 (''CRR Reporting ITS'') sets forth implementing technical standard regarding supervisory reporting. Pursuant to amendments that will become effective in June 2021, the requirements of CRD and the CRR will apply to credit institutions and to certain nonbank undertakings (that carry on activities involving dealing, portfolio management, investment advice and underwriting/placing) that meet specified thresholds (*e.g.,* consolidated assets of €30 billion or more). *See generally* Investment Firms Regulation (''IFR''), Regulation (EU) 2019/2033, art. 62 (amending certain definitions in the CRR).

[28] The Market Abuse Regulation (''MAR''), Regulation (EU) 596/2014, sets forth requirements to enhance market integrity and investor protection. The MAR Investment Recommendations Regulation, Commission Delegated Regulation (EU) 2016/958, supplements MAR with respect to regulatory technical standards regarding investment recommendations.

[29] BaFin's application incorporates and builds upon European Commission analyses related to: Risk control (*see* BaFin application Annex A category 1), books and records (*see* BaFin application Annex A category 2), internal supervision and compliance (*see* BaFin application Annex A category 3), and counterparty protection (*see* BaFin application Annex A category 4). These analyses are available on the Commission's website along with the remainder of BaFin's application. *See* note 20, *supra.*

[30] *See* para. (f)(1)(i)–(ii) to the proposed Order.

[31] *See* para. (f)(1)(iii) to the proposed Order.

[32] *E.g.,* para. (d)(1) to the proposed Order (providing for conditional substituted compliance in connection with certain disclosure provisions provided that the Covered Entity ''is subject to and complies'' with specified German and EU requirements related to disclosure).

when an SBS Entity is excused from compliance with relevant foreign provisions, such as, for example, would be the case if the German or EU requirements that the Commission has deemed comparable for purposes of the proposed Order do not apply to the security-based swap activities of a third-country branch of a German SBS Entity. In that event, the Covered Entity would not be ''subject to'' those requirements, and the Covered Entity could not rely on substituted compliance in connection with those activities.[33]

2. Additional General Conditions

Substituted compliance under the proposed Order further would be subject to general conditions intended to help ensure the applicability of relevant German and EU requirements. In particular:

• *MiFID* ''*investment services or activities*''—The SBS Entity's security-based swap activities must constitute ''investment services or activities'' for purposes of applicable provisions under MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions, and must fall within the scope of the firm's authorization from BaFin.[34]

• *MiFID* ''*clients*''—The SBS Entity's counterparties (or potential counterparties) must be ''clients'' (or potential ''clients'') for purposes of applicable provisions under MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions.[35]

• *MiFID* ''*financial instruments*''—The relevant security-based swaps must be ''financial instruments'' for purposes of MiFID, the WpHG and/or other EU and German requirements adopted pursuant to those provisions.[36]

• *CRD* ''*institutions*''—The Covered Entity must be an ''institution'' for purposes of applicable provisions under CRD, KWG and CRR and/or other EU and German requirements adopted pursuant to those provisions.[37]

• *Memorandum of Understanding*—The Commission and BaFin have an applicable memorandum of understanding or other arrangement addressing cooperation with respect to the substituted compliance Order at the time the Covered Entity makes use of substituted compliance.[38]

• *Notice of reliance on substituted compliance*—An SBS Entity relying on the substituted compliance order must provide notice of its intent to rely on the order by notifying the Commission in writing.[39]

3. European Union Cross-Border Matters

For some EU requirements under MiFID (and other EU and German requirements adopted pursuant to MiFID), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of the Member State in whose territory a Covered Entity provides certain services.[40] To help ensure that the prerequisites to substituted compliance with respect to supervision and enforcement are satisfied in fact, the proposed Order would provide substituted compliance only if BaFin is the authority responsible for supervision and enforcement of those EU requirements under MiFID (and other EU and German requirements adopted pursuant to MiFID) in relation to the particular service for which substituted compliance is used.

Similarly, for some of the EU requirements under MAR (and other EU requirements adopted pursuant to MAR), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of potentially multiple Member States. For those EU requirements under MAR (and other EU requirements adopted pursuant to MAR), to help ensure that the prerequisites to substituted compliance with respect to supervision and enforcement are satisfied in fact, the proposed Order would provide substituted compliance only if one of those authorities is BaFin.[41]

IV. Substituted Compliance for Risk Control Requirements

A. BaFin Request and Associated Analytic Considerations

BaFin's application in part requests substituted compliance in connection with risk control requirements under the Exchange Act relating to:

• *Risk management systems*—An internal risk management system is required pursuant to Exchange Act section 15F(j)(2) and relevant aspects of Exchange Act rule 15Fh–3(h)(2)(iii)(I).[42] These provisions address the obligation of registered entities to follow policies and procedures reasonably designed to help manage the risks associated with their business activities.[43]

• *Trade acknowledgment and verification*—Trade acknowledgment and verification is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–2. These provisions help avoid legal and operational risks by requiring definitive written records of transactions and for procedures to avoid disagreements regarding the meaning of transaction terms.[44]

• *Portfolio reconciliation and dispute reporting*—Portfolio reconciliation and dispute reporting is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–3. These provisions require that counterparties engage in portfolio reconciliation and resolve discrepancies in connection with uncleared security-based swaps. These also require prompt notification of the Commission and applicable

[33] A SBS Entity's ''voluntary'' compliance with the relevant German and EU requirements would not suffice for these purposes. Substituted compliance reflects an alternative means by which an SBS Entity may comply with applicable requirements under the Exchange Act, and thus mandates that the SBS Entity be subject to the requirements needed to establish comparability and face consequences arising from any failure to comply with those requirements. Moreover, the comparability assessment takes into account the effectiveness of the supervisory compliance program administered and the enforcement authority exercised by BaFin, which would not be expected to promote comparable outcomes when compliance merely is ''voluntary.''

[34] *See* paragraph (a)(1) to the proposed Order (requiring that relevant activities constitute ''investment services'' or ''investment activities'' as defined in MiFID art. 4(1)(2) and WpHG sec. 2(8) in connection with applicable provisions).

[35] *See* paragraph (a)(2) to the proposed Order (requirement that relevant counterparties or potential counterparties be ''clients'' or potential ''clients'' as defined in MiFID art. 4(1)(9) and WpHG sec. 67(1) in connection with applicable provisions).

[36] *See* paragraph (a)(3) to the proposed Order (requirement that relevant security-based swaps be ''financial instruments'' as defined in MiFID art. 4(1)(15) and WpHG sec. 2(4) in connection with applicable provisions).

[37] *See* para. (a)(4) to the proposed Order (requirement that relevant Covered Entities must be ''institutions'' as defined in CRD art. 3(1)(3), CRR art. 4(1)(3) and KWG sec. 1(1b)).

[38] *See* para. (a)(5) to the proposed Order; *see also* part I.A.2.b, *supra.*

[39] *See* para. (a)(6) to the proposed Order.

[40] *See* MiFID art. 35(8).

[41] *See* para. (a) to the proposed Order.

[42] BaFin is not requesting substituted compliance in connection with Exchange Act rules 18a–1(f) and 18a–2(c), which set forth additional internal risk management system requirements for nonbank security-based swap dealers and nonbank major security-based swap participants.

[43] *See* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70250 (Nov. 23, 2012) (proposing capital and margin requirements for security-based swap dealers and major security-based swap participants). BaFin's application discusses German and EU requirements that address SBS Entities' obligations related to risk management. *See* BaFin application Annex A category 1 at 9–21.

[44] Exchange Act Release No. 78011 (Jun. 8, 2016), 81 FR 39808, 39809 & 39820 (Jun. 17, 2019) (''Trade Acknowledgment and Verification Adopting Release''). BaFin's application discusses German and EU requirements that address SBS Entities' obligations related to confirmations and to information to be provided to clients regarding executed orders. *See* BaFin application Annex A category 1 at 22–39.

prudential regulators regarding certain valuation disputes.[45]

• *Portfolio compression*—Portfolio compression is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–4. These provisions require that SBS Entities have procedures addressing bilateral offset, bilateral compression and multilateral compression in connection with uncleared security-based swaps.[46]

• *Trading relationship documentation*—Trading relationship documentation is required pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi–5. These provisions require that SBS Entities have procedures to execute written security-based swap trading relationship documentation with their counterparties prior to, or contemporaneously with, executing certain security-based swaps.[47]

Taken as a whole, these risk control requirements help to promote market stability by mandating that registered entities follow practices that are appropriate to manage the market, counterparty, operational and legal risks associated with their security-based swap businesses. The Commission's comparability assessment accordingly focuses on whether the analogous foreign requirements—taken as a whole—produce comparable outcomes with regard to providing that registered entities follow financial responsibility, risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses.

B. Preliminary Views and Proposed Order

1. General Considerations

In the Commission's preliminary view based on BaFin's application and the Commission's review of applicable provisions, relevant German and EU requirements in general would produce regulatory outcomes that are comparable to those associated with the above risk control requirements, by subjecting German SBS Entities to financial responsibility, risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses. Substituted compliance accordingly would be conditioned on SBS Entities being subject to the German and EU provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with the risk control requirements under the Exchange Act.[48]

In reaching these preliminary views, the Commission recognizes that there are certain differences between those German and EU requirements and the applicable risk control requirements under the Exchange Act. In the Commission's preliminary view, on balance, those differences would not be inconsistent with substituted compliance for these requirements. As noted, requirement-by-requirement similarity is not needed for substituted compliance.[49]

2. Additional Conditions

Substituted compliance in connection with these requirements would be subject to certain additional conditions to help ensure the comparability of outcomes:

a. Trading Relationship Documentation—MiFID ''Eligible Counterparty'' Exception Not Applicable

Under the proposed Order, substituted compliance in connection with the trading relationship documentation provisions of Exchange Act rule 15Fi–5 would be conditioned on the requirement that the non-U.S. firm not treat its counterparties as ''eligible counterparties'' for purposes of the relevant MiFID provisions needed to establish comparability.[50]

Certain of the relevant German and EU requirements that provide for this type of documentation [51] do not apply to investment firms' transactions with ''eligible counterparties.'' [52] The Commission is concerned that a foreign framework which completely excludes

[45] *See* Exchange Act Release No. 87782 (Dec. 18, 2019), 85 FR 6359, 6360–61 (Feb. 4, 2020) (''Risk Mitigation Adopting Release''). BaFin's application discusses German and EU requirements that address portfolio reconciliation and dispute resolution and reporting. *See* BaFin application Annex A category 1 at 40–53.

[46] *See* Risk Mitigation Adopting Release, 85 FR at 6361. BaFin's application discusses EU portfolio compression requirements. *See* BaFin application Annex A category 1 at 54–56.

[47] *See* Risk Mitigation Adopting Release, 85 FR at 6361. BaFin's application discusses German and EU requirements regarding records of rights, obligations and terms of investment firm services. *See* BaFin application Annex A category 1 at 56–62.

[48] In connection with risk management system requirements, Covered Entities particularly must comply with: MiFID art. 16(4)–(5) and WpHG sec. 80 (addressing administrative and accounting procedures, internal control mechanisms, risk assessment procedures and information processing system safeguards); MiFID Org Reg art. 21–24 (addressing risk management and internal audit); CRD art. 74, 76 and 79–87 and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)) (addressing internal governance and the treatment of various categories of risk); and EMIR Margin RTS art. 2 (addressing required risk management procedures for the exchange of collateral for non-centrally cleared over-the-counter derivatives contracts); CRR art. 286–88 and 293 (addressing counterparty credit risk management and risk management systems); EMIR Margin RTS art. 2 (addressing general provisions for risk management procedures). para. (b)(1) to the proposed Order. In connection with trade acknowledgement and verification requirements, firms must comply with MiFID art. 25(6) and WpHG sec. 63(12) (addressing reports on services), MiFID Org Reg art. 59–61 (addressing essential information regarding executed orders and portfolio management), EMIR art. 11(1)(a) (addressing required bilateral confirmations for uncleared over-the-counter derivatives) and EMIR RTS art. 12 (addressing timeliness of confirmations). *See* para. (b)(2) to the proposed Order. In connection with portfolio reconciliation and dispute reporting requirements, firms must comply with EMIR art. 11(1)(b) (addressing required portfolio reconciliation and dispute resolution for uncleared over-the-counter derivatives) and EMIR RTS art. 13 and 15 (addressing further requirements related to portfolio reconciliation and dispute resolution). *See* para. (b)(3) to the proposed Order. In connection with portfolio compression requirements, firms must comply with EMIR RTS art. 14 (also addressing portfolio protection). *See* para. (b)(4) to the proposed Order. In connection with trading relationship documentation requirements, firms must comply with: MiFID art. 25(5) and WpHG sec. 83(2) (addressing required records of documents regarding parties' rights and obligations and other terms on which the investment firm will provide services); MiFID Org Reg art. 24, 56, 58, 73 and applicable parts of Annex I (addressing audit requirements, records related to appropriateness assessments, client agreements and parties' rights and obligations); and EMIR Margin RTS art. 2 (addressing general provisions for risk management procedures, including procedures providing for or specifying the terms of agreements). *See* para. (b)(5) to the proposed Order. The above EMIR requirements apply only to ''OTC derivatives contracts,'' which are defined as derivatives contracts not executed on certain ''regulated markets'' or equivalent ''third-country markets.'' *See* EMIR art. 2(7). The EMIR-related conditions accordingly will not impede substituted compliance in connection with exchange-traded or market-traded security-based swaps that do not constitute ''OTC derivatives contracts.''

[49] *See* note 14, *supra*, and accompanying text.

[50] *See* para. (b)(5)(ii) to the proposed Order (incorporating condition that the Covered Entity cannot treat applicable counterparties as ''eligible counterparties'' for purpose of MiFID art. 30 or WpHG sec. 68). Because trading relationship documentation is an entity-level requirement, this condition generally would disapply the ''eligible counterparty'' exception in connection with all of the entity's applicable counterparties, including non-U.S. counterparties. Rule 15Fi–5, however, does not apply to existing security-based swaps, or to cleared and certain security-based swaps executed anonymously on a national security exchange or a security-based swap execution facility. *See* rule 15Fi–5(a)(1).

[51] *E.g.,* MiFID art. 25(5) (requiring that investment firms establish a record that includes documents ''that set out the rights and obligations of the parties, and the other terms on which the investment firm will provide services to the client''); WpHG sec. 83(2); MiFID Org Reg art. 58.

[52] *See* MiFID art. 30(1); WpHG sec. 68. On the other hand, certain relevant EU provisions are not subject to this ''eligible counterparty'' exclusion. *See* EMIR Margin RTS art. 2 (requiring risk management procedures associated with the exchange of collateral, including procedures providing for or specifying ''the terms of all necessary agreements to be entered into by counterparties'' in connection with non-cleared OTC derivatives including terms of netting and collateral exchange agreements); MiFID art. 25(6) and MiFID Org Reg art. 59 (addressing required reports of services, including confirmations).

compliance in connection with a particular category of security-based swap counterparties may not promote the risk control purpose of the trading relationship documentation requirement sufficiently to produce a comparable regulatory outcome.

The Commission is mindful that compliance with this condition may require German SBS Entities that wish to rely on substituted compliance to supplement their existing practices, and incur additional time and cost burdens, to follow relevant German and EU documentation requirements in connection with their security-based swap business involving ''eligible counterparties.'' On balance, however, in the Commission's preliminary view, this prerequisite to substituted compliance is necessary to promote comparability in light of the risk control purposes of the trading relationship documentation requirement, and the requirement's lack of a comparable carveout based on counterparty categories.

b. Trading Relationship Documentation—Disclosure Regarding Legal and Bankruptcy Status

Under the proposed Order, substituted compliance in connection with trading relationship documentation would not extend to disclosures required by rule 15F(b)(5) regarding the status of the SBS Entity or its counterparty as an insured depository institution or financial counterparty, and regarding the possibility that in certain circumstances the SBS Entity or its counterparty may be subject to the insolvency regime set forth under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act, which may affect rights to terminate, liquidate or net security-based swaps.[53] Documentation requirements under applicable German and EU law would not be expected to address the disclosure of information related to insolvency procedures under U.S. law.

c. Dispute Reporting—Provision of Dispute Reports Consistent With EU Law

Under the proposed Order, substituted compliance also would be conditioned on SBS Entities having to provide the Commission with reports regarding disputes between counterparties, on the same basis as the SBS Entities provide those reports to competent authorities pursuant to EU law.[54] This condition promotes comparability with the Exchange Act requirement, which requires reporting to the Commission regarding significant valuation disputes,[55] while efficiently leveraging EU reporting provisions to avoid the need for SBS Entities to create additional *de novo* reporting frameworks.[56]

V. Substituted Compliance for Internal Supervision, Chief Compliance Officers and Additional Exchange Act Section 15F(j) Requirements

A. BaFin Request and Associated Analytic Considerations

BaFin also requests substituted compliance in connection with requirements under the Exchange Act relating to:

• *Internal supervision*—Diligent supervision is required pursuant to Exchange Act section 15F(h)(1)(B) and Exchange Act rule 15Fh–3(h), and additional conflict of interest provisions under Exchange Act section 15F(j)(5). These provisions generally require that SBS Entities establish, maintain and enforce supervisory policies and procedures that reasonably are designed to prevent violations of applicable law, and implement certain systems and procedures related to conflicts of interest. [57]

• *Chief compliance officers*—Chief compliance officer requirements are set out in Exchange Act section 15F(k) and Exchange Act rule 15Fk–1. These provisions in general require that SBS Entities designate individuals with the responsibility and authority to establish, administer and review compliance policies and procedures, to resolve conflicts of interest, and to prepare and certify an annual compliance report to the Commission.[58]

• *Additional Exchange Act section 15F(j) requirements*—There are certain additional requirements related to information-gathering pursuant to Exchange Act section 15F(j)(4)(A), and certain antitrust prohibitions specified by Exchange Act section 15F(j)(6).[59]

Taken as a whole, these internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements help to promote SBS Entities' use of structures, processes and responsible personnel reasonably designed to promote compliance with applicable law, to identify and cure instances of non-compliance, and to manage conflicts of interest. The comparability assessment accordingly may focus on whether the analogous foreign requirements—taken as a whole—produce comparable outcomes with regard to providing that registered entities have structures and processes reasonably designed to promote compliance with applicable law, identify and cure instances of non-compliance, and to manage conflicts of interest, in part through the designation of an individual with responsibility and authority over compliance matters.

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[53] *See* Risk Mitigation Adopting Release, 85 FR at 6374 (discussing potential application of alternatives to the liquidation schemes established under the Securities Investor Protection Act of 1970 or the U.S. Bankruptcy Code).

[54] *See* para. (b)(3)(ii) to the proposed Order (requiring that the Covered Entity provide the Commission with reports regarding counterparty disputes on the same basis that it provides those reports to competent authorities pursuant to EMIR RTS art. 15(2)).

[55] In proposing the notice provision, the Commission recognized that valuation inaccuracies may lead to uncollaterialized credit exposure and the potential for loss in the event of default. *See* Exchange Act Release No. 84861 (Dec. 19, 2018), 84 FR 4614, 4621 (Feb. 15, 2019). It thus is important that the Commission be informed regarding valuation disputes affecting registered entities.

[56] The principal difference between the two sets of requirements concerns the timing of notices. Under Exchange Act rule 15Fi–3, SBS Entities must promptly report, to the Commission, valuation disputes in excess of $20 million that have been outstanding for three or five business days (depending on counterparty types). Under EMIR RTS art. 15(2), firms must report at least monthly, to competent authorities, disputes between counterparties in excess of €15 million and outstanding for at least 15 business days. BaFin states that these reports regarding outstanding disputes must be provided on a monthly basis within 14 days of the end of the reporting period. *See* BaFin, ''EMIR—Requirements for financial counterparties'' (*https://www.bafin.de/EN/Aufsicht/BoersenMaerkte/Derivate/EMIR/FinanzielleGegenparteien/finanzielle__gegenparteien__artikel__en.html*) The Commission is mindful that the EU provision does not provide for notice as quickly as rule 15Fi–3(c), but in the Commission's preliminary view, on balance this difference would not be inconsistent with the conclusion that the two sets of risk control requirements—taken as a whole—produce comparable regulatory outcomes.

[57] BaFin's application addresses German and EU provisions that address firms' supervisory frameworks, persons with supervisory authority, supervisory policies and procedures, general compliance and internal recordkeeping, investigation of personnel, conflicts of interest, personal trading and remuneration. *See* BaFin application Annex A category 3 at 4–24, 27–64.

[58] BaFin's application discusses German and EU requirements that address compliance officers and their responsibilities, compliance officer appointment, removal and compensation, related conflict of interest provisions, and compliance-related reports. *See* BaFin application Annex A category 3 at 65–98.

[59] Section 15F(j)(4)(A) particularly requires firms to have systems and procedures to obtain necessary information to perform functions required under section 15F. BaFin's application in turn discusses German and EU provisions generally addressing information gathering and disclosure. *See* BaFin application Annex A category 3 at 24–27. Section 15F(j)(6) prohibits firms from adopting any process or taking any action that results in any unreasonable restraint of trade, or to impose any material anticompetitive burden on trading or clearing. BaFin's application addresses EU antitrust requirements. *See* BaFin application Annex A category 3 at 28.

B. Preliminary Views and Proposed Order

1. General Considerations

Based on BaFin's application and the Commission's review of applicable provisions, in the Commission's preliminary view, the relevant German and EU requirements in general would produce regulatory outcomes that are comparable to those associated with the above-described internal supervision, chief compliance officer, conflict of interest and information-related requirements by providing that German SBS Entities have structures and processes that reasonably are designed to promote compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest.

This portion of the proposed Order would extend generally to the internal supervision provisions of Exchange Act rule 15Fh–3(h), the information gathering provisions of Exchange Act section 15F(j)(4)(A), and the conflict of interest provisions of Exchange Act section 15F(j)(5),[60] and to the chief compliance officer provisions of Exchange Act section 15F(k) and Exchange Act rule 15Fk–1.[61]

In taking this proposed approach, the Commission recognizes that certain differences are present between those German and EU requirements and the applicable requirements under the Exchange Act. In the Commission's preliminary view, on balance, however, those differences would not be inconsistent with substituted compliance within the relevant outcomes-oriented context. As elsewhere, this part of the proposed Order conditions substituted compliance on SBS Entities complying with specified German and EU requirements that are necessary to establish comparability.[62]

2. Additional Conditions and Scope Issues

Substituted compliance in connection with these requirements would be subject to certain additional conditions to help ensure the comparability of outcomes:

a. Application of German and EU Supervisory and Compliance Requirements to Residual U.S. Requirements and Order Conditions

Under the proposed Order, substituted compliance with the relevant internal supervision requirements would be conditioned with relevant German SBS Entities complying with applicable German and EU supervisory and compliance provisions *as if* those provisions also require SBS Entities to comply with applicable requirements under the Exchange Act and the other conditions to the Order.[63]

This condition addresses the fact that, even with substituted compliance, SBS Entities still would be subject directly to a number of requirements under the Exchange Act and to the conditions to the final Order. In some cases, particular requirements under the Exchange Act are outside the ambit of substituted compliance.[64] In other cases, certain requirements under the Exchange Act may not have comparable German or EU requirements, or may be outside the scope of BaFin's request.[65] While the German and EU regulatory frameworks in general reasonably appear to promote SBS Entities' compliance with applicable German and EU laws, those requirements do not—and would not be expected to—appear to promote SBS Entities' compliance with requirements under the Exchange Act that are not subject to substituted compliance, or promote SBS Entities' compliance with the conditions to substituted compliance.

This condition would allow SBS Entities to use their existing internal supervision and compliance frameworks to comply with the relevant Exchange Act requirements and order conditions, rather than having to establish separate special-purpose supervision and compliance frameworks. In practice, compliance with this condition likely would require SBS Entities to comprehensively identify all applicable requirements under the Exchange Act with which they must comply directly even with substituted compliance (as well as the other conditions to the Order), and augment their existing internal supervision and compliance frameworks to the extent necessary to incorporate reasonable policies and processes to help ensure that they follow those requirements.[66]

b. Compliance Reports

Under the proposed Order, substituted compliance in connection with the compliance report requirements under Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk–1(c) also would be conditioned on the requirement that the compliance reports required pursuant to MiFID Org Reg article 22(2)(c) must: (a) Be provided to the Commission annually and in the English language, (b) include a certification under penalty of law that the report is accurate and complete, and (c) address the SBS Entity's compliance with other conditions to this Order.[67]

[60] *See* proposed para. (c)(1) to the Order. This portion of the proposed Order does not extend to applicable portions of rule 15Fh–3(h) as that rule mandates supervisory policies and procedures in connection with: The risk management system provisions of Exchange Act section 15F(j)(2) (which are addressed by proposed paragraph (b)(1) to the Order in connection with internal risk management); the information-related provisions of Exchange Act sections 15F(j)(3) and (j)(4)(B) (for which substituted compliance is not available); and the antitrust provisions of Exchange Act section 15F(j)(6) (for which the Commission is not proposing to provide substituted compliance). *See* proposed para. (c)(1)(iii) to the Order.

[61] *See* proposed para. (c)(2) to the Order.

[62] In connection with these internal supervision, chief compliance officer and conflict of interest and information gathering provisions, SBS Entities particularly must comply with: MiFID art. 16 and 23 and WpHG sec. 63, 80 and 83–84 (addressing organizational requirements and conflicts of interest); MiFID Org Reg art. 21–37 (addressing organizational requirements, compliance, risk management, internal audit, senior management responsibility, complaints handling, remuneration policies and practices, personal transaction restrictions, outsourcing, conflicts of interest and investment research and marketing); MiFID Org Reg 72–76 and Annex IV (addressing recordkeeping, including records of orders, transactions and communications); and CRD articles 74, 76, 79–87, 88(1) and 91(1)–(2), 91(7)–(9), 92–95 and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25e and 25f (addressing internalgovernance, recovery and resolution plans, risk management policies, and management body and remuneration policies).

[63] *See* para. (c)(4) to the proposed Order.

[64] As discussed above, *see* notes 11 and 12, *supra*, substituted compliance does not extend to certain Exchange Act antifraud prohibitions and other requirements under the Exchange Act (*e.g.,* requirements related to transactions with non-ECPs, and segregation requirements). Substituted compliance also does not extend to requirements under the Exchange Act that are outside of the scope of BaFin's request (*e.g.,* ECP verification and special entity requirements), or to requirements under the Exchange Act for which the Commission has not found comparability.

[65] For example, BaFin is not requesting substituted compliance in connection with ECP verification requirements, ''special entity'' provisions and political contribution provisions. *See* note 23, supra.

[66] For example, MiFID Org Reg art. 22 addresses several aspects of firms' compliance with requirements under MiFID, and includes provisions that the compliance function: Monitor the adequacy and effectiveness of compliance measures, policies and procedures; advise and assist relevant persons in compliance with MiFID; and report on implementation and effectiveness. Under the proposed condition, SBS Entities would have to apply those article provisions in a manner that also promotes compliance with the applicable requirements under the Exchange Act and the conditions to the Order.

[67] *See* para. (c)(2)(ii) to the proposed Order. MiFID Org Reg art. 22(2)(c) particularly requires that a firm's compliance function ''report to the management body, on at least an annual basis, on the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be undertaken[.]'' Under the proposed condition, those reports, as submitted to the Commission and the firm's management body, also would address SBS Entities' compliance with the other conditions to the Order (in addition

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Although certain German and EU requirements address firms' use of internal compliance reports, the requirements do not—and would not be expected to—require those entities to submit compliance reports to the Commission.[68] Under this condition, SBS Entities could leverage the compliance reports that they otherwise are required to produce, by extending those reports to address compliance with the conditions to the Order.[69]

c. Antitrust Considerations

Under the proposed Order, substituted compliance would not extend to Exchange Act section 15F(j)(6) (and related internal supervision requirements of Exchange Act rule 15Fh–3(h)(2)(iii)(I)). Section 15F(j)(6) prohibits SBS Entities from adopting any process or taking any action that results in any unreasonable restraint of trade, or to impose any material anticompetitive burden on trading or clearing.[70] In the Commission's preliminary view, allowing an alternative means of compliance would not lead to outcomes comparable to that statutory prohibition.[71]

VI. Substituted Compliance for Counterparty Protection Requirements

A. BaFin Request and Associated Analytic Considerations

BaFin further requests substituted compliance in connection with provisions under the Exchange Act relating to:

• *Disclosure of material risks and characteristics and material incentives or conflicts of interest*—Exchange Act rule 15Fh–3(b) requires that SBS Entities disclose to certain counterparties to a security-based swap certain information about the material risks and characteristics of the security-based swap, as well as material incentives or conflicts of interest that the SBS Entity may have in connection with the security-based swap. These provisions address the need for security-based swap market participants to have information that is sufficient to make informed decisions regarding potential transactions involving particular counterparties and particular financial instruments.[72]

• *Daily mark disclosure*—Exchange Act rule 15Fh–3(c) requires that SBS Entities provide daily mark information to certain counterparties. These provisions address the need for market participants to have effective access to daily mark information necessary to manage their security-based swap positions.[73]

• *Fair and balanced communications*—Exchange Act rule 15Fh–3(g) requires that SBS Entities communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith. These provisions promote complete and honest communications as part of SBS Entities' security-based swap businesses.[74]

• *Clearing rights disclosure*—Exchange Act rule 15Fh–3(d) requires that SBS Entities provide certain counterparties with information regarding clearing rights under the Exchange Act.[75]

• ''*Know your counterparty*''—Exchange Act rule 15Fh–3(e) requires that SBS Entities establish, maintain and enforce written policies and procedures to obtain and retain certain information regarding a counterparty that is necessary for conducting business with that counterparty. This provision accounts for the need that SBS Entities obtain essential counterparty information necessary to promote effective compliance and risk management.[76]

• *Suitability*—Exchange Act rule 15Fh–3(f)requires a security-based swap dealer that recommends to certain counterparties a security-based swap or trading strategy involving a security-based swap, to undertake reasonable diligence to understand the potential risks and rewards associated with the recommendation and to have a reasonable basis to believe that the recommendation is suitable for the counterparty.[77] This provision accounts for the need to guard against security-based swap dealers making unsuitable recommendations.[78]

Taken as a whole, the counterparty protection requirements under section 15F of the Exchange Act help to ''bring professional standards of conduct to, and increase transparency in, the security-based swap market and to require registered [entities] to treat parties to these transactions fairly.'' [79] The comparability assessment accordingly may focus on whether the analogous foreign requirements—taken as a whole—produce similar outcomes

to addressing those firms' compliance with applicable German and EU provisions).

[68] The application also indicates that there is no EU requirement to submit compliance reports to a regulator. See EU supervision and compliance analysis at 75.

[69] In practice, SBS Entities may satisfy this condition by identifying relevant Order conditions, and reporting on the implementation and effectiveness of their controls with regard to compliance with those Order conditions.

[70] *See* para. (c)(1)(ii) to the proposed Order.

[71] The Commission is not taking any position regarding the applicability of the section 15F(j)(6) antitrust prohibitions in the cross-border context. Non-U.S. SBS Entities should assess the applicability of those prohibitions to their security-based swap businesses.

[72] *See* Business Conduct Adopting Release, 81 FR at 29983–86. BaFin's application discusses German and EU requirements that address disclosure of product information and firm information. *See* BaFin application Annex A category 4 at 27–47.

[73] *See* Business Conduct Adopting Release, 81 FR at 29986–91. BaFin's application discusses German and EU requirements that address valuation, portfolio reconciliation and trade reporting. *See* BaFin application Annex A category 4 at 48–60.

[74] *See* Business Conduct Adopting Release, 81 FR at 30000–02. BaFin's application discusses German and EU requirements that address communications standards. *See* BaFin application Annex A category 4 at 3–26.

[75] Exchange Act section 3C(g)(5) [15 U.S.C. 78c–3(g)(5)] provides certain rights for counterparties to select the clearing agency at which a security-based swap is cleared. For all security-based swaps that an SBS Entity enters into with certain counterparties, the counterparty has the sole right to select the clearing agency at which the security-based swap is cleared. For security-based swaps that are not subject to mandatory clearing (pursuant to Exchange Act sections 3C(a)–(b)) and that an SBS Entity enters into with certain counterparties, the counterparty also may elect to require clearing of the security-based swap. Substituted compliance is not available in connection with this provision. BaFin's application discusses German and EU provisions that address clearing rights. *See* BaFin application Annex A category 4 at 85–92.

[76] *See* Business Conduct Adopting Release, 81 FR at 29993–94. BaFin's application discusses German and EU suitability requirements regarding information that firms must obtain regarding counterparties. *See* BaFin application Annex A category 4 at 71–84.

[77] *See* Business Conduct Adopting Release, 81 FR at 29994–30000. A security-based swap dealer may satisfy its counterparty-specific suitability obligation with respect to an ''institutional counterparty,'' as defined in Exchange Act rule 15Fh–3(f)(4), if the security-based swap dealer reasonably determines that the counterparty or its agent is capable of independently evaluating relevant investment risks, the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendation, and the security-based swap dealer discloses that it is acting as counterparty and is not undertaking to assess the suitability of the recommendation for the counterparty. *See* Exchange Act rule 15Fh–3(f)(2)–(3).

[78] *See* Business Conduct Adopting Release, 81 FR at 29997. BaFin's application discusses German and EU suitability requirements that are more targeted for transactions with ''professional clients.'' *See* BaFin application Annex A category 4 at 71–84.

[79] *See* Business Conduct Adopting Release, 81 FR at 30065. These transaction-level requirements generally apply only to a non-U.S. SBS Entity's activities involving U.S. counterparties (unless the transaction is arranged, negotiated or executed in the United States). In particular, for non-U.S. SBS Entities, the counterparty protection requirements under Exchange Act section 15F(h) apply only to the SBS Entity's transactions with U.S. counterparties (apart from certain transactions conducted through a foreign branch of the U.S. counterparty), or to transactions arranged, negotiated or executed in the United States. *See* Exchange Act rule 3a71–3(c) [17 CFR 240.3a71–3(c)] (exception from business conduct requirements for a security-based swap dealer's ''foreign business''); *see also* Exchange Act rules 3a71–3(a)(3), (8) and (9) [17 CFR 240.3a71–3(a)(3), (8) and (9)] (definitions of ''transaction conducted through a foreign branch,'' ''U.S. business'' and ''foreign business'').

with regard to promoting professional standards of conduct, increasing transparency and requiring SBS Entities to treat parties fairly.

B. Preliminary Views and Proposed Order

1. General Considerations

Based on BaFin's application and the Commission's review of applicable provisions, in the Commission's preliminary view, the relevant German and EU requirements produce regulatory outcomes that are comparable to counterparty protection requirements under Exchange Act section 15F(h) related to fair and balanced communications; disclosure of material risks and characteristics; disclosure of material incentives or conflicts of interest; ''know your counterparty''; suitability; and daily mark disclosure, by subjecting German SBS Entities to obligations that promote standards of professional conduct, transparency and the fair treatment of parties.

The proposed Order accordingly would provide conditional substituted compliance in connection with those requirements.[80] The proposed Order preliminarily does not provide substituted compliance in connection with requirements related to clearing rights disclosure, however, for reasons addressed below.

In taking this proposed approach, the Commission recognizes that there are certain differences between relevant German and EU requirements, on the one hand, and the relevant communications, disclosure, ''know your counterparty'' and suitability requirements under the Exchange Act, on the other hand. On balance, however, in the Commission's preliminary view, those differences, when coupled with the conditions in the proposed Order, are not so material as to be inconsistent with substituted compliance within the requisite outcomes-oriented context. As elsewhere, the counterparty protection provisions of the proposed Order in part condition substituted compliance on SBS Entities being subject to, and complying with, specified German and EU requirements that are necessary to establish comparability.[81] Substituted compliance in connection with these counterparty protection requirements also would be subject to specific conditions and limitations necessary to promote consistency in regulatory outcomes.

2. Additional Conditions and Scope Issues

a. Daily Mark Disclosure

The proposed Order would provide substituted compliance in connection with daily mark disclosure requirements pursuant to Exchange Act rule 15Fh–3(c) to the extent that the Covered Entity participates in daily portfolio reconciliation exercises that include the relevant security-based swap pursuant to German and EU requirements. BaFin's application takes the view that EU requirements directing certain types of derivatives counterparties to mark-to-market (or mark-to-model) uncleared transactions each day are comparable to Exchange Act requirements. In the Commission's preliminary view, however, these EU mark-to-market (or mark-to-model) requirements are not comparable to Exchange Act requirements because the EU requirements do not require disclosure to counterparties. In the alternative, BaFin's application notes that certain derivatives counterparties must report to an EU trade repository updated daily valuations for each OTC derivative contract and that all counterparties have the right to access these valuations at the relevant EU trade repository. In the Commission's preliminary view, in practice U.S. counterparties may encounter challenges when attempting to access daily marks for different security-based swaps reported to multiple EU trade repositories with which they may not otherwise have business relationships. In addition, the information may be less current, given the time necessary for reporting and for the trade repository to make the information available. For these reasons, in the Commission's preliminary view, these EU reporting requirements also are not comparable to Exchange Act requirements. Finally, BaFin's application describes the EU's portfolio reconciliation requirements for uncleared OTC derivative contracts, which include a requirement to exchange valuations of those contracts directly between counterparties. The required frequency of portfolio reconciliations varies depending on the types of counterparties and the size of the portfolio of OTC derivatives between them, with daily reconciliation required only for the largest portfolios. For security-based swaps to which the EU's daily portfolio reconciliation requirements apply (*i.e.,* security-based swaps of a financial counterparty or non-financial counterparty subject to the clearing obligation in EMIR, if the counterparties have 500 or more OTC derivatives contracts outstanding with each other),[82] the Commission preliminarily views these requirements as comparable to Exchange Act requirements. For all other security-based swaps in portfolios that are not required to be reconciled on each business day, the Commission preliminarily views the EU's portfolio reconciliation requirements as not comparable to Exchange Act requirements.

b. No Substituted Compliance in Connection With Clearing Rights Disclosure

The proposed Order would not provide substituted compliance in connection with clearing rights disclosure requirements pursuant to Exchange Act rule 15Fh–3(d). For those

[80] *See generally* para. (d) to the proposed Order.

[81] In connection with requirements related to disclosure of information regarding material risks and characteristics, Covered Entities must be subject to and comply with: MiFID art. 24(4); WpHG sections 63(7) and 64(1); and MiFID Org Reg art. 48–50, in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (d)(1) to the proposed Order. In connection with requirements related to disclosure of information regarding material incentives or conflicts of interest, Covered Entities must be subject to and comply with either: (i) MiFID art. 23(2)–(3); WpHG section 63(2); and MiFID Org Reg art. 33–35; (ii) MiFID art. 24(9); WpHG section 70; and MiFID Delegated Directive art. 11(5); or (iii) Market Abuse Regulation art. 20(1), in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (d)(2) to the proposed Order. In connection with ''know your counterparty'' requirements, Covered Entities must be subject to and comply with: MiFID art. 16(2); WpHG section 80(1); MiFID Org Reg art. 21–22, 25–26 and applicable parts of Annex I; CRD art. 74(1) and 85(1); KWG section 25a; MLD art. 11 and 13; GwG sections 10–11; MLD art. 8(3) and 8(4)(a) as applied to internal policies, controls and procedures regarding recordkeeping of customer due diligence activities; GwG section 6(1)–(2) as applied to principles, procedures and controls regarding recordkeeping of customer due diligence activities, in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (d)(3) to the proposed Order. In connection with suitability requirements, Covered Entities must be subject to and comply with: MiFID art. 24(2)–(3) and 25(1)–(2); WpHG sections 63(5)–(6), 80(9)–(13) and 87(1)–(2); and MiFID Org Reg art. 21(1)(b) and (d), 54 and 55, in each case in relation to the recommendation for which substituted compliance is applied. *See* para. (d)(4)(i) to the proposed Order. In connection with fair and balanced communications requirements, Covered Entities must be subject to and comply with: (i) either MiFID art. 24(1), (3) and WpHG sections 63(1), (6) or MiFID art. 30(1) and WpHG section 68(1); and (ii) MiFID art. 24(4)–(5); WpHG sections 63(7) and 64(1); MiFID Org Reg art. 46–48; Market Abuse Regulation art. 12(1)(c) and 15; and MAR Investment Recommendations Regulation art. 5, in each case in relation to the communication for which substituted compliance is applied. *See* para. (d)(5) to the Proposed Order. In connection with daily mark disclosure requirements, Covered Entities must be required to reconcile, and in fact reconcile, the portfolio containing the security-based swap for which substituted compliance is applied, on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13. *See* para. (d)(6) to the Proposed Order.

[82] *See* EMIR RTS article 13(3)(a)(i); EMIR article 10.

requirements, BaFin's application cites certain provisions related to clearing rights in the EU that are unrelated to the clearing rights provided by Exchange Act section 3C(g)(5).[83] The section 3C(g)(5) clearing rights are not eligible for substituted compliance, and the EU provisions do not require disclosure of these section 3C(g)(5) clearing rights. In the Commission's preliminary view, substituted compliance based on EU clearing provisions would not lead to comparable disclosure of a counterparty's clearing rights under the Exchange Act.

c. Suitability

Under the proposed Order, substituted compliance in connection with the suitability provisions of Exchange Act rule 15Fh–3(f) in part would be conditioned on the requirement that the counterparty be a per se ''professional client'' as defined in MiFID and not be a ''special entity'' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh–2(d).[84] Accordingly, the proposed Order would not provide substituted compliance for Exchange Act suitability requirements for a recommendation made to a counterparty that is a ''retail client'' or an elective ''professional client,'' as such terms are defined in MiFID,[85] or for a ''special entity'' as defined in the Exchange Act. In the Commission's preliminary view, absent such a condition the MiFID suitability requirement would not be expected to produce a counterparty protection outcome that is comparable with the outcome produced by the suitability requirements under the Exchange Act.[86]

VII. Substituted Compliance for Recordkeeping, Reporting, and Notification Requirements

A. BaFin Request and Associated Analytic Considerations

BaFin's application in part requests substituted compliance for requirements applicable to SBS Entities under the Exchange Act relating to:

- *Recordmaking*—Exchange Act rule 18a–5 requires prescribed records to be made and kept current.[87]
- *Record Preservation*—Exchange Act rule 18a–6 requires preservation of records.[88]
- *Reporting*—Exchange Act rule 18a–7 requires certain reports.[89]
- *Notification*—Exchange Act rule 18a–8 requires notification of the Commission when certain financial or operational problems occur.[90]

The Commission does not administer or oversee capital and margin requirements for prudentially regulated SBS Entities.[91] Taken as a whole, the recordkeeping, reporting, and notification requirements that apply to prudentially regulated SBS Entities are designed to promote the prudent operation of the firm's security-based swap activities, assist the Commission in conducting compliance examinations of those activities, and alert the Commission to potential financial or operational problems that could impact the firm and its customers. The comparability assessment accordingly may focus on whether the analogous foreign requirements—taken as a whole—produce comparable outcomes with regard to recordkeeping, reporting, and notification and related practices that support the Commission's oversight of these registrants. A foreign jurisdiction need not have analogues to every requirement under Commission rules.[92]

For certain of the recordkeeping and notification requirements, the comparability assessment also appropriately may consider the extent to which those requirements are linked to separate requirements in the Exchange Act that may be subject to a substituted compliance application. In particular, a number of recordkeeping requirements serve a primary purpose of promoting and/or documenting SBS Entities' compliance with associated Exchange Act requirements.[93] When substituted compliance is permitted for the associated Exchange Act requirements, substituted compliance also may be appropriate for the linked recordkeeping and notification requirements. Conversely, when substituted compliance is not available or requested for Exchange Act requirements, substituted compliance may not be appropriate for linked recordkeeping or notification requirements.

B. Preliminary Views and Proposed Order

1. General Considerations

Based on BaFin's application and Commission's review of applicable provisions, in the Commission's preliminary view, the relevant German and EU requirements, subject to the

[83] *See* note 75, *supra*.

[84] *See* para. (d)(4)(ii) to the proposed Order.

[85] Annex II of MiFID describes which clients are ''professional clients.'' Section I of Annex II describes the types of clients considered to be professional clients unless the client elects non-professional treatment; these clients are per se professional clients. Section II of Annex II describes the types of clients who may be treated as professional clients on request; these clients are elective professional clients. *See* MiFID Annex II.

[86] The Commission recognizes that Exchange Act rules permit security-based swap dealers, when making a recommendation to an ''institutional counterparty,'' to satisfy some elements of the suitability requirement if the security-based swap dealer reasonably determines that the counterparty or its agent is capable of independently evaluating relevant investment risks, the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating recommendations, and the security-based swap dealer discloses to the counterparty that it is acting as counterparty and is not undertaking to assess the suitability of the recommendation for the counterparty. *See* Exchange Act rule 15Fh–3(f)(2). However, the institutional counterparties to whom this alternative applies are only a subset of the ''professional clients'' to whom more narrowly tailored suitability requirements apply under MiFID. The Commission notes that the institutional counterparty alternative under the Exchange Act would remain available, in accordance with its terms, for recommendations that are not eligible for, or for which a Covered Entity does not rely on, substituted compliance.

[87] BaFin's application discusses German and EU requirements that address firms' record creation obligations related to matters such as transactions, counterparties and their property, personnel and business conduct. *See* BaFin application Annex A category 2 at 4–34.

[88] BaFin's application discusses German and EU requirements that address firms' record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. *See* BaFin application Annex A category 2 at 35–79.

[89] BaFin's application discusses German and EU requirements that address firms' obligations to make certain reports. *See* BaFin application Annex A category 2 at 80–91 and 96–102.

[90] BaFin's application discusses German and EU requirements that address firms' obligations to make certain notifications. *See* BaFin application Annex A category 2 at 92–96 and 102.

[91] Because of the close relationship between many of the recordkeeping, reporting, and notification requirements and the administration and oversight of capital and margin requirements, the Commission preliminarily believes that it would be appropriate to consider substituted compliance for recordkeeping, reporting and notification requirements applicable to nonbank SBS Entities in connection with a potential substituted compliance request for capital and margin requirements. The Commission is seeking commenters' views on this issue below.

[92] Rule 3a71–6 sets forth additional analytic considerations in connection with substituted compliance for the Commission's recordkeeping, reporting, and notification requirements. In particular, Exchange Act rule 3a71–6(d)(6) provides that the Commission intends to consider (in addition to any conditions imposed) ''whether the foreign financial regulatory system's required records and reports, the timeframes for recording or reporting information, the accounting standards governing the records and reports, and the required format of the records and reports'' are comparable to applicable provisions under the Exchange Act, and whether the foreign provisions ''would permit the Commission to examine and inspect regulated firms' compliance with the applicable securities laws.''

[93] Recordkeeping and notification rules that are linked to other Exchange Act rules include provisions that address: (1) Unverified security-based swap transactions (Exchange Act rules 18a–5(b)(11) and 18a–6(b)(2)(i)); (2) compliance with business conduct requirements (Exchange Act rules 18a–5(b)(12) and (13), 18a–6(b)(2)(i), and 18a–6(b)(2)(vii)); (3) preservation of records relating to certain risk mitigation requirements (Exchange Act rules 18a–6(d)(4) and (5); and (4) segregation requirements (Exchange Act Rules 18a–5(b)(9) and (10), 18a–6(b)(2)(v), and 18a–8(g)).

conditions and limitations of the proposed Order, would produce regulatory outcomes that are comparable to the outcomes associated with the recordkeeping and notification requirements under the Exchange Act applicable to prudentially regulated SBS Entities pursuant to Exchange Act rules 18a–5, 18a–6, 18a–7, and 18a–8.

In reaching this preliminary conclusion, the Commission recognizes that there are certain differences between those German and EU requirements and the applicable recordkeeping and notification requirements under the Exchange Act. In the Commission's preliminary view, on balance, those differences generally would not be inconsistent with substituted compliance for these requirements. As noted, ''requirement-by-requirement similarity'' is not needed for substituted compliance.

As discussed below, in select areas, substituted compliance in connection with these requirements is subject to specific conditions necessary to promote consistency in regulatory outcomes, or to reflect the scope of substituted compliance that would be available in connection with associated Exchange Act rules.

2. Additional Conditions

i. Additional Conditions Applicable to Exchange Act Rule 18a–5

Under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a–5 is subject to the condition that the SBS Entity: (1) Preserves all of the data elements necessary to create the records required by Exchange Act rules 18a–5(b)(1), (2), (3), and (7); and (2) upon request furnishes promptly to representatives of the Commission the records required by those rules. This condition is modeled on the alternative compliance mechanism in paragraph (c) of Exchange Act rule 18a–5. In effect, a firm will not be required to create a record formatted pursuant to the Commission's rules each day, but instead only when requested to do so by Commission staff. The objective is to require—on a very limited basis—the production of a record that consolidates the information required by Exchange Act rule 18a–5(b)(1), (2), (3), or (7) in a single record and, as applicable, in a blotter or ledger format. This will assist the Commission staff in reviewing the information on the record.

Under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a–5 is subject to the condition that the prudentially regulated SBS Entity make and keep current the records required by rules 18a–5(b)(9) and (10) if the firm is not exempt from the requirements of Exchange Act rule 18a–4.[94] These rules require the SBS Entity to make a record of compliance with the possession or control requirements of Exchange Act rule 18a–4 and a record of the reserve computation required by Exchange Act rule 18a–4, respectively. Substituted compliance is not available with respect to Exchange Act rule 18a–4. Instead, provisions of the rule address cross-border transactions and provide exemptions from its requirements depending on the nature of the transaction.[95] For example, a security-based swap dealer that is a foreign bank is subject to the possession or control and reserve account requirements of Exchange Act rule 18a–4 with respect to a security-based swap customer that is a U.S. person or, in the case of a non-U.S. person, if the security-based swap dealer holds funds or other property arising out of a transaction had by such non-U.S. person with a branch or agency in the United States of the foreign security-based swap dealer. Further, Exchange Act rule 18a–4 contains a complete exemption from its requirements if the security-based swap dealer limits its business activities and meets certain conditions.[96] Prudentially regulated security-based swap dealers that are not subject to the requirements of Exchange Act rule 18a–4 will not need to make the records required by Exchange Act rules 18a–5(b)(9) and (10) under this condition in the proposed Order. However, if a firm is subject to Exchange Act rule 18a–4, it will need to make these records under this condition of the Order.

Under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a–5 is subject to the condition that the prudentially regulated SBS Entity makes and keeps current the records required by Exchange Act rule 18a–5(b)(12). This rule requires the firm to document compliance with Exchange Act rule 15Fh–6, which imposes restrictions related to political contributions to municipal entities. BaFin has not requested substituted compliance with respect to Exchange Act rule 15Fh–6.

Finally, under the proposed Order, substituted compliance in connection with the recordmaking requirements of Exchange Act rule 18a–5 is subject to the condition that the SBS Entity makes and keeps current records documenting compliance with requirements referenced in Exchange Act rule 18a–5(b)(13) for which substituted compliance is not available. Exchange Act rule 18a–5(b)(13) requires the firm to document compliance with Exchange Act rules 15Fh–1 through 15Fh–5 and Exchange Act rule 15Fk–1—which, as discussed more fully in sections V and VI of this notice, establish certain obligations with respect to diligent supervision, compliance, and counterparty protection. Under the proposed Order, when substituted compliance is available with respect to such an obligation, substituted compliance also would be available with respect to the corresponding recordmaking requirement of Exchange Act rule 18a–5(b)(13). In circumstances where substituted compliance is not permitted,[97] has not been requested,[98] or is otherwise not available under the proposed Order, direct compliance with the relevant Exchange Act obligation would be required, and so, too, would direct compliance with the corresponding recordmaking requirement of Exchange Act rule 18a–5(b)(13).

ii. Additional Conditions Applicable to Exchange Act Rule 18a–6

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a–6 is subject to the condition that the security-based swap dealer or major security-based swap participant, with respect to a security-based swap transaction, preserves the information required by Exchange Act rule 18a–6(b)(2)(vi) if the transaction is required to be reported to a registered security-based swap data repository pursuant to Regulation SBSR (or pursuant to any substituted compliance order addressing Regulation SBSR).[99] This condition is designed to ensure that the firm preserves information it reports to a security-based swap data repository registered under the Exchange Act pursuant to Regulation SBSR (or pursuant to any substituted compliance order addressing Regulation SBSR) in addition to preserving information it

[94] 17 CFR 240.18a–4.

[95] *See* 17 CFR 240.18a–4(e).

[96] *See* 17 CFR 240.18a–4(f).

[97] *See* Exchange Act rule 3a71–6(d)(1) (specifying that substituted compliance is not available in connection with the antifraud provisions of Exchange Act rule 15Fh–4(a)).

[98] BaFin has not requested substituted compliance in connection with the ECP verification requirements of Exchange Act rule 15Fh–3(a)(1)) or the ''special entity'' provisions of Exchange Act rules 15Fh–3(a)(2)–(3), 15Fh–4(b) and 15Fh–5.

[99] 17 CFR 242.900–909.

reports to a data repository pursuant to German and EU laws.

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a–6 is subject to the condition that the prudentially regulated SBS Entity preserves the records required by Exchange Act rule 18a–6(b)(2)(v) if the firm is not exempt from the requirements of Exchange Act rule 18a–4. Exchange Act rule 18a–6(b)(2)(v) requires the preservation of detail relating to information for the possession or control requirements of Exchange Act rule 18a–4. As discussed above, substituted compliance is not available for Exchange Act rule 18a–4. Consequently, under this condition, a prudentially regulated SBS Entity will need to preserve the records required by Exchange Act rule 18a–6(b)(2)(v), but only if the firm is not exempt from Exchange Act rule 18a–4.

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a–6 is subject to the condition that the prudentially regulated SBS Entity preserves records with respect to requirements referenced in Exchange Act rule 18a–6(b)(2)(vii) for which substituted compliance is not available. Under Exchange Act rule 18a–6(b)(2)(vii), the firm must preserve copies of documents, communications, disclosures, and notices required pursuant to Exchange Act rules 15Fh–1 through 15Fh–6 and Exchange Act rule 15Fk–1—which establish certain obligations with respect to diligent supervision, compliance, and counterparty protection. Under the proposed Order, when substituted compliance is available with respect to such an obligation, substituted compliance also would be available with respect to the corresponding record preservation requirement of Exchange Act rule 18a–6(b)(2)(vii). In circumstances where substituted compliance is not permitted, has not been requested, or is otherwise not available under the proposed Order, direct compliance with the relevant Exchange Act obligation would be required, and so, too, would direct compliance with the corresponding record preservation requirement of Exchange Act rule 18a–6(b)(2)(vii).

Under the proposed Order, substituted compliance in connection with the record preservation requirements of Exchange Act rule 18a–6 is subject to the condition that the SBS Entity preserves the records required by Exchange Act rule 18a–6(b)(2)(viii). This rule requires the preservation of documents used to make a reasonable determination with respect to special entities, including information relating to the financial status, the tax status, and the investment or financing objectives of the special entity as required under Exchange Act sections 15F(h)(4)(C) and (5)(A). BaFin is not seeking substituted compliance with respect to these Exchange Act requirements.

iii. Additional Conditions Applicable to Exchange Act Rule 18a–7

Under the proposed Order, substituted compliance with respect to Exchange Act rule 18a–7 is subject to the condition that the SBS Entity file with the Commission financial and operational information in the manner and format specified by the Commission by order or rule.[100] Rule 18a–7 requires SBS Entities, on a quarterly basis, to file an unaudited financial and operational report known as FOCUS Report Part IIC. The Commission will use the FOCUS Report Part IIC to both monitor the financial and operational condition of individual SBS Entities and to perform comparisons across SBS Entities. The FOCUS Report Part IIC is a standardized form that elicits specific information through numbered line items. This facilitates cross-firm analysis and comprehensive monitoring of all SBS Entities registered with the Commission. Further, the Commission has designated the Financial Industry Regulatory Authority, Inc. (''FINRA'') to receive the FOCUS reports from SBS Entities.[101] Broker-dealers registered with the Commission currently file their FOCUS reports with FINRA through the eFOCUS system it administers. FINRA's eFOCUS system will enable broker-dealers, security-based swap dealers, and major security-based swap participants to file FOCUS reports on the same platform using the same preexisting templates, software, and procedures.

The Commission preliminarily believes that it would be appropriate to condition substituted compliance with respect to rule 18a–7 on the SBS Entity filing financial and operational information in a manner and format that facilitates cross-firm analysis and comprehensive monitoring of all SBS Entities registered with the Commission. For example, the Commission could by order or rule require SBS Entities to file the financial and operational information with FINRA using the FOCUS Report Part IIC but permit the information input into the form to be the same information the SBS Entity reports to BaFin or other European supervisors.[102] Further, the Commission could specify that as a condition to the substituted compliance, an SBS Entity may present the information reported in the FOCUS Report Part IIC in accordance with generally accepted accounting principles (''GAAP'') that the SBS Entity uses to prepare general purpose financial statements in its home jurisdiction instead of U.S. GAAP if other GAAP, such as International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), is used by the SBS Entity in preparing general purpose financial statements.

iv. Additional Conditions Applicable to Exchange Act Rule 18a–8

Under the proposed Order, substituted compliance in connection with the notification requirements of Exchange Act rule 18a–8 is subject to the condition that the prudentially regulated SBS Entity: (1) Simultaneously transmits to the principal office of the Commission or to an email address provided on the Commission's website a copy of any notice required to be sent by the German notification laws; and (2) includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice. The purpose of this condition is to alert the Commission to financial or operational problems that could adversely affect the firm—the objective of Exchange Act rule 18a–8.

In addition, under the proposed Order, substituted compliance in connection with the notification requirements of Exchange Act rule 18a–8 is subject to the condition that the prudentially regulated SBS Entity comply with the notification

[100] For example, the Commission could specify the manner and format of the filing of the financial and operational information in a final substituted compliance order.

[101] *See* Order Designating Financial Industry Regulatory Authority, Inc., to Receive Form X–17A–5 (FOCUS Report) from Certain Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Release No. 34–88866 (May 14, 2020).

[102] The Commission anticipates that it would be appropriate to tailor the line items required to be reported pursuant to this condition and is requesting comment on which, if any, line items in FOCUS Report Part IIC the SBS Entity does not otherwise report or record pursuant to applicable laws or regulations. Further, the Commission is requesting comment on whether it would be appropriate as a condition to substituted compliance for SBS Entities to file a FOCUS Report Part IIC with a limited number of the required line items filled out for two years. During this time, the Commission could further evaluate the scope of information SBS Entities should file.

requirement of Exchange Act rule 18a–8(g) if the firm is not exempt from Exchange Act rule 18a–4. This rule requires notification if the firm fails to make in its special reserve account for the exclusive benefit of security-based swap customers a deposit, as required by Exchange Act rule 18a–4(c). As discussed above, substituted compliance is not available for Exchange Act rule 18a–4.

3. Examination and Production of Records

Every SBS Entity registered with the Commission, whether complying directly with Exchange Act requirements or relying on substituted compliance as a means of complying with the Exchange Act, is required to satisfy the inspection and production requirements imposed on such entities under the Exchange Act.[103] Covered entities may make, keep, and preserve records, subject to the conditions described above, in a manner prescribed by applicable European and German requirements. The Commission notes that as an element of its substituted compliance application, BaFin has provided the Commission with adequate assurances that no law or policy would impede the ability of any entity that is directly supervised by the authority and that may register with the Commission ''to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.'' Consistent with those assurances and the requirements that apply to all registered SBS Entities under the Exchange Act, prudentially regulated SBS Entities will need to keep books and records open to inspection by any representative of the Commission and to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the firm that these entities are required to preserve under Exchange Act rule 18a–6 (which would include records for which a positive substituted compliance determination is being made with respect to Exchange Act rule 18a–6 under this order), or any other records of the firm that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

VIII. Additional Considerations Regarding Supervisory and Enforcement Effectiveness in Germany

A. General Considerations

As noted above, Exchange Act rule 3a71–6 provides that the Commission's assessment of the comparability of the requirements of the foreign financial regulatory system take into account ''the effectiveness of the supervisory program administered, and the enforcement authority exercised'' by the foreign financial regulatory authority. This prerequisite accounts for the understanding that substituted compliance determinations should reflect the reality of the foreign regulatory framework, in that rules that appear high-quality on paper nonetheless should not form the basis for substituted compliance if—in practice—market participants are permitted to fall short of their regulatory obligations. This prerequisite, however, also recognizes that differences among the supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another.[104]

In connection with these considerations, BaFin's application includes information regarding the German supervisory and enforcement framework applicable to derivatives markets and market participants. This includes information regarding the supervisory and enforcement authority afforded to BaFin to promote compliance with applicable requirements, applicable supervisory and enforcement tools and capabilities, consequences of non-compliance, and the application of BaFin's supervisory and enforcement practices in the cross-border context.

In preliminarily concluding that the relevant supervisory and enforcement considerations are consistent with substituted compliance, the Commission particularly has considered the following factors:

B. Supervisory Framework in Germany

Supervision of credit institutions located in Germany is conducted by both BaFin and the European Central Bank (''ECB''). BaFin supervises credit institutions for compliance with the WpHG (the German Securities Trading Act), MiFID, and EMIR. The ECB, through joint supervisory teams (''JSTs'') comprising ECB staff, BaFin staff, and staff from other countries in the EU where the institution has a subsidiary or branch, supervises credit institutions that are classified as significant institutions for compliance with the CRD and CRR.[105] Both BaFin and the ECB are able to request records needed for supervision from credit institutions through the supervisory process. In addition, both BaFin and the ECB set annual priorities and conduct thematic reviews that are used to deepen supervision in specific regulatory areas. The results of these thematic reviews are made public and are used to provide transparency to the industry.

1. BaFin Supervisory Considerations

BaFin's supervision over credit institutions is conducted by multiple supervisors who are in frequent contact with the firms. The supervisors review various reports submitted to BaFin to ensure they are complete, accurate and timely, including the independent auditor reports that are required by statute in Germany.[106] Supervisors review each report against other information they have about the firm to look for inconsistencies. Depending on the issue, BaFin's supervisors follow up with the firm in a variety of ways to ensure that the auditor's findings have been remedied, including document and data requests, meetings with compliance staff, formal meetings with senior management, onsite inspections, requiring a special audit, or accompanying the auditors on the annual audit or a special audit. BaFin requires special audits when it suspects a violation of a regulatory provision. During a special audit, BaFin will provide the independent auditor with comprehensive and detailed information on the scope of the audit and the issues and questions that need to be addressed. BaFin staff is in close contact with the auditor and discusses preliminary findings and the progress of the audit. The auditor issues a final report to BaFin on the audit, which serves as a basis for further regulatory measures.

BaFin's specialized divisions engage in daily supervision of the markets. Should they detect misconduct, they have the authority to initiate administrative procedures in order to

[103] *See* Exchange Act section 15F(f); Exchange Act rule 18a–6(g).

[104] *See generally* Business Conduct Adopting Release, 81 FR at 30079.

[105] All credit institutions supervised under the ECB's single supervision mechanism are classified as significant institutions or less significant institutions. Additional information on how credit institutions are classified is available at: *https://www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl181114_3.en.html.*

[106] Although the credit institution can choose its auditor, the auditor must be approved by BaFin. BaFin also has the authority to require a firm to change its auditor, to direct the areas that the auditor must review, or to take over the audit.

halt it. The specialized divisions also may refer the misconduct to the Division for Administrative Offence Proceedings for enforcement, or, in the case of a criminal offense, must refer the case to the state prosecutor for criminal consideration.

2. ECB and JST Supervisory Considerations

Supervision of credit institutions' compliance with the CRD and CRR is conducted through the ECB's single supervisory mechanism and executed by JSTs. The head of the JST is from the ECB and generally is not from the country where the significant institution is located. As part of its day-to-day supervision, the JST analyzes the supervisory reporting, financial statements, and internal documentation of supervised entities. The JSTs hold regular and ad hoc meetings with the supervised entities at various levels of staff seniority. They conduct ongoing risk analyses of approved risk models, and analyze and assess the recovery plans of supervised entities. The various supervisory activities typically result in supervisory measures addressed to the supervised institution. Supervisory activities and decisions result in a number of routine steps such as the monitoring of compliance by the JST and, if necessary, enforcement measures and sanctions. In addition to ongoing supervision, the JST may conduct in-depth reviews on certain topics by organizing a dedicated onsite mission (*e.g.,* an inspection or an internal model investigation). The onsite inspections are carried out by an independent inspection team, which works in close cooperation with the respective JST.

C. Enforcement Authority in Germany

The Securities Trading Act empowers BaFin Securities Supervision to compel in an investigation, via formal request, information from any person, including responses to questions, documents, or other data. In addition, its Division for Administrative Offence Proceedings has the authority to compel unsworn testimony from witnesses and subjects of an investigation, but under German law, the subject of the investigation is not required to answer questions about the accusation.

When a matter has been referred for enforcement proceedings, BaFin Securities Supervision is authorized to impose a range of sanctions. The main sanctioning tool is imposition of financial penalties. Other sanctions include publishing warnings on BaFin's website, prohibiting certain trading, requiring cessations of the misconduct, and prohibiting an individual from exercising professional activity. Because BaFin's general focus is to ensure compliance with the applicable regulatory framework, investigations do not always result in a sanction process.

Misconduct detected by the JSTs is addressed primarily by the ECB. The ECB has the power to enforce violations and to impose fines on supervised entities for breaches of directly applicable European Union law. The ECB can also ask national competent authorities (such as BaFin) to open proceedings that may lead to the imposition of certain pecuniary and non-pecuniary penalties.

IX. Request for Comment

Commenters are invited to address all aspects of the application, the Commission's preliminary views and the proposed Order.

A. General Aspects of the Comparability Assessments and Proposed Order

The Commission requests comment regarding the preliminary views and proposed Order in connection with each of the general ''regulatory outcome'' categories addressed above. Commenters particularly are invited to address, among other issues:

- Whether the relevant German and EU provisions generally are sufficient to produce regulatory outcomes that are comparable to the outcomes associated with requirements under the Exchange Act;
- Whether the conditions and limitations of the proposed Order would adequately address potential gaps in the relevant regulatory outcomes;
- Whether additional or fewer conditions or limitations would be appropriate for enhancing regulatory efficiency while promoting regulatory outcomes that are comparable to those arising under the Exchange Act;
- Whether the proposed conditions and limitations sufficiently guard against comparability gaps arising from the cross-border application of German or EU requirements (including when SBS Entities conduct security-based swap business through branches located in the United States or in third countries);
- Whether the proposed conditions and limitations sufficiently guard against comparability gaps arising from the cross-border application of German or EU requirements, including when SBS Entities conduct security-based swap business through branches located in other EU jurisdictions, and when SBS Entities conduct that business through branches located in the United States or in third countries; and
- Any implementation or other practical issues that may arise due to the proposed conditions and limitations.

Commenters also are invited to address the references to EU directives (*e.g.,* MiFID and CRD) that are incorporated into the conditions to the proposed Order. EU directives by themselves do not apply to market participants, but instead require implementation by member states (*see* notes 25 and 27, *supra*). As drafted, the conditions to the proposed Order not only would require Covered Entities to comply with EU regulations (which directly are applicable to market participants) and with German laws implementing EU directives, but also incorporate references to relevant EU directives. Commenters are invited to address the implication of those references to EU directives, including whether their inclusion may raise questions regarding the availability of substituted compliance.

B. Risk Control Requirements

The Commission further requests comment regarding the proposed conditions in connection with the risk control requirements.

Trading relationship documentation and MiFID ''eligible counterparty'' exclusion—Commenters in part are requested to address the potential impact of the condition that would disapply application of the MiFID ''eligible counterparty'' exclusion in connection with substituted compliance for the trading relationship documentation requirements. What potential disruption may arise as a result of that condition? Is that condition necessary given the related EU requirements that are not subject to the MiFID ''eligible counterparty'' exclusion—*i.e.,* EMIR Margin RTS article 2 (regarding procedures providing for or specifying the terms of agreements), EMIR article 11(1)(a) (regarding bilateral confirmations), and MiFID article 25(6) and MiFID Org Reg article 59 (regarding required reports on services)? Are there more targeted conditions that would effectively promote the relevant regulatory outcomes?

Trading relationship documentation disclosure provisions—In addition, commenters are requested to address whether the proposal appropriately excludes the provisions of paragraph (b)(5) of rule 15Fi–5 from the scope of substituted compliance in connection with trading relationship documentation, on the basis that the German and EU documentation requirements would not be expected to subsume those disclosures. Also, should

the proposal be modified to further exclude the clearing disclosure provisions of paragraph (b)(6) of rule 15Fi–5 from the scope of substituted compliance, for similar reasons? [107]

Risk management systems—Commenters further are requested to address the set of German and EU requirements that Covered Entities must satisfy as conditions to substituted compliance in connection with risk management system requirements (as well as in connection with the internal supervision and compliance requirements addressed below), including whether any additions to or subtractions from those conditions are warranted. In this respect the Commission notes that although the proposed conditions in connection with those requirements generally incorporate CRD requirements related to internal governance (CRD article 74), treatment of risk (CRD article 76), additional risk-related practices (CRD articles 79–87), governance arrangements (CRD article 88), management body responsibilities (CRD article 91) and remuneration (CRD articles 92–95),[108] the proposed conditions do not incorporate certain CRD requirements related to management body activities and recruitment.[109] While the Commission is mindful that the holistic approach toward substituted compliance generally necessitates a focus on the U.S. and foreign regulatory regimes as a whole, those foreign requirements related to management body activities and recruitment appear significantly different from the U.S. internal supervision and compliance requirements at issue. The Commission accordingly believes that, on balance, the conditions to substituted compliance should not subsume those particular CRD requirements. The Commission invites comment regarding whether this aspect of the proposal strikes the correct balance.

Delivery of trade acknowledgements—Commenters are invited to address whether substituted compliance in connection with trade acknowledgment and verification requirements should be conditioned on Covered Entities having to use electronic means to provide relevant information to clients pursuant to applicable EU requirements. In this regard, the Commission notes that Exchange Act rule 15Fi–2(c) requires that trade acknowledgments be provided via ''electronic means,'' while MiFID Org Reg article 59 instead states that applicable disclosures must be in a ''durable medium'' but does not appear to explicitly mandate electronic disclosure.

Timing of dispute reporting—Commenters also are requested to address whether substituted compliance in connection with dispute reporting appropriately may be satisfied by disclosing information to the Commission based on the 15 business day standard of EMIR RTS art. 15(2), in lieu of the three to five business day standard prescribed by rule 15Fi–3(c).

Applicability of relevant requirements under EMIR—Substituted compliance for Exchange Act rules 15Fi–2 through 15Fi–4, related to trade acknowledgments and verifications, portfolio reconciliation and dispute reporting, and portfolio compression, in part are conditioned on EMIR article 11 requirements that are linked to the presence of an ''OTC derivative contract not cleared by a CCP.'' [110] Those Exchange Act rules similarly do not apply to cleared security-based swaps. Commenters are invited to address whether there are any differences between the scope of the EMIR requirements and the scope of those Exchange Act rules that may lead to uncertainty or otherwise complicate the implementation of substituted compliance in connection with those requirements.

C. Internal Supervision, Chief Compliance Officer and Additional Exchange Act Section 15F(j) Requirements

The Commission also requests comment regarding the proposed conditions in connection with the internal supervision, chief compliance officer and additional Exchange Act section 15F(j) requirements.

''As if'' compliance condition—Commenters particularly are invited to address the proposed condition that SBS Entities apply relevant German and EU supervisory and compliance provisions ''as if'' those provisions also promoted the SBS Entities' compliance with applicable requirements under the Exchange Act (*i.e.,* requirements that are not satisfied via substituted compliance) and the other conditions to the Order. To what extent would this condition lead to implementation issues, including but not limited to issues regarding how SBS Entities—in practice—would leverage existing supervisory and compliance frameworks to comply with this condition? Would alternative approaches, more targeted conditions or further guidance promote regulatory outcomes that are comparable to outcomes under the Exchange Act, while reducing implementation issues?

Annual reports pursuant to EU rules—Commenters also are invited to address the proposed condition that SBS Entities provide to the Commission, at least annually, certified English-language versions of the annual compliance reports required under MiFID Org Reg article 22(2)(c) that also address compliance with other conditions to the Order. Are those compliance reports sufficient to provide the Commission with compliance-related information that is comparable to the information required by Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk–1(c)? If not, how may the condition appropriately be modified? Could the proposed condition impose implementation issues? Would alternative approaches or more targeted conditions promote regulatory outcomes that are comparable to those under the Exchange Act while reducing implementation issues? Should the condition also require SBS Entities to provide the Commission with *ad hoc* compliance reports required pursuant to MiFID Org Reg article 22(3)(c)?

D. Counterparty Protection Requirements

The Commission also requests comment regarding the proposed conditions in connection with counterparty protection requirements. Commenters particularly are invited to address the Commission's preliminary view that German and EU requirements are not comparable to clearing rights disclosure requirements under the Exchange Act. Do any German or EU requirements compare in scope and objective to the clearing rights disclosure requirements under the Exchange Act?

Commenters also are invited to address the Commission's preliminary view that German and EU portfolio reconciliation requirements are comparable to Exchange Act daily mark

[107] Paragraph (b)(6) to rule 15Fi–5 requires that trading relationship documentation include a notice containing information regarding certain consequences of a security-based swap being accepted by a clearing agency.

[108] *See* paragraphs (b)(1) and (c)(3) to the proposed Order.

[109] The proposed conditions in connection with the risk control requirements and internal supervision and compliance requirements particularly do not incorporate CRD articles 88(2), 91(3)–(6) and 91(10) and KWG sections 25c(2), 25d(3) and 25d(11), which address nomination committees, outside directorships, and management body qualities and diversity.

[110] EMIR article 2(3) defines ''OTC derivative contract'' by reference to derivatives not executed on a ''regulated market'' within the meaning of article 4(1)(14) of MiFID I (Directive 2004/39/EC the predecessor to the current version of MiFID) or on a third country market considered as equivalent to a regulated market in accordance with article 19(6) of MiFID I.

disclosure requirements only for transactions required to be reconciled each business day. Should the Commission instead allow substituted compliance for daily mark disclosure requirements for any uncleared OTC derivative contract that is subject to German and EU portfolio reconciliation requirements, even if reconciliation is required on less than a daily basis? Should the Commission allow substituted compliance for daily mark disclosure requirements for any OTC derivative contract for which margin is exchanged, even if German and EU portfolio reconciliation requirements do not require that contract to be reconciled? Similarly, are the scope and objectives of German and EU trade reporting requirements comparable to the scope and objectives of Exchange Act daily mark disclosure requirements? Do the scope and/or objectives of those German and EU requirements differ in important ways from the scope and/or objectives of daily mark disclosure requirements under the Exchange Act?

Commenters also are invited to address the proposed condition that would require an SBS Entity's counterparty to be a per se ''professional client'' that is not a ''special entity,'' for substituted compliance to be available for Exchange Act suitability requirements. Would that condition appropriately limit substituted compliance to recommendations that are subject to German and EU suitability requirements comparable to those under the Exchange Act? Would the absence of that condition permit SBS Entities to comply with materially narrower German and EU suitability requirements in lieu of broader Exchange Act suitability requirements? Would that condition cause any market disruption or be difficult to implement? Would alternative approaches or more targeted conditions effectively promote the counterparty protection objectives of the Exchange Act suitability requirement while reducing implementation issues?

Commenters also are invited to address whether the Commission should allow SBS Entities to use substituted compliance for Exchange Act material incentives or conflicts of interest disclosure requirements if the SBS Entity is subject to and complies with German and EU laws that require the SBS Entity to have organizational arrangements to prevent conflicts of interest from adversely affecting the interest of the SBS Entity's client and, when those arrangements are not sufficient to ensure with reasonable confidence that risks of damage to client interests will be prevented, to disclose a conflict of interest and the steps taken to mitigate those risks. Would permitting substituted compliance in the latter scenario achieve comparable regulatory outcomes as the relevant Exchange Act disclosure requirements? Should the Commission limit substituted compliance for Exchange Act material incentives or conflicts of interest disclosure requirements only to conflicts of interest for which German and EU laws require disclosure because the organizational arrangements are not sufficient as described above? Would limiting substituted compliance in this way cause any market disruption or be difficult to implement? Would alternative approaches effectively promote the counterparty protection objectives of the Exchange Act disclosure requirements while reducing implementation issues?

E. Recordkeeping, Reporting, and Notification

The Commission also requests comment regarding the proposed conditions with respect to the recordkeeping, reporting, and notification requirements. Commenters particularly are invited to address the proposed condition with respect to Exchange Act rule 18a–5 that the prudentially regulated SBS Entity: (a) Preserve all of the data elements necessary to create the records required by Exchange Act rules 18a–5(b)(1), (2), (3), and (7); and (b) upon request furnish promptly to representatives of the Commission the records required by those rules. Do the relevant German and EU laws require prudentially regulated SBS Entities to retain the data elements necessary to create the records required by these rules? If not, please identify which data elements are not preserved pursuant to the relevant German and EU laws. Further, how burdensome would it be for a prudentially regulated SBS Entity to format the data elements into the records required by these rules (*e.g.,* a blotter, ledger, or securities record, as applicable) if the firm was requested to do so? In what formats do prudentially regulated SBS Entities in Germany produce this information to BaFin or other European authorities? How do those formats differ from the formats required by Exchange Act rules 18a–5(b)(1), (2), (3), and (7)?

Commenters also are invited to address the proposal that a positive substituted compliance determination with respect to Exchange Act rule 18a–7 would be conditioned on the SBS Entity filing financial and operational information with the Commission in the manner and format specified by the Commission by order or rule. Because the Commission does not have responsibility to administer capital and margin requirements for prudentially regulated SBS Entities, the FOCUS Report Part IIC elicits much less information than the FOCUS Report Part II or the financial reports SBS Entities file with BaFin and/or other European authorities. Should the Commission require SBS Entities to file the financial and operational information using the FOCUS Report Part IIC? Are there line items on the FOCUS Report Part IIC that elicit information that is not included in the reports SBS Entities file with BaFin and/or other European authorities? If so, do SBS Entities record that information in their required books and records? Please identify any information that is elicited in the FOCUS Report Part IIC that is not: (1) Included in the financial reports filed by SBS Entities with BaFin and/or other European authorities; or (2) recorded in the books and records required of SBS Entities. Would the answer to these questions change if references to FFIEC Form 031 were not included in the FOCUS Report Part IIC? If so, how? As a preliminary matter, as a condition of substituted compliance should SBS Entities file a limited amount of financial and operational information on the FOCUS Report Part IIC for a period of two years to further evaluate the burden of requiring all applicable line items to be filled out? If so, which line items should be required? To the extent that SBS Entities otherwise report or record information that is responsive to the FOCUS Report Part IIC, how could the information on these reports be integrated into a database of filings the Commission or its designee will maintain for filers of the FOCUS Report Parts II and IIC (*e.g.,* the eFOCUS system) to achieve the objective of being able to perform cross-form analysis of information entered into the uniquely numbered line items on the forms?

In addition, commenters are invited to address the Commission's preliminary view that a substituted compliance determination with respect to the recordkeeping, reporting, and notification requirements applicable to nonbank SBS Entities be made in connection with an application for substituted compliance with respect to the capital and margin requirements applicable to nonbank SBS Entities. For example, are there recordkeeping, reporting, and notification requirements applicable to nonbank SBS Entities that the Commission should consider for substituted compliance in the context of this application? If so, please identify the requirements and explain why the Commission should consider them.

Further, if the Commission makes a positive substituted compliance determination with respect to the underlying requirements and the related record making and record preservation requirements applicable to prudentially regulated SBS Entities, should the Commission also make a positive substituted compliance determination with respect to parallel record making and record preservation requirements for SBS Entities that do not have a prudential regulator? In particular, in this circumstance, should the Commission make a positive substituted compliance determination with respect to the following record making and record preservation requirements applicable to SBS Entities that do not have a prudential regulator: Exchange Act rule 18a–5(a)(18) (regarding making portfolio reconciliation records), Exchange Act rule 18a–6(d)(4)–(5) (regarding portfolio reconciliation retention), Exchange Act rule 18a–5(a)(16)–(17) with respect to requirements of Exchange Act rules 15Fh–3 and 15Fk–1 to which the proposed order extends (regarding making records evidencing compliance with business conduct standards), Exchange Act rule 18a–6(b)(1)(xii) with respect to requirements of Exchange Act rules 15Fh–3 and 15Fk–1 to which the proposed order extends (regarding business conduct record retention), and Exchange Act rule 18a–5(a)(15) (regarding making non-verified security-based swap records)? If so, explain why.

Finally, if the Commission makes a positive substituted compliance determination with respect to other record making and record preservation requirements applicable to prudentially regulated SBS Entities where there is a parallel requirement applicable to SBS Entities without a prudential regulator, should the Commission make a substituted compliance determination with respect to the parallel requirements? If so, identify the parallel requirements and explain why the Commission should make a positive substituted compliance determination.

F. Supervisory and Enforcement Issues

The Commission further requests comment regarding how to weigh considerations regarding supervisory and enforcement effectiveness in Germany as part of the comparability assessments. Commenters particularly are invited to address relevant issues regarding the effectiveness of German supervision and enforcement over firms that may register with the Commission as SBS Entities, including but not limited to issues regarding:

- BaFin and ECB supervisory and enforcement authority, supervisory inspection practices and the use of alternative supervisory tools, and enforcement tools and practices;
- BaFin and ECB supervisory and enforcement effectiveness with respect to derivatives such as security-based swaps;
- BaFin and ECB supervision and enforcement in the cross-border context (*e.g.,* any differences between the oversight of firms' businesses within Germany and the oversight of activities and branches outside of Germany, including within the United States); and
- BaFin supervision and enforcement effectiveness with respect to investment firms as compared to BaFin and ECB supervision and enforcement effectiveness with respect to credit institutions.

By the Commission.

Vanessa A. Countryman,

Secretary.

Attachment A

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-)

[DATE]

Order Providing for Conditional Substituted Compliance to Certain German Security-Based Swap Dealers and Major Security-Based Swap Participants

IT IS HEREBY ORDERED, pursuant to rule 3a71–6 under the Exchange Act, that a Covered Entity (as defined in paragraph (f)(1) of this Order) may satisfy the requirements under the Exchange Act that are addressed in paragraphs (b) through (e) of this Order so long as the Covered Entity is subject to and complies with relevant requirements of the Federal Republic of Germany and the European Union and with the conditions to this Order.

(a) General conditions.

This Order is subject to the following general conditions, in addition to the conditions specified in paragraphs (b) through (e):

(1) *Activities as* ''*investment services or activities.*'' For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of MiFID, WpHG, and/or other EU and German requirements adopted pursuant to those provisions, the Covered Entity's relevant security-based swap activities constitute ''investment services'' or ''investment activities,'' as defined in MiFID article 4(1)(2) and in WpHG section 2(8), and fall within the scope of the Covered Entity's authorization from BaFin to provide investment services and/or perform investment activities in the Federal Republic of Germany.

(2) *Counterparties as* ''*clients.*'' For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions, the relevant counterparty (or potential counterparty) to the Covered Entity is a ''client'' (or potential ''client''), as defined in MiFID article 4(1)(9) and in WpHG section 67(1).

(3) *Security-based swaps as* ''*financial instruments.*'' For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of MiFID, WpHG and/or other EU and German requirements adopted pursuant to those provisions, the relevant security-based swap is a ''financial instrument,'' as defined in MiFID article 4(1)(15) and in WpHG section 2(4).

(4) *Covered Entity as* ''*institution.*'' For each condition in paragraph (b) through (e) of this Order that requires the application of, and the Covered Entity's compliance with, the provisions of the CRD, KWG, CRR and/or other EU and German requirements adopted pursuant to those provisions, the Covered Entity is an ''institution,'' as defined in CRD article 3(1)(3), in CRR article 4(1)(3) and in KWG section 1(1b).

(5) *Memorandum of Understanding.* The Commission and BaFin have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to this Order at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(6) *Notice to Commission.* A Covered Entity relying on this Order must provide notice of its intent to rely on this Order by notifying the Commission in writing. Such notice must be sent to an email address provided on the Commission's website. The notice must include the contact information of an individual who can provide further information about the matter that is the subject of the notice.

(7) *European Union Cross-Border Matters.* If, in relation to a particular service provided by a Covered Entity, responsibility for ensuring compliance with any provision of MiFID or any other EU or German requirement adopted pursuant to MiFID listed in

paragraphs (b) through (e) of this Order is allocated to an authority of the Member State of the European Union in whose territory a Covered Entity provides the service, BaFin must be the authority responsible for supervision and enforcement of that provision or requirement in relation to the particular service. If responsibility for ensuring compliance with any provision of MAR or any other EU requirement adopted pursuant to MAR listed in paragraphs (b) through (e) of this Order is allocated to one or more authorities of a Member State of the European Union, one of such authorities must be BaFin.

(b) Substituted compliance in connection with risk control requirements.

This Order extends to the following provisions related to risk control:

(1) *Internal risk management.* The requirements of Exchange Act section 15F(j)(2) and related aspects of Exchange Act rule 15Fh-3(h)(2)(iii)(I), provided that the Covered Entity is subject to and complies with the requirements of: MiFID articles 16(4) and 16(5); WpHG section 80; MiFID Org Reg articles 21–24; CRD articles 74, 76 and 79–87; KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25(e) and 25(f); CRR articles 286–88 and 293; and EMIR Margin RTS article 2.

(2) *Trade acknowledgement and verification.* The requirements of Exchange Act rule 15Fi-2, provided that the Covered Entity is subject to and complies with the requirements of MiFID article 25(6), WpHG section 63(12), MiFID Org Reg articles 59–61, EMIR article 11(1)(a) and EMIR RTS article 12.

(3) *Portfolio reconciliation and dispute reporting.* The requirements of Exchange Act rule 15Fi-3, provided that:

(i) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b) and EMIR RTS article 13 and 15;

(ii) The Covered Entity provides the Commission with reports regarding disputes between counterparties on the same basis as it provides those reports to competent authorities pursuant to EMIR RTS article 15(2).

(4) *Portfolio compression.* The requirements of Exchange Act rule 15Fi-4, provided that the Covered Entity is subject to and complies with the requirements of EMIR RTS article 14.

(5) *Trading relationship documentation.* The requirements of Exchange Act rule 15Fi-5, other than paragraph (b)(5) to that rule, provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID article 25(5), WpHG section 83(2), MiFID Org Reg articles 24, 56, 58, 73 and applicable parts of Annex I, and EMIR Margin RTS article 2; and

(ii) The Covered Entity does not treat the applicable counterparty as an ''eligible counterparty'' for purposes of MiFID article 30 and WpHG section 68.

(c) Substituted compliance in connection with internal supervision and compliance requirements and certain Exchange Act section 15F(j) requirements.

This Order extends to the following provisions related to internal supervision and compliance and Exchange Act section 15F(j) requirements:

(1) *Internal supervision.* The requirements of Exchange Act rule 15Fh-3(h) and Exchange Act sections 15F(j)(4)(A) and (j)(5), provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (c)(3);

(ii) The Covered Entity complies with paragraph (c)(4) to this Order; and

(iii) This paragraph (c) does not extend to the requirements of paragraph (h)(2)(iii)(I) to rule 15Fh-3 to the extent those requirements pertain to compliance with Exchange Act sections 15F(j)(2), (j)(3), (j)(4)(B) and (j)(6), or to the general and supporting provisions of paragraph (h) to rule 15Fh-3 in connection with those Exchange Act sections.

(2) *Chief compliance officers.* The requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk-1, provided that:

(i) The Covered Entity complies with the requirements identified in paragraph (c)(3) to this Order;

(ii) All reports required pursuant to MiFID Org Reg article 22(2)(c) must also:

(A) Be provided to the Commission at least annually, and in the English language;

(B) Include a certification that, under penalty of law, the report is accurate and complete; and

(C) Address the firm's compliance with the other conditions to this Order.

(3) *Applicable supervisory and compliance requirements.* Paragraphs (c)(1) and (c)(2) are conditioned on the Covered Entity being subject to and complying with the following requirements: MiFID articles 16 and 23; WpHG sections 63, 80, 83 and 84; MiFID Org Reg articles 21–37, 72–76 and Annex IV; CRD articles 74, 76, 79–87, 88(1), 91(1)-(2), 91(7)-(9) and 92–95; and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25e and 25f.

(4) *Additional condition to paragraph (c)(1).* Paragraph (c)(1) further is conditioned on the requirement that Covered Entities comply with the provisions specified in paragraph (c)(3) as if those provisions also require compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other conditions to this Order.

(d) Substituted compliance in connection with counterparty protection requirements.

This Order extends to the following provisions related to counterparty protection:

(1) *Disclosure of information regarding material risks and characteristics.* The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material risks and characteristics of a security-based swap, provided that the Covered Entity is subject to and complies with the requirements of MiFID article 24(4), WpHG sections 63(7) and 64(1) and MiFID Org Reg articles 48–50, in each case in relation to that security-based swap.

(2) *Disclosure of information regarding material incentives or conflicts of interest.* The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material incentives or conflicts of interest that a Covered Entity may have in connection with a security-based swap, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of either:

(i) MiFID article 23(2)-(3); WpHG section 63(2); and MiFID Org Reg articles 33–35;

(ii) MiFID article 24(9); WpHG section 70; and MiFID Delegated Directive article 11(5); or

(iii) Market Abuse Regulation article 20(1).

(3) ''*Know your counterparty.*'' The requirements of Exchange Act rule 15Fh-3(e), provided that the Covered Entity is subject to and complies with the requirements of MiFID article 16(2); WpHG section 80(1); MiFID Org Reg articles 21–22, 25–26 and applicable parts of Annex I; CRD articles 74(1) and 85(1); KWG section 25a; MLD articles 11 and 13; GwG sections 10–11; MLD articles 8(3) and 8(4)(a) as applied to internal policies, controls and procedures regarding recordkeeping of customer due diligence activities; and GwG section 6(1)-(2) as applied to principles, procedures and controls regarding recordkeeping of customer

diligence activities, in each case in relation to that security-based swap.

(4) *Suitability.* The requirements of Exchange Act rule 15Fh-3(f), provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID articles 24(2)-(3) and 25(1)-(2); WpHG sections 63(5)-(6), 80(9)-(13) and 87(1)-(2); and MiFID Org Reg articles 21(1)(b) and (d), 54 and 55, in each case in relation to the recommendation that is provided by or on behalf of the Covered Entity; and

(ii) The counterparty to which the Covered Entity makes the recommendation is a ''professional client'' mentioned in MiFID Annex II section I and WpHG section 67(2) and is not a ''special entity'' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh-2(d).

(5) *Fair and balanced communications.* The requirements of Exchange Act rule 15Fh-3(g), provided that the Covered Entity, in relation to the relevant communication, is subject to and complies with the requirements of:

(i) Either MiFID articles 24(1), (3) and WpHG sections 63(1), (6) or MiFID article 30(1) and WpHG section 68(1); and

(ii) MiFID articles 24(4)-(5); WpHG sections 63(7) and 64(1); MiFID Org Reg articles 46–48; Market Abuse Regulation articles 12(1)(c) and 15; and MAR Investment Recommendations Regulation article 5.

(6) *Daily mark disclosure.* The requirements of Exchange Act rule 15Fh-3(c), provided that the Covered Entity is required to reconcile, and does reconcile, the portfolio containing the relevant security-based swap on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13.

(e) Substituted compliance in connection with recordkeeping, reporting, and notification requirements.

This Order extends to the following provisions related to Commission requirements to:

(1) *Make and keep current certain records.* The requirements to make and keep current records of Exchange Act rule 18a-5 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRR articles 103 and 103(b)(ii); EMIR articles 9(2), 11(1)(a), and 39(4); EMIR RTS 148/2013; MiFID articles 9(1), 16(3), 16(6)-16(9), 25(1), 25(5), and 25(6); MiFID Delegated Directive article 2; MiFID Org Reg. articles 16(7), 21(1)(a), 35, 59, 72, 73, 74, 75, 76, and applicable parts of Annex I; MiFID Org Reg. Annex IV; MiFIR article 25; MLD4 articles 11 and 13; EBA/ESMA Guidelines on Management Suitability guidelines 74, 75, and 172, and Annex III; CRD articles 88, 91(1), and 91(8); KWG sections 25c(1) and 25d(1)-(3); WpHG section 63, section 64, section 81 paragraph 1, section 83 paragraphs 1 through 8, and section 84; and GwG section 10, paragraph 1, points 1 through 3;

(ii)(A) The Covered Entity preserves all of the data elements necessary to create the records required by Exchange Act rules 18a-5(b)(1), (2), (3), and (7); and

(B) The Covered Entity upon request furnishes promptly to representatives of the Commission the records required by those rules;

(iii) The Covered Entity makes and keeps current the records required by Exchange Act rules 18a-5(b)(9) and (10) if the Covered Entity is not exempt from the requirements of Exchange Act rule 18a-4;

(iv) The Covered Entity makes and keeps current the records required by Exchange Act rule 18a-5(b)(12); and

(v) Except with respect to requirements of Exchange Act rules 15Fh-3 and 15Fk-1 to which this Order extends pursuant paragraphs (c)(2) and (d), the Covered Entity makes and keeps current the records required by Exchange Act rule 18a-5(b)(13).

(2) *Preserve records.* The record preservation requirements of Exchange Act rule 18a-6 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRD articles 88, 91(1), and 91(8); CRR articles 99, 104(1)(j), 294, 394, 415–428, and 430; CRR Reporting ITS Article 14 and Annexes I–V, VIII–XIII; EMIR articles 9(1) and 9(2); MiFID articles 9(1), 16(3), and 69(2); MiFID Org Reg. articles 21(1)(a), 21(2), 35, 58, 72(1), 72(3), 73, and 76; MiFIR articles 16(2), 16(5), 16(6), 16(7), 25(1), 25(5), 31(1) and 72; MLD4 articles 11 and 13; EBA/ESMA Guidelines on Management Suitability guidelines 74, 75, and 172, and Annex III; EBA Guidelines on Outsourcing section 13.3; KWG 25c(1) and 25d(1)-(3); WpHG sections 6, 7, 63, 64, and 80 and section 83 paragraphs 1, 2, 3, and 8; and GwG sections 10 and 11;

(ii) The Covered Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(v) if the Covered Entity is not exempt from the requirements of Exchange Act rule 18a-4;

(iii) Except with respect to requirements of Exchange Act rules 15Fh-3 and 15Fk-1 to which this Order extends pursuant to paragraphs (c)(2) and (d), the Covered Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(vii); and

(iv) The Covered Entity preserves the records required by Exchange Act rule 18a-6(b)(2)(vi) and (b)(2)(viii).

(3) *File Financial and Operational Information.* The reporting requirements of Exchange Act rule 18a-7 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRR articles 99, 104(1)(j), 394, 415–428, and 430; CRR Reporting ITS chapter 2 and Annexes I–V and VII–XIII; and Commission Delegated Regulation (EU) 2017/1443, as amended from time to time; and

(ii) The Covered Entity files financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order.

(4) *Provide Notification.* The notification requirements of Exchange Act rule 18a-8 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRD article 71; MiFID article 73; KWG section 24 paragraph 1; and FinDAG section 4d; and

(ii) The Covered Entity:

(A) Simultaneously transmits to the principal office of the Commission or to an email address provided on the Commission's website a copy of any notice required to be sent by the German and EU laws referenced in paragraph (e)(3)(i) of this order; and

(B) Includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice;

(iii) The Covered Entity complies with notification requirements of Exchange Act rule 18a–8(g) if the Covered Entity is not exempt from Exchange Act rule 18a–4.

(4) *Examination and Production of Records.* Notwithstanding the forgoing provisions of paragraph (e) of this Order, prudentially regulated security-based swap dealers and major security-based swap participants remains subject to the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative

of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity that are required to be preserved under Exchange Act rule 18a-6, or any other records of the Covered Entity that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

(f) Definitions.

(1) ''Covered Entity'' means an entity that:

(i) Is a security-based swap dealer or major security-based swap participant registered with the Commission;

(ii) Is not a ''U.S. person,'' as that term is defined in rule 3a71–3(a)(4) under the Exchange Act; and

(iii) Is an investment firm or credit institution authorized by BaFin to provide investment services or perform investment activities in the Federal Republic of Germany.

(2) ''MiFID'' means the ''Markets in Financial Instruments Directive,'' Directive 2014/65/EU, as amended from time to time.

(3) ''WpHG'' means Germany's ''Wertpapierhandelsgesetz'', as amended from time to time.

(4) ''MiFID Org Reg'' means Commission Delegated Regulation (EU) 2017/565, as amended from time to time.

(5) ''MiFID Delegated Directive'' means Commission Delegated Directive (EU) 2017/593, as amended from time to time.

(6) ''MLD'' means Directive (EU) 2015/849, as amended from time to time.

(7) ''GwG'' means Germany's ''Geldwäschegesetz,'' as amended from time to time.

(8) ''MiFIR'' means Regulation (EU) 600/2014, as amended from time to time.

(9) ''EMIR'' means the ''European Market Infrastructure Regulation,'' Regulation (EU) No 648/2012, as amended from time to time.

(10) ''EMIR RTS'' means Commission Delegated Regulation (EU) No 149/2013, as amended from time to time.

(11) ''CRR Reporting ITS'' means Commission Implementing Regulation (EU) 680/2014, as amended from time to time.

(12) ''CRD'' means Directive 2013/36/EU, as amended from time to time.

(13) ''KWG'' means Germany's ''Kreditwesengesetz,'' as amended from time to time.

(14) ''CRR'' means Regulation (EU) No 575/2013, as amended from time to time.

(15) ''Market Abuse Regulation'' means Regulation (EU) 596/2014, as amended from time to time.

(16) ''MAR Investment Recommendations Regulation'' means Commission Delegated Regulation (EU) 2016/958, as amended from time to time.

(17) ''FinDAG'' means Germany's ''Finanzdienstleistungsaufsichtsgesetz,'' as amended from time to time.

(18) ''BaFin'' means the Bundesanstalt für Finanzdienstleistungsaufsicht.

[FR Doc. 2020–25166 Filed 11–10–20; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16706 and #16707; Louisiana Disaster Number LA–00105]

Presidential Declaration Amendment of a Major Disaster for the State of Louisiana

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–4570–DR), dated 10/16/2020.

Incident: Hurricane Delta.

Incident Period: 10/06/2020 through 10/10/2020.

DATES: Issued on 10/16/2020.

Physical Loan Application Deadline Date: 12/15/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 07/16/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of LOUISIANA, dated 10/16/2020, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans):
Beauregard, Lafayette, Rapides, Saint Landry, Saint Martin

Contiguous Counties (Economic Injury Loans Only):
Louisiana: Assumption, Avoyelles, Grant, Iberville, La Salle, Natchitoches, Pointe Coupee, Saint Mary, Vernon

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. 2020–25136 Filed 11–12–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16772 and #16773; New York Disaster Number NY–00199]

Administrative Declaration of a Disaster for the State of New York

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of New York dated 11/6/2020. *Incident:* Severe Storms and Flooding. *Incident Period:* 08/24/2020.

DATES: Issued on 11/6/2020. Physical Loan Application Deadline Date: 01/05/2021. Economic Injury (EIDL) Loan Application Deadline Date: 08/06/2021.

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: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Washington

Contiguous Counties:
New York: Essex, Rensselaer, Saratoga, Warren
Vermont: Addison, Bennington, Rutland

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	2.375
Homeowners Without Credit Available Elsewhere	1.188

	Percent
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	3.000
Non-Profit Organizations With Credit Available Elsewhere	2.750
Non-Profit Organizations Without Credit Available Elsewhere	2.750
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	3.000
Non-Profit Organizations Without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 16772 6 and for economic injury is 16773 0.

The States which received an EIDL Declaration # are New York, Vermont.

(Catalog of Federal Domestic Assistance Number 59008)

Jovita Carranza,

Administrator.

[FR Doc. 2020–25102 Filed 11–12–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before January 12, 2021.

ADDRESSES: Send all comments to, Kelly Templeton Financial Analyst, Office of Portfolio Management and Office of Financial Program Operations, Small Business Administration, 409 3rd Street, 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Kelly Templeton, Financial Analyst Office of Portfolio Management and Office of Financial Program Operations *Kelly.templeton@sba.gov* or Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov*;

SUPPLEMENTARY INFORMATION:

Lenders requesting SBA to purchase the guaranty portion of a loan are required to supply the Agency with a certified transcript of the loan account. This form is uniform and convenient means for lenders to report and certify loan accounts to purchase by SBA. The Agency uses the information to determine date of loan default and whether Lender disbursed and serviced the loan according to Loan Guaranty agreement.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

(1) Title: Lender's Transcript of Account.

Description of Respondents: SBA Lenders.

Form Number: SBA Form 1,149.

Total Estimated Annual Responses: 9,500.

Total Estimated Annual Hour Burden: 2,375.

Curtis Rich,

Management Analyst.

[FR Doc. 2020–25137 Filed 11–12–20; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Public Notice: 11251]

Determination Pursuant to the Foreign Missions Act

Pursuant to the authority vested in the Secretary of State by the laws of the United States, including the Foreign Missions Act (22 U.S.C. 4301 *et seq.*), and delegated by the Secretary to me in accordance with the Department of State's Delegation of Authority No. 214, dated September 20, 1994, I hereby determine that the representative offices and operations in the United States of the National Association for China's Peaceful Unification, including its real property and personnel, are a foreign mission within the meaning of 22 U.S.C. 4302(a)(3).

Furthermore, I hereby determine it to be reasonably necessary to protect the interests of the United States to require the above noted entity, and its agents or employees acting on its behalf, to comply with the terms and conditions specified by the Department of State's Office of Foreign Missions relating to the above noted entities' operations in the United States.

Finally, I determine that the requirements established by Foreign Missions Act Designation and Determination 2020–2, dated June 5, 2020, (85 FR 11152) will not be applied to the National Association for China's Peaceful Unification unless and until further notice.

Clifton C. Seagroves,

Acting Director, Office of Foreign Missions.

[FR Doc. 2020–25122 Filed 11–12–20; 8:45 am]

BILLING CODE 4710–43–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Resource Stewardship Council and the Regional Energy Resource Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of meeting.

SUMMARY: The TVA Regional Resource Stewardship Council (RRSC) and the Regional Energy Resource Council (RERC) will hold a virtual meeting on Tuesday, December 1, 2020, to discuss and seek advice about TVA's 2019 Sustainability Report.

DATES: The meeting will be held on Tuesday, December 1, 2020, from 9:30 a.m. to 1:00 p.m. EST.

ADDRESSES: The meeting is virtual and open to the public. Public members must preregister at the following link: *http://bit.ly/RERC-RRSC-SR.* Any member of the public attending must indicate their preference, when registering, to view the RRSC Advice or the RERC Advice sessions. Anyone needing special accommodations should let the contact below know at least a week in advance.

FOR FURTHER INFORMATION CONTACT: Cathy Coffey, *ccoffey@tva.gov* or 865/632–4494.

SUPPLEMENTARY INFORMATION: The RRSC was established to advise TVA on its natural resource and stewardship activities, and the priorities among competing objectives and values. The RERC was established to advise TVA on its energy resource activities, and the priorities among competing objectives and values. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2. While sustainability and integrated planning have always been part of its mission, TVA gathered this information in one report in 2019. (*www.tva.com/*

environment/environmental-stewardship/sustainability/sustainability-report). This 2019 Sustainability Report serves as the baseline for TVA's sustainability work. At the meeting on December 1, 2020, the RRSC and RERC will discuss and provide advice about how TVA's sustainability initiatives can be further refined from the baseline reflected in the 2019 report.

The meeting agenda includes the following:

1. Welcome and Introductions
2. Presentation Regarding TVA's Sustainability Program and Report
3. Councils Discussion
4. Councils Advice

No public comment session will be held at the meeting, but written comments on the 2019 Sustainability Report are invited. Written comments must be emailed to *ccoffey@tva.gov* or *dlmurray@tva.gov* no later than November 29, 2020.

Dated: November 5, 2020.

Joseph J. Hoagland,

Vice President, Innovation and Research, Tennessee Valley Authority.

[FR Doc. 2020–25152 Filed 11–12–20; 8:45 am]

BILLING CODE 8120–08–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Product Exclusion Amendment: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Effective September 2018, the U.S. Trade Representative imposed additional duties on goods of China with an annual trade value of approximately $200 billion as part of the action in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. The U.S. Trade Representative initiated a product exclusion process in June 2019, and interested persons have submitted requests for the exclusion of specific products. This notice announces the U.S. Trade Representative's determination to make one technical amendment to a previously announced exclusion.

DATES: As stated in the September 20, 2019 notice, product exclusions will apply from September 24, 2018 to August 7, 2020. The amendments announced in this notice are retroactive to the date the original exclusions were published and do not further extend the period for the original exclusions. U.S. Customs and Border Protection will issue instructions on entry guidance and implementation.

FOR FURTHER INFORMATION CONTACT: For general questions about this notice, contact Associate General Counsel Philip Butler or Megan Grimball, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725. For specific questions on customs classification or implementation of the product exclusions identified in the Annex to this notice, contact *traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

For background on the proceedings in this investigation, please see prior notices including: 82 FR 40213 (August 24, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), 83 FR 47974 (September 21, 2018), 83 FR 49153 (September 28, 2018), 83 FR 65198 (December 19, 2018), 84 FR 7966 (March 5, 2019), 84 FR 20459 (May 9, 2019), 84 FR 29576 (June 24, 2019), 84 FR 38717 (August 7, 2019), 84 FR 46212 (September 3, 2019), 84 FR 49591 (September 20, 2019), 84 FR 57803 (October 28, 2019), 84 FR 61674 (November 13, 2019), 84 FR 65882 (November 29, 2019), 84 FR 69012 (December 17, 2019), 85 FR 549 (January 6, 2020), 85 FR 6674 (February 5, 2020), 85 FR 9921 (February 20, 2020), 85 FR 15015 (March 16, 2020), 85 FR 17158 (March 26, 2020), 85 FR 23122 (April 24, 2020), 85 FR 27489 (May 8, 2020), 85 FR 32094 (May 28, 2020), 85 FR 38000 (June 24, 2020), 85 FR 42968 (July 15, 2020), 85 FR 52188 (August 24, 2020), and 85 FR 63329 (October 7, 2020).

Effective September 24, 2018, the U.S. Trade Representative imposed additional 10 percent *ad valorem* duties on goods of China classified in 5,757 full and partial subheadings of the Harmonized Tariff Schedule of the United States (HTSUS), with an approximate annual trade value of $200 billion. *See* 83 FR 47974, as modified by 83 FR 49153. In May 2019, the U.S. Trade Representative increased the additional duty to 25 percent. *See* 84 FR 20459. On June 24, 2019, the U.S. Trade Representative established a process by which stakeholders could request exclusion of particular products classified within an eight-digit HTSUS subheading covered by the $200 billion action from the additional duties. *See* 84 FR 29576 (the June 24 notice).

In August 2019, the U.S. Trade Representative granted an initial set of exclusion requests. *See* 84 FR 38717. The U.S. Trade Representative granted additional exclusions in September, October, November, and December 2019, and January, February, March, April, May, June, July, August, and October 2020. *See* 84 FR 49591; 84 FR 57803; 84 FR 61674; 84 FR 65882; 84 FR 69012; 85 FR 549; 85 FR 6674; 85 FR 9921; 85 FR 15015; 85 FR 17158; 85 FR 23122; 85 FR 27489; 85 FR 32094; 85 FR 38000; 85 FR 42968; 85 FR 52188; 85 FR 63329. The status of each request can be found on the Exclusions Portal at *https://exclusions.ustr.gov/s/docket?docketNumber=USTR-2019-0005.*

C. Technical Amendment to Exclusion

Paragraph A of the Annex contains one technical amendment to U.S. note 20(yy)(75) to subchapter III of chapter 99 of the HTSUS, as set out in the Annex of the notice published at 85 FR 27489 (May 8, 2020).

Annex

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on September 24, 2018, and through August 7, 2020, U.S. note 20(yy)(75) to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS), is modified by deleting ''(described in statistical reporting number 8427.90.0090)'' and inserting ''(described in statistical reporting number 8427.90.0000 prior to July 1, 2019; described in statistical reporting number 8427.90.0090 effective July 1, 2019)'' in lieu thereof.

Joseph Barloon,

General Counsel, Office of the United States Trade Representative.

[FR Doc. 2020–25068 Filed 11–12–20; 8:45 am]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0623]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA

invites public comments about our intention to request the Office of Management and Budget (OMB) approval renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on in the **Federal Register** on 14 July 2020. The collection involves a series of voluntary surveys within the aviation community. The information to be collected will be used to and/or is necessary because it will lead to improvements for safety within the National Airspace.

DATES: Written comments should be submitted by 15 December 2020.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Edward Kleinschmidt, *edward.kleinschmidt@faa.gov* phone: 202–267–4265.

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: 2120–0759.

Title: Safety Awareness Feedback and Evaluation (SAFE) Program.

Form Numbers: None.

Type of Review: Renewal.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on in the **Federal Register** on 14 July 2020 with citation: 85 FR 42482. The collection involves a series of voluntary surveys within the aviation community. The information to be collected will be used to and/or is necessary because it will lead to improvements for safety within the National Airspace.

Respondents: Respondents include active certificated entities within five (5) aviation stakeholder groups. These stakeholder groups include General Aviation Pilots, Aviation Maintenance Technicians (Mechanics), Commercial and ATP Rated Pilots, Repair Station Management, and Air Carrier Management.

Frequency: The FAA currently conducts two (2) SAFE program studies per calendar year. As such, each of the above five stakeholders will be surveyed once in a 2.5 year period.

Estimated Average Burden per Response: 20 minutes.

Estimated Total Annual Burden:

Stakeholder group	Population size (2018 data)	Estimated sample size (95% confidence level, 3% margin of error)	Estimated hour burden (20 minutes per respondent)	Estimated cost to respondent (based on median hourly rate from BLS)	Estimate cost of data collection
Commercial and Airline Transport Pilots	262,025	1,063	354	$18.53	$6,565.80
General Aviation (top row) and Sport Pilots (bottom row)	224,404	1,063	354	8.33	5,497.80
	6,513	918	306	8.33	
Repair Station Operators	4,801	873	291	9.59	2,790.69
Aviation Maintenance Technicians and Repairers	327,384	1,064	354	10.10	3,575.40
Air Carrier Operations Management	1,895	683	228	19.78	4,509.84
Total	.....	.....	1,887	.....	22,939.53
Annualized	.....	.....	629	.....	7,646.15

Issued in Washington, DC, on November 4, 2020.

Jacqueline A Tonic,

SAFE Program Assistant, FAA, AVS, Flight Standards.

[FR Doc. 2020–25133 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability, Notice of Public Comment Period, Notice of Public Meeting, and Request for Comment on the Draft Programmatic Environmental Assessment for the Shuttle Landing Facility Reentry Site Operator License

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

ACTION: Notice of availability, notice of public comment period, notice of public meeting, and request for comment.

SUMMARY: The FAA is announcing the availability of and requesting comments on the Draft PEA for the Shuttle Landing Facility (SLF) Reentry Site Operator License. The FAA has prepared the Draft PEA to evaluate the potential environmental impacts of the FAA issuing a Reentry Site Operator License to Space Florida for the operation of a commercial space reentry site at the SLF located at the Cape Canaveral Spaceport, which includes the Kennedy Space Center and the Cape Canaveral Air Force Station. A programmatic document is a type of general, broad National Environmental Policy Act (NEPA) review from which subsequent NEPA documents can be tiered, focusing on the issues specific to the subsequent action. If a commercial space operator applies to the FAA for a reentry license to conduct reentry operations at the SLF, a separate

environmental document, tiering off the PEA, would be developed to support the issuance of a reentry license to the prospective reentry operator. The tiered environmental document would be a more detailed analysis based on vehicle specific operations.

DATES: Comments on the Draft PEA must be received on or before December 7, 2020.

The FAA will hold a virtual public meeting on December 2, 2020 from 5:00 to 7:00 p.m. EST. During this meeting, Space Florida will provide information on their proposed project, FAA will provide a licensing and PEA overview and members of the public can provide oral comments at the meeting. The FAA invites all interested parties to attend the meeting. Information for the meeting is posted on the FAA Office of Commercial Space Transportation website at: *https://www.faa.gov/space/stakeholder_engagement/shuttle_landing_facility/.*

ADDRESSES: Please submit comments or questions regarding the Draft PEA to Ms. Stacey Zee, SLF PEA, c/o ICF, 9300 Lee Highway, Fairfax, VA 22031 or by email to *slfproject@icf.com.*

FOR FURTHER INFORMATION CONTACT: Ms. Stacey Zee, Environmental Protection Specialist, Federal Aviation Administration, 800 Independence Avenue SW, Suite 325, Washington, DC 20591; email *Stacey.Zee@faa.gov;* phone 202–981–1437.

SUPPLEMENTARY INFORMATION: The FAA is the lead agency. The National Aeronautics and Space Administration, U.S. Space Force, U.S. Fish and Wildlife Service, and the National Park Service are cooperating agencies for the Programmatic Environmental Assessment (PEA) due to their special expertise and jurisdictions.

The FAA has prepared the Draft PEA in accordance with NEPA (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, as part of its licensing process. Concurrent with the NEPA process and to determine the potential effects of the Proposed Action on historic and cultural properties, the FAA has initiated Section 106 Consultation with the Florida State Historic Preservation Office and the following Native American tribes: The Catawba Indian Nation, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the Eastern Band of Cherokee Indians, the Jena Band of Choctaw Indians, the Miccosukee Tribe of Indians of Florida, the Muscogee (Creek) Nation, the Poarch Band of Creek Indians, and the Seminole Tribe of Florida.

The FAA has prepared the Draft PEA to evaluate the potential environmental impacts of Space Florida's proposal to operate a reentry location for horizontally landed reentry vehicles at the SLF located at the Cape Canaveral Spaceport, which includes the Kennedy Space Center and the Cape Canaveral Air Force Station. The Draft PEA considers the potential environmental impacts of the Proposed Action and the No Action Alternative. A programmatic document is a type of general, broad NEPA review from which subsequent NEPA documents can be tiered, focusing on the issues specific to the subsequent action (40 CFR 1502.20). If a commercial space operator applies to the FAA for a reentry license to conduct reentry operations at the SLF, a separate environmental document, tiering off the PEA, would be developed to support the issuance of a reentry license to the prospective reentry operator. The tiered environmental document would be a more detailed analysis based on vehicle specific operations.

An electronic version of the Draft PEA is available on the FAA Office of Commercial Space Transportation website at: *https://www.faa.gov/space/environmental/nepa_docs/slf_ea/.*

The FAA encourages all interested agencies, organizations, Native American tribes, and members of the public to submit comments on the analysis presented in the Draft PEA by December 7, 2020. Comments should be as specific as possible and address the analysis of potential environmental impacts. Reviewers should organize their participation, so it is meaningful and makes the agency aware of the viewer's interests and concerns using quotations and other specific references to the text of the Draft PEA and related documents. Matters that could have been raised with specificity during the comment period on the Draft PEA may not be considered if they are raised for the first time later in the decision process. This comment procedure is intended to ensure that substantive comments and concerns are made available to the FAA in a timely manner so that the FAA has an opportunity to address them.

Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from the public review your personal identifying information, we cannot guarantee that we will be able to do so.

Issued in Washington, DC.

Daniel Murray,

Manager, Safety Authorization Division.

[FR Doc. 2020–25062 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Utah

AGENCY: Utah Department of Transportation (UDOT), Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by UDOT.

SUMMARY: The FHWA, on behalf of UDOT, is issuing this notice to announce actions taken by UDOT that are final Federal agency actions. The final agency actions relate to a proposed highway project, a new interchange on Interstate 15 (I–15) between approximate mileposts 325.2 and 326, at Shepard Lane, in Farmington City, Davis County, Utah. Those actions grant licenses, permits and/or approvals for the project.

DATES: By this notice, FHWA, on behalf of UDOT, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before April 12, 2021. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Elisa Albury, Environmental Program Manager, UDOT Environmental Services, PO Box 143600, Salt Lake City, UT 84114; (801) 965–4000; email: *ealbury@utah.gov.* UDOT's normal business hours are 8 a.m. to 5 p.m. (Mountain Time Zone), Monday through Friday, except State and Federal holidays.

SUPPLEMENTARY INFORMATION: Effective January 17, 2017, FHWA assigned to UDOT certain responsibilities of FHWA for environmental review, consultation, and other actions required by applicable Federal environmental laws and regulations for highway projects in Utah, pursuant to 23 U.S.C. 327. Actions taken by UDOT on FHWA's behalf

pursuant to 23 U.S.C. 327 constitute Federal agency actions for purposes of Federal law. Notice is hereby given that UDOT has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and/or approvals for the Shepard Lane Interchange project in the State of Utah.

The project proposes to construct a new interchange on I–15 at Shepard Lane to reduce congestion and improve safety on mainline I–15 and US–89 by decreasing 2050 travel demand on Park Lane in Farmington City, Davis County, Utah. The project is included in UDOT's adopted 2020–2025 State Transportation Improvement Plan (STIP) as project number S–I15–7(340)325; PIN 15684. The project is also included in the Wasatch Front Regional Council's 2019–2050 Regional Transportation Plan.

The actions by UDOT and the laws under which such actions were taken are described in the Shepard Lane Interchange Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) approved on October 19, 2020, and other documents in the UDOT project records. The EA and the FONSI are available for review by contacting UDOT at the address provided above. In addition, these documents can be viewed and downloaded from the UDOT project website at *www.udot.utah.gov/shepardlaneinterchange.* This notice applies to the EA, the FONSI, the determination pursuant to Section 4(f) of the Department of Transportation Act of 1966 (23 U.S.C. 138 and 49 U.S.C. 303), and all other UDOT and other federal agency decisions and other actions with respect to the project as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to the following laws (including their implementing regulations):

1. *General:* National Environmental Policy Act [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128]; MAP–21, the Moving Ahead for Progress in the 21st Century Act [Pub. L. 112–141].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [23 U.S.C. 138 and 49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1377]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(M, 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986; Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Noise:* Federal-Aid Highway Act of 1970, Public Law 91–605 [84 Stat. 1713].

10. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

(Authority: 23 U.S.C. 139 (*l*)(1))

Dated: November 6, 2020.

Ivan Marrero,

Division Administrator, Federal Highway Administration, Salt Lake City, Utah.

[FR Doc. 2020–25156 Filed 11–12–20; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of this person are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See Supplementary Information section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treas.gov/ofac*).

Notice of OFAC Action(s)

On November 6, 2020, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following person are blocked under the relevant sanctions authority listed below.

Individual:

1. BASSIL, Gibran (a.k.a. BASSIL, Gebran; a.k.a. BASSIL, Gebran Gerji (Arabic: جبران باسيل جرجي); a.k.a. BASSIL, Gebran Jerji; a.k.a. BASSIL, Jibran), Embassies Street, Baabda, Mount Lebanon Governorate, Lebanon; Bank Street, Beirut, Beirut Governorate, Lebanon; Mar Mikhael Street, Beirut, Beirut Governorate, Lebanon; DOB 21 Jun 1970; POB Batroun, Northern Governorate, Lebanon; nationality Lebanon; Gender Male; Passport LD0000004 (Lebanon) expires 23 Aug 2022 (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(B)(1) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2018 Comp., p. 399, (E.O. 13818) for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or who has directly or indirectly engaged in, corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery.

Dated: November 6, 2020.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2020–25052 Filed 11–12–20; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0636]

Agency Information Collection Activity Under OMB Review: Accelerated Payment Verification of Completion Letter

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0636.''

FOR FURTHER INFORMATION CONTACT: Danny S. Green, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 421–1354 or email *danny.green2@va.gov.* Please refer to ''OMB Control No. 2900–0636'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 107–103; Public Law 110–181; Section 3014A of title 38; Section 16131a of title 10; 38 CFR 21.7154(d)(1); Sections 16131a of title 10, United States Code.

Title: Accelerated Payment Verification of Completion Letter.

OMB Control Number: 2900–0636.

Type of Review: Revision of a currently approved collection.

Abstract: Claimants electing to receive an accelerated payment for educational assistance allowance must certify they received such payment and how the payment was used. The data collected is used to determine the claimant's entitlement to accelerated payment.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** *Notice* with a 60-day comment period soliciting comments on this collection of information was published on September 8, 2020, at page 55581.

Affected Public: Individuals and Households.

Estimated Annual Burden: 1 hour.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: One Time.

Estimated Number of Respondents: 9.

By direction of the Secretary.

Danny S. Green,

VA PRA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020–25092 Filed 11–12–20; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 85 Friday,
No. 220 November 13, 2020

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 438 and 457
Medicaid Program; Medicaid and Children's Health Insurance Program (CHIP) Managed Care; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 438 and 457

[CMS–2408–F]

RIN 0938–AT40

Medicaid Program; Medicaid and Children's Health Insurance Program (CHIP) Managed Care

AGENCY: Centers for Medicare & Medicaid Services (CMS), Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule advances CMS' efforts to streamline the Medicaid and Children's Health Insurance Program (CHIP) managed care regulatory framework and reflects a broader strategy to relieve regulatory burdens; support state flexibility and local leadership; and promote transparency, flexibility, and innovation in the delivery of care. These revisions of the Medicaid and CHIP managed care regulations are intended to ensure that the regulatory framework is efficient and feasible for states to implement in a cost-effective manner and ensure that states can implement and operate Medicaid and CHIP managed care programs without undue administrative burdens.

DATES:

Effective Date: These regulations are effective on December 14, 2020, except for the additions of §§ 438.4(c) (instruction 4) and 438.6(d)(6) (instruction 7), which are effective July 1, 2021.

Compliance Dates: States must comply with the requirements of this rule beginning December 14, 2020, except for §§ 438.4(c), 438.6(d)(6), 438.340, and 438.364. States must comply with §§ 438.4(c) and 438.6(d)(6) as amended effective July 1, 2021 for Medicaid managed care rating periods starting on or after July 1, 2021. States must comply with § 438.340 as amended for all Quality Strategies submitted after July 1, 2021. As § 438.340 applies to CHIP through an existing cross-reference in § 457.1240(e), separate CHIPs must also come into compliance with the requirements of § 438.340 as amended for all Quality Strategies submitted after July 1, 2021. States must comply with § 438.364 for all external quality reports submitted on or after July 1, 2021. Because § 438.364 applies to CHIP through an existing cross reference in § 457.1250(a), separate CHIPs must also come into compliance with the requirements of § 438.364 for external quality reports submitted on or after July 1, 2021.

FOR FURTHER INFORMATION CONTACT:

John Giles, (410) 786–5545, for Medicaid Managed Care provisions.

Carman Lashley, (410) 786–6623, for the Medicaid Managed Care Quality provisions.

Melissa Williams, (410) 786–4435, for the CHIP provisions.

SUPPLEMENTARY INFORMATION:

I. Medicaid Managed Care

A. Background

States may implement a managed care delivery system using four types of Federal authorities—sections 1915(a), 1915(b), 1932(a), and 1115(a) of the Social Security Act (the Act); each is described briefly in this final rule.

Under section 1915(a) of the Act, states can implement a voluntary managed care program by executing a contract with organizations that the state has procured using a competitive procurement process. To require beneficiaries to enroll in a managed care program to receive services, a state must obtain approval from CMS under one of two primary authorities:

- Through a state plan amendment that meets standards set forth in section 1932 of the Act, states can implement a mandatory managed care delivery system. This authority does not allow states to require beneficiaries who are dually eligible for Medicare and Medicaid (dually eligible), American Indians/Alaska Natives (except as permitted in section 1932(a)(2)(C) of the Act), or children with special health care needs to enroll in a managed care program. State plans, once approved, remain in effect until modified by the state.
- We may grant a waiver under section 1915(b) of the Act, permitting a state to require all Medicaid beneficiaries to enroll in a managed care delivery system, including dually eligible beneficiaries, American Indians/Alaska Natives, or children with special health care needs. After approval, a state may operate a section 1915(b) waiver for a 2-year period (certain waivers can be operated for up to 5 years if they include dually eligible beneficiaries) before requesting a renewal for an additional 2 (or 5) year period.

We may also authorize managed care programs as part of demonstration projects under section 1115(a) of the Act that include waivers permitting the state to require all Medicaid beneficiaries to enroll in a managed care delivery system, including dually eligible beneficiaries, American Indians/Alaska Natives, and children with special health care needs. Under this authority, states may seek additional flexibility to demonstrate and evaluate innovative policy approaches for delivering Medicaid benefits, as well as the option to provide services not typically covered by Medicaid. Such flexibility is approvable only if the objectives of the Medicaid statute are likely to be met, and the demonstration is subject to evaluation.

The above authorities may permit states to operate their programs without complying with the following standards of Medicaid law outlined in section of 1902 of the Act:

- *Statewideness* [section 1902(a)(1) of the Act]: States may implement a managed care delivery system in specific areas of the state (generally counties/parishes) rather than the whole state;
- *Comparability of Services* [section 1902(a)(10) of the Act]: States may provide different benefits to people enrolled in a managed care delivery system; and
- *Freedom of Choice* [section 1902(a)(23)(A) of the Act]: States may generally require people to receive their Medicaid services only from a managed care plan's network of providers or primary care provider.

In the May 6, 2016 **Federal Register** (81 FR 27498), we published the ''Medicaid and Children's Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, and Revisions Related to Third Party Liability'' final rule (hereinafter referred to as ''the 2016 final rule'') that modernized the Medicaid and CHIP managed care regulations to reflect changes in the use of managed care delivery systems. The 2016 final rule aligned many of the rules governing Medicaid and CHIP managed care with those of other major sources of coverage; implemented applicable statutory provisions; strengthened actuarial soundness payment provisions to promote the accountability of managed care program rates; strengthened efforts to reform delivery systems that serve Medicaid and CHIP beneficiaries; and enhanced policies related to program integrity.

In the January 18, 2017 **Federal Register** (82 FR 5415), we published the ''Medicaid Program; The Use of New or Increased Pass-Through Payments in Medicaid Managed Care Delivery Systems'' final rule (the 2017 pass-through payments final rule) that made changes to the pass-through payment transition periods and the maximum

amount of pass-through payments permitted annually during the transition periods under Medicaid managed care contract(s) and rate certification(s). That final rule prevented increases in pass-through payments and the addition of new pass-through payments beyond those in place when the pass-through payment transition periods were established in the 2016 final Medicaid managed care regulations.

In the November 14, 2018 **Federal Register** (83 FR 57264), we published the ''Medicaid Program; Medicaid and Children's Health Insurance Plan (CHIP) Managed Care'' proposed rule (the 2018 proposed rule) which included proposals designed to streamline the Medicaid and CHIP managed care regulatory framework to relieve regulatory burdens; support state flexibility and local leadership; and promote transparency, flexibility, and innovation in the delivery of care. This 2018 proposed rule was intended to ensure that the Medicaid and CHIP managed care regulatory framework is efficient and feasible for states to implement in a cost-effective manner and ensure that states can implement and operate Medicaid and CHIP managed care programs without undue administrative burdens.

Since publication of the 2016 final rule, the landscape for healthcare delivery continues to change, and states are continuing to work toward reforming healthcare delivery systems to address the unique challenges and needs of their local citizens. To that end, the Department of Health and Human Services (HHS) and CMS issued a letter [1] to the nation's Governors on March 14, 2017, affirming the continued HHS and CMS commitment to partnership with states in the administration of the Medicaid program, and noting key areas where we intended to improve collaboration with states and move toward more effective program management. In that letter, we committed to a thorough review of the managed care regulations to prioritize beneficiary outcomes and state priorities.

Since our issuance of that letter, stakeholders have expressed that the current Federal regulations are overly prescriptive and add costs and administrative burden to state Medicaid programs with few improvements in outcomes for beneficiaries. As part of the agency's broader efforts to reduce administrative burden, we undertook an analysis of the current managed care regulations to ascertain if there were ways to achieve a better balance between appropriate Federal oversight and state flexibility, while also maintaining critical beneficiary protections, ensuring fiscal integrity, and improving the quality of care for Medicaid beneficiaries. This review process culminated in the November 14, 2018 proposed rule. After reviewing the public comments to the 2018 proposed rule, this final rule seeks to streamline the managed care regulations by reducing unnecessary and duplicative administrative burden and further reducing Federal regulatory barriers to help ensure that state Medicaid agencies are able to work efficiently and effectively to design, develop, and implement Medicaid managed care programs that best meet each state's local needs and populations.

B. Medicaid Managed Care Provisions of the Rule and Analysis of and Responses to Public Comments

We received a total of 215 timely comments from state Medicaid and CHIP agencies, advocacy groups, health care providers and associations, health insurers, managed care plans, health care associations, and the general public. The following sections, arranged by subject area, include a summary of the comments we received and our responses to those comments. In response to the November 14, 2018 proposed rule, some commenters chose to raise issues that were beyond the scope of our proposals. In this final rule, we are not summarizing or responding to those comments.

1. Standard Contract Requirements (§ 438.3(t))

In the 2016 final rule, we added a new provision at § 438.3(t) requiring that contracts with a managed care organization (MCO), prepaid inpatient health plan (PIHP), or prepaid ambulatory health plan (PAHP) that cover Medicare-Medicaid dually eligible enrollees provide that the MCO, PIHP, or PAHP sign a Coordination of Benefits Agreement (COBA) and participate in the automated crossover claim process administered by Medicare. The purpose of this provision was to promote efficiencies for providers by allowing providers to bill once, rather than sending separate claims to Medicare and the Medicaid MCO, PIHP, or PAHP. The Medicare crossover claims process is limited to fee-for service-claims for Medicare Parts A and B; it does not include services covered by Medicare Advantage plans under Medicare Part C.

Since publication of the 2016 final rule, we heard from a number of states that, prior to the rule, had effective processes in place to identify and send appropriate crossover claims to their managed care plans from the crossover file the states received from us. Medicaid beneficiaries can be enrolled in multiple managed care plans or the state's fee-for-service (FFS) program. For example, a beneficiary may have medical care covered by an MCO, dental care covered by a PAHP, and behavioral health care covered by the state's FFS program. When a Medicaid managed care plan enters into a crossover agreement with Medicare, as required in § 438.3(t), we then send to that plan all the Medicare FFS crossover claims for their Medicaid managed care enrollees, as well as to the state Medicaid agency. When this occurs, the managed care plan(s) may receive claims for services that are not the contractual responsibility of the managed care plan. Additionally, states noted that having all claims sent to the managed care plan(s) can result in some claims being sent to the wrong plan when beneficiaries change plans. Some states requested regulation changes to permit states to send the appropriate crossover claims to their managed care plans; that is, states would receive the CMS crossover file and then forward to each Medicaid managed care plan only those crossover claims for which that plan is responsible. These states have expressed that to discontinue existing effective processes for routing crossover claims to their managed care plans to comply with this provision adds unnecessary costs and burden to the state and plans, creates confusion for payers and providers, and delays provider payments.

To address these concerns, we proposed to revise § 438.3(t) to remove the requirement that managed care plans must enter into a COBA directly with Medicare and instead would require a state's contracts with managed care plans to specify the methodology by which the state would ensure that the managed care plans receive all appropriate crossover claims for which they are responsible. Under this proposal, states would be able to determine the method that best meets the needs of their program, whether by requiring the managed care plans to enter into a COBA and participate in the automated claims crossover process directly or by using an alternative method by which the state forwards crossover claims it receives from Medicare to each MCO, PIHP, or PAHP, as appropriate. Additionally, we proposed to require, if the state elects to use a methodology other than requiring

[1] Letter to the nation's Governors on March 14, 2017: *https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf*.

the MCO, PIHP, or PAHP to enter into a COBA with Medicare, that the state's methodology would have to ensure that the submitting provider is promptly informed on the state's remittance advice that the claim has been sent to the MCO, PIHP, or PAHP for payment consideration.

The following summarizes the public comments received on our proposal to revise § 483.3(t) and our response to those comments.

Comment: Many commenters supported the proposed addition of state flexibility to use alternate mechanisms to send crossover claims to managed care plans. Commenters stated that the changes would provide states and plans more flexibility while continuing to promote better coordination of benefits for dually eligible individuals and reducing burden on the providers who serve them.

Response: We appreciate the support for the proposed change to the regulation.

Comment: One commenter supported the proposed rule but added that it is necessary for CMS to ensure that any alternative state crossover methodology separates Medicare claims from Medicaid rate setting and actuarial soundness.

Response: While Medicare Part A or Part B cost-sharing payments—which are Medicaid costs—must be factored into Medicaid rate setting if a Medicaid plan is responsible for covering them, we agree that other costs for the provision of Medicare covered services should not be. Nothing in our proposal or the revision to § 438.3(t) that we finalize here will impact the processes for Medicaid rate-setting or determination of actuarial soundness.

Comment: One commenter supported the proposed changes but offered a note of caution relating to potentially opening the door to subpar manual processes that states might adopt that could incur additional costs and unnecessary complexity.

Response: As discussed in this final rule, the regulations at § 438.3(t) finalized in 2016 established a crossover process in which providers only bill once, rather than multiple times. The revision to § 438.3(t) that we are finalizing here maintains a process in which providers only bill once (to Medicare), because the regulation only applies when the state enters into a COBA but allows greater state flexibility in how that claim is routed from Medicare to Medicaid and Medicaid managed care plans. We agree that automated processes are usually optimal and create efficiencies for states, plans, and providers. We encourage states that adopt alternate methodologies to use automated processes as appropriate to achieve efficient and economical systems. Regardless of the method chosen by a state, the provider role in the crossover claim submission process is not changed by this proposal.

Comment: Some commenters noted concern that the proposed changes would have on plans and providers that operated across state lines. One commenter noted that Medicaid managed care plans that operate in multiple states would need to develop and maintain different processes in different states. Another commenter who supported the proposed changes noted that it may pose challenges for providers that furnish services in multiple states.

Response: We carefully considered the benefits of national uniformity for Medicaid managed care plans and providers that serve multiple states. In this instance, we believe that states should have the flexibility to adopt the methodology that works best within their state to ensure that the appropriate MCO, PIHP, or PAHP will receive all applicable crossover claims for which the MCO, PIHP, or PAHP is responsible. This flexibility will allow states to maintain current processes and not incur unnecessary costs or burden to providers and beneficiaries to conform to a new mandated process. We note here that this revision to § 438.3(t) does not require states to change their current cross over claim handling processes; it merely provides states with an option. Regardless of which methodology a state chooses to implement, it should not have any effect on providers, who should be able to submit their claims once and have it routed to the appropriate MCO, PIHP, or PAHP for adjudication.

Comment: One commenter who objected to the proposed changes requested clarification about how it intersects with a similar provision in section 53102(a)(1) of the Bipartisan Budget Act (BBA) of 2018 (Pub. L. 115–123, enacted February 9, 2018) concerning procedures for states processing prenatal claims when there is a known third party liability.

Response: We do not believe that § 438.3(t), as amended here, conflicts with the third party liability requirements added by section 53102(a)(1) of the BBA of 2018. We note that section 53102(a)(1) of the BBA of 2018 applies when the provider bills Medicaid directly for a prenatal claim. As further discussed in our June 1, 2018 Informational Bulletin to states,[2] that provision requires states to use standard cost avoidance when processing prenatal claims. Thus if the state Medicaid agency has determined that a third party is likely liable for a prenatal claim, it must reject, but not deny, the claim returning the claim back to the provider noting the third party that the Medicaid state agency believes to be legally responsible for payment. If a provider billed Medicaid for a prenatal claim for a dually eligible individual, the state would be required to reject the claim but note that Medicare is the liable third party, as Medicare would be the primary payer.

By contrast, the regulation in § 438.3(t), which is triggered because the state enters into a COBA with Medicare, applies when the provider bills Medicare for any Part A or B service under Medicare FFS for a dually eligible individual for which there is cost-sharing covered by Medicaid. Medicare would generate the crossover consistent with the COBAs in place. If the state has elected to require its Medicaid managed care plans to enter into a COBA with Medicare, then Medicare would forward the crossover claims to the Medicaid managed care plan. If the state has elected under § 438.3(t) to use a different methodology for ensuring that the appropriate managed care plan receives the applicable crossover claims, then Medicare would forward the crossover claims to the state pursuant to the state's COBA with Medicare; the state would then forward that crossover claim to the Medicaid managed care plan for payment. If a state adopts an alternate methodology as provided in § 438.3(t), the state must ensure that the submitting provider is promptly informed on the state's remittance advice that the claims have not been denied, but instead, has been sent to the MCO, PIHP, or PAHP for consideration.

Comment: One commenter requested that CMS add regulatory language at § 438.3(t) stating that ''The coordination methodology also must ensure that dually eligible individuals are not denied Medicaid benefits they would be eligible to receive if they were not also eligible for Medicare benefits.''

Response: We agree that it is essential that dually eligible individuals are not denied Medicaid benefits they would be eligible to receive if they were not also eligible for Medicare benefits; however, this is outside the scope of this regulation, which is limited to how states must ensure the appropriate managed care plan receives all

[2] See *https://www.medicaid.gov/federal-policy-guidance/downloads/cib060118.pdf.*

applicable crossover claims for which it is responsible. We note that there is no regulation in part 438 that authorizes denial of Medicaid-covered services for an enrollee who is eligible for those services based on the enrollee's eligibility as well for Medicare.

Comment: One commenter suggested providing Medicare eligibility data to MCOs, PIHPS, and PAHPs through data feeds, file transfers, or an online portal for efficient coordination of benefits, to improve care coordination and outcomes. One commenter encouraged free and timely access to all clinical and administrative data to promote coordination among managed care plans. The commenter suggested creating a standardized process by which managed care organizations can receive timely claims and clinical data from both Medicaid and Medicare. The commenter noted that the proposed changes may limit full integration in instances where a beneficiary in a Medicaid managed long term care plan is enrolled in an unaligned (that is, offered by a separate organization) Medicare Advantage plan such as a Dual Eligible Special Needs Plan offered by a different organization than offers the Medicaid plan in which the person is enrolled.

Response: We appreciate the value of making such data available to plans. We are separately exploring whether we have authority to do so within existing limits, such as those established under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191, enacted August 21, 1996). For the comment on enrollment in different managed care plans for Medicaid and Medicare, we note that the Medicare crossover process is limited to Original Medicare (Medicare Part A and B). Claims for cost sharing for a Medicare Advantage enrollee are beyond the scope of this regulation.

Comment: One commenter requested that we itemize all claim inclusion and exclusion selection criteria for professional claim services.

Response: We do not have the authority to make the requested change. The National Uniform Claims Committee (NUCC), which establishes the standards for 837 professional claims and the CMS–1500 form, has chosen not to array professional and DME claims by type of bill (TOB), as happens with institutional claims, which are under the purview of the National Uniform Billing Committee (NUBC).

Comment: One commenter requested that we allow plans to continue their COBA with, and receive crossover claims directly from, Medicare in states where plans already did so as required under the 2016 final rule.

Response: As we proposed the amendment and are finalizing it here, § 438.3(t) does not require any changes for states and MCOs, PIHPs, and PAHPs that are already complying with the 2016 final rule. This final rule amends § 438.3(t) to provide states with additional flexibility to adopt a different methodology to ensure that the appropriate MCO, PIHP, or PAHP will receives all applicable crossover claims for which the MCO, PIHP, or PAHP is responsible, subject to some limited parameters to ensure that the applicable provider is provided information on the state's remittance advice. This additional flexibility might result in states developing and using more efficient and economical processes for handling cross-over claims applicable to Medicaid managed care enrollees.

Comment: One commenter who supported the proposed changes encouraged CMS to monitor states that adopt alternative methodologies to ensure that providers still receive payments in a timely manner.

Response: While this regulation does not establish a timeframe for the state to forward the crossover claim to its managed care plan, we note that the existing regulations on timely claims payment in the Medicaid FFS context apply. Specifically, § 447.45(d)(4)(ii) specifies that the state Medicaid agency must pay the Medicaid claim relating to a Medicare claim within 12 months of receipt or within 6 months of when the agency or provider receives notice of the disposition of the Medicare claim. A state that uses an alternative methodology under § 438.3(t) and receives crossover claims from Medicare would need to ensure payment within this timeframe. To do so, the state would need to forward crossover claims to a Medicaid plan and ensure the plan pays it within 6 months of when the state initially received it.

Comment: A few commenters who opposed the proposed changes recommended that, if the regulation is finalized as proposed and a state elects to devise its own system, the state be required to promptly educate participating health care providers about any ensuing changes in the state's updated remittance advice. One commenter expressed concern that some health care providers would not be promptly made aware of the new requirements to submit multiple claims to the managed care plan for payment consideration, resulting in unpaid claims through no fault of their own, and that this would be antithetical to CMS' ''Patients Over Paperwork'' initiative.

Response: We believe that provider education is critical whenever a state implements changes to how crossover claims are routed to the Medicaid managed care plan responsible for processing them. We encourage states to conduct such education prior to implementing any process changes.

For the concern that without education, providers would not know where to submit claims for Medicare cost-sharing, this provision is designed to remove from providers the burden of having to identify the Medicaid managed care plan in which each dually eligible patient is enrolled, and submit the bill for the Medicare cost-sharing to the correct plan. Under our proposed regulation, the crossover claim is still routed to the Medicaid managed care plan. States may continue to require that plans enter into a COBA with Medicare to route crossover claims directly to the plan. In the alternative, states that elect to receive crossover claims from Medicare (or elect any other methodology than having the Medicaid managed care plans enter into COBAs with Medicare) would route the claims to the plan and issue remittance advice to the applicable provider. In both cases, the claims will be routed to the Medicaid managed care plan; there is no need for the provider to take any action to identify or submit the crossover claim to the plan. We believe this is fully in line with our ''Patients over Paperwork'' initiative.

We also sponsor an enhanced secondary COBA feed (also known as the ''Medicaid Quality project''), which is available to states that have a COBA and participate in the Medicare crossover process. This secondary feed ensures that states receive a complete array of Medicare FFS adjudicated Part A and B claims for individuals that the states submitted to CMS on their eligibility file. The state must be in receipt of the normal crossover claims file to be eligible to receive the second enhanced COBA feed.

Comment: One commenter who opposed the proposed changes expressed concern that any process in which there is an intermediary would create confusion and delay. The commenter noted that a smoothly operating crossover claim process reduces burden on providers, and may make them more willing to serve Qualified Medicare Beneficiaries and other dually eligible individuals. The commenter suggested simplifying and streamlining the procedures so that all crossover claims can be handled promptly by one entity, either the state

Medicaid agency or the MCO. The commenter also noted that when CMS adopted § 438.3(t), it allowed states time to have Medicaid managed care plans get COBAs in place, and that if more time is needed, the better course would be to extend the time for enforcement rather than to modify the regulation.

Response: We share the preference for reducing the complexity of the crossover claim process and agree with the commenter that complexity in the crossover process can be a disincentive to serving dually eligible individuals. The § 438.3(t) regulatory language that we proposed and are finalizing requires that if a state uses an alternate methodology, it must ensure that the appropriate managed care plan (that is, the MCO, PIHP, or PAHP whose contract covers the services being billed on the claim) receives all applicable crossover claims, and ensure the remittance advice conveys that the claim is forwarded rather than denied. In either scenario, the provider is relieved of the burden of determining which entity—the state or Medicaid managed care plan—is liable for the Medicare cost-sharing.

Comment: Several commenters opposed the proposed changes and requested we leave the current regulatory requirements in place. Many of these commenters noted that the flexibility in the proposed change could increase provider administrative burden and confusion when states indicate multiple denials on the state's remittance advice to providers (that is, when they forward a crossover claim to an MCO, PIHP, or PAHP) and that it would create further confusion when the Medicaid managed care plan then processed the claim and notified the provider on the plan's remittance advice. Some also expressed concern that alternate methodologies would increase provider practice costs—especially for small practices.

Response: As noted in the proposed rule and in this final rule, an important factor prompting the proposed change was that some states and providers raised concerns after the original provision was finalized in the 2016 final rule requiring a state to abandon effective alternative processes would actually add to provider burden and increase risk of payment delays. We believe that state flexibility would permit carefully crafted alternative arrangements to continue in a way that benefits providers, plans, and states. We reiterate that this proposal retains a system in which providers are only required to bill once (to Medicare), and that the claim will be transferred to Medicaid or the Medicaid managed care plan to address the payment of Medicare cost-sharing.

To address the commenter's concern about when states indicate multiple denials on the state's remittance advice, we are clarifying our intent by finalizing § 438.3(t) with additional text specifying that the state's remittance advice must inform the provider that the claim was not denied by the state but was redirected to a managed care plan for adjudication. We regret that our intent was not clear in the proposed rule and believe this clarification will minimize provider confusion and reduce the risk of providers inadvertently perceiving forwarded claims as denied.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.3(t) as proposed with one modification to clarify that when a state elects not to require its managed care plans to enter into COBAs with Medicare, the remittance advice issued by the state must indicate that the state has not denied payment but that the claim has been sent to the MCO, PIHP, or PAHP for payment consideration. In addition, we are finalizing the regulation text with slight grammatical corrections to use the present tense consistently.

2. Actuarial Soundness Standards (§ 438.4) [3]

a. Option to Develop and Certify a Rate Range (§ 438.4(c))

Before the 2016 final rule was published, we considered any capitation rate paid to a managed care plan that fell anywhere within the certified rate range to be actuarially sound (81 FR 27567). However, to make the rate setting and the rate approval process more transparent, we changed that process in the 2016 final rule at § 438.4 to require that states develop and certify as actuarially sound each individual rate paid per rate cell to each MCO, PIHP, or PAHP with enough detail to understand the specific data, assumptions, and methodologies behind that rate (81 FR 27567). We noted in that 2016 final rule that states could continue to use rate ranges to gauge an appropriate range of payments on which to base negotiations with an MCO, PIHP, or PAHP, but would have to ultimately provide certification to us of a specific rate for each rate cell, rather than a rate range (81 FR 27567). We believed that this change would enhance the integrity of the Medicaid rate-setting process and align Medicaid policy more closely with actuarial practices used in setting rates for non-Medicaid plans (81 FR 27568).

Since publication of the 2016 final rule, we heard from stakeholders that the requirement to certify a capitation rate per rate cell, rather than to certify a rate range, has the potential to diminish states' ability to obtain the best rates when contracts are procured through competitive bidding. For example, we heard from one state that historically competitively bid the administrative component of the capitation rate that the requirement to certify a capitation rate per rate cell may prevent the state from realizing a lower rate that could have been available through the state's procurement process. States that negotiate dozens of managed care plans' rates annually have also cited the potential burden associated with losing the flexibility to certify rate ranges. States have claimed that the elimination of rate ranges could potentially increase administrative costs and burden to submit separate rate certifications and justifications for each capitation rate paid per rate cell.

To address states' concerns while ensuring that rates are actuarially sound and Federal resources are spent appropriately, we proposed to add § 438.4(c) to provide an option for states to develop and certify a rate range per rate cell within specified parameters. We designed our proposal to address our previously articulated concerns over the lack of transparency when large rate ranges were used by states to increase or decrease rates paid to the managed care plans without providing further notification to us or the public of the change. We noted that the rate range option at proposed paragraph (c) would allow states to certify a rate range per rate cell subject to specific limits and

[3] In *Texas* v. *United States,* No. 7:15–cv–151–O, slip op. at 40, 62 (N.D. Tex. Mar. 5, 2018), appeal docketed, No. 18–10545 (5th Cir. May 7, 2018) (''Texas''), six states challenged the portion of the regulation previously codified at 42 CFR 438.6(c)(1)(i)(C) (2002) (now codified in portions of 42 CFR 438.2, 438.4), defining ''actuarially sound capitation rates'' as capitation rates ''that . . . [h]ave been certified . . . by actuaries who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board,'' on the basis that Actuarial Standard of Practice (''ASOP'') 49 defines ''actuarially sound capitation rates'' to mean rates that account for all fees and taxes, including the Health Insurance Provider Fee (''HIPF''). In a decision issued on March 5, 2018, the court declared the challenged portion of the regulation to be ''set aside'' under the Administrative Procedure Act, 5 U.S.C. 706(2)(B) through (C). Texas, slip op. at 62. In its decision, the court specifically allowed CMS to ''continue to use ASOP 49 to make internal decisions whether capitation rates are 'actuarially sound,' '' and only ''cannot use ASOP 49 to . . . require Plaintiffs to pay the HIPF.'' Texas, slip op. at 21. As of July 2019, the court had not issued a final judgment. The government has appealed the court's March 5, 2018 decision; during the pendency of the appeal, the government is complying with the court's order.

would require the submission of a rate recertification if the state determines that changes are needed within the rate range during the rate year. Under our proposal, we noted that an actuary must certify the upper and lower bounds of the rate range as actuarially sound and would require states to demonstrate in their rate certifications how the upper and lower bounds of the rate range were actuarially sound.

Specifically in § 438.4(c)(1), we proposed the specific parameters for the use of rate ranges: (1) The rate certification identifies and justifies the assumptions, data, and methodologies specific to both the upper and lower bounds of the rate range; (2) the upper and lower bounds of the rate range are certified as actuarially sound consistent with the requirements of part 438; (3) the upper bound of the rate range does not exceed the lower bound of the rate range multiplied by 1.05; (4) the rate certification documents the state's criteria for paying MCOs, PIHPs, and PAHPs at different points within the rate range; and (5) compliance with specified limits on the state's ability to pay managed care plans at different points within the rate range. States using this option would be prohibited from paying MCOs, PIHPs, and PAHPs at different points within the certified rate range based on the willingness or agreement of the MCOs, PIHPs, or PAHPs to enter into, or adhere to, intergovernmental transfer (IGT) agreements, or the amount of funding the MCOs, PIHPs, or PAHPs provide through IGTs. We proposed these specific conditions and limitations on the use of rate ranges to address our concerns noted in this final rule; that is, that rates are actuarially sound and ensure appropriate stewardship of Federal resources, while also permitting limited state flexibility to use certified rate ranges. We stated in the proposed rule our belief that the proposed conditions and limitations on the use of rate ranges struck the appropriate balance between prudent fiscal and program integrity and state flexibility. We invited comment on these specific proposals and whether additional conditions should be considered to ensure that rates are actuarially sound.

Under proposed § 438.4(c)(2)(i), states certifying a rate range would be required to document the capitation rates payable to each managed care plan, prior to the start of the rating period for the applicable MCO, PIHP, and PAHP, at points within the certified rate range consistent with the state's criteria in proposed paragraph (c)(1)(iv). States electing to use a rate range would have to submit rate certifications to us prior to the start of the rating period and must comply with all other regulatory requirements including § 438.4, except § 438.4(b)(4) as specified. During the contract year, states using the rate range option in § 438.4(c)(1) would not be able to modify capitation rates within the +/− 1.5 percent range allowed under existing § 438.7(c)(3); we proposed to codify this as § 438.4(c)(2)(ii). We noted that this provision would enable us to give states the flexibility and administrative simplification to use certified rate ranges. We noted in the proposed rule that while the use of rate ranges is not standard practice in rate development, our proposal would align with standard rate development practices by requiring recertification when states elect to modify capitation rates within a rate range during the rating year. States wishing to modify the capitation rates within a rate range during the rating year would be required, in proposed § 438.4(c)(2)(iii), to provide a revised rate certification demonstrating that the criteria for initially setting the rate within the range, as described in the initial rate certification, were not applied accurately; that there was a material error in the data, assumptions, or methodologies used to develop the initial rate certification and that the modifications are necessary to correct the error; or that other adjustments are appropriate and reasonable to account for programmatic changes.

We acknowledged that our proposal had the potential to reintroduce some of the risks that were identified in the 2016 final rule related to the use of rate ranges in the Medicaid program. In the 2016 final rule, we generally prohibited the use of rate ranges, while finalizing § 438.7(c)(3) to allow *de minimis* changes of +/− 1.5 percent to provide some administrative relief to states for small changes in the capitation rates. This change was intended to provide some flexibility with rates while eliminating the ambiguity created by rate ranges in rate setting and to be consistent with our goal to make the rate setting and rate approval processes more transparent. We specifically noted in the 2016 final rule that states had used rate ranges to increase or decrease rates paid to the managed care plans without providing further notification to us or the public of the change or certification that the change was based on actual experience incurred by the MCOs, PIHPs, or PAHPs that differed in a material way from the actuarial assumptions and methodologies initially used to develop the capitation rates (81 FR 27567 through 27568).

We further noted in the 2016 final rule that the prohibition on rate ranges was meant to enhance the integrity and transparency of the rate setting process in the Medicaid program, and to align Medicaid policy more closely with the actuarial practices used in setting rates for non-Medicaid health plans. We noted that the use of rate ranges was unique to Medicaid managed care and that other health insurance products that were subject to rate review submit and justify a specific premium rate. We stated in the 2016 final rule our belief that once a managed care plan has entered into a contract with the state, any increase in funding for the contract should correspond with something of value in exchange for the increased capitation payments. We also provided additional context that our policy on rate ranges was based on the concern that some states have used rate ranges to increase capitation rates paid to managed care plans without changing any obligations within the contract or certifying that the increase was based on managed care plans' actual expenses during the contract period. In the 2016 final rule, we reiterated that the prohibition on rate ranges was consistent with the contracting process where managed care plans are agreeing to meet obligations under the contract for a fixed payment amount (81 FR 27567–27568).

We noted how the specific risks described in the proposed rule concerned us, and as such, were the reason for specific conditions and limitations on the use of rate ranges that we proposed. Our rate range proposal was intended to prevent states from using rate ranges to shift costs to the Federal Government. There are some states that currently make significant retroactive changes to the contracted rates at, or after, the end of the rating period. As we noted in the 2016 final rule, we do not believe that these changes are made to reflect changes in the underlying assumptions used to develop the rates (for example, the utilization of services, the prices of services, or the health status of the enrollee), but rather we are concerned that these changes are used to provide additional reimbursements to the plans or to some providers (81 FR 27834). Additionally, we noted that states would need to demonstrate that the entirety of rate ranges (that is, lower and upper bound) compliant with our proposal are actuarially sound. As noted in the 2016 final rule, 14 states used rate ranges with a width of 10 percent or smaller (that is, the low end and the high end of the range were within 5

percent of the midpoint of the range), but in some states, the ranges were as wide as 30 percent (81 FR 27834). We noted that we believed that our proposal would limit excessive ranges because proposed § 438.4(c)(1)(i) and (ii) would require the upper and lower bounds of the rate range to be certified as actuarially sound and that the rate certification would identify and justify the assumptions, data, and methodologies used to set the bounds. While we believed that our proposal struck the right balance between enabling state flexibility and our statutory responsibility to ensure that managed care capitation rates are actuarially sound, we noted that our approach may reintroduce undue risk in Medicaid rate-setting.

Therefore, we requested public comments on our proposal in general and on our approach. We requested public comment on the value of the additional state flexibility described in our proposal relative to the potential for the identified risks described in the proposed rule and in the 2016 final rule, including other unintended consequences that could arise from our proposal that we have not yet identified or described. We requested public comment on whether additional conditions or limitations on the use of rate ranges would be appropriate to help mitigate the risks we identified. We also requested public comment from states on the utility of state flexibility in this area—specifically, we requested that states provide specific comments about their policy needs and clear explanations describing how utilizing rate ranges effectively meets their needs or whether current regulatory requirements on rate ranges were sufficiently flexible to meet their needs. We also requested that states provide quantitative data to help us quantify the benefits and risks associated with the proposal. We also encouraged states and other stakeholders to comment on the needs, benefits, risks, and risk mitigations described in the proposed rule.

The following summarizes the public comments received on our proposal to add § 438.4(c) and our responses to those comments.

Comment: Many commenters supported the proposed option to develop and certify a 5 percent rate range, stating it allows for increased flexibility in rate setting. Commenters noted that the rate range proposal will remove ambiguities in determining actuarial soundness and will put appropriate limits on unsustainable rates. Some commenters specifically noted support for the requirements to recertify rates when there are changes made within the approved rate range and for states to document the specific rates for each managed care plan. Commenters also noted support for the proposal that states cannot pay managed care plans at different rates within the range based on IGT agreements. Several commenters noted that the specific conditions proposed by CMS must be implemented and strictly enforced to ensure that actuarial soundness is achieved within the rate ranges. A few commenters urged CMS to adopt all of the conditions set forth in § 438.4(c) if rate ranges are finalized.

Response: We continue to believe, particularly with the support of commenters, that the 5 percent, or +/ − 2.5 percent from the midpoint, rate range will permit increased flexibility in rate setting, while the specific conditions proposed will also ensure that the rates are actuarially sound. The proposed parameters and guardrails carefully strike a balance between state flexibility and program integrity and we are finalizing them, with some modifications as discussed in response to other comments.

Comment: Several commenters opposed the proposal to allow states to certify rate ranges and urged CMS not to finalize it. Some of these commenters expressed concerns that rate ranges decrease transparency, do not ensure that rates are actuarially sound, and do not enable CMS to ensure the adequacy of state and Federal investments in patient care. Some commenters noted that our proposal represents diminished Federal oversight of the adequacy of payment rates to Medicaid managed care plans and that it would result in lower payments to managed care plans, which could limit patient access to care. One commenter specifically expressed concern that wider rate ranges may result in lower rates to managed care plans and in turn result in contracts being awarded to less qualified plans, which may lead to early contract terminations, plan turnover, and instability for beneficiaries; this commenter also noted that such plans may be unable to pay competitive market rates, which could reduce patient access to care. Commenters also stated that the rate range provision is unnecessary since the existing +/ − 1.5 percent adjustment under § 438.7(c)(3) is adequate to provide states with administrative flexibility. One commenter expressed concern that the rate range proposal would result in reduced services for enrollees and instability for managed care plans and providers.

Response: We understand commenters' concerns related to the use of rate ranges in Medicaid managed care. We also acknowledge our own fiscal and program integrity concerns which were noted in the 2016 final rule, as well as in the 2018 proposed rule. However, we proposed this rate range provision because we heard from states that this was a critical flexibility to reduce administrative burden in state Medicaid programs. We developed our proposal to carefully strike a balance between state flexibility and program integrity. Balancing this flexibility with the fiscal and program integrity concerns was the driving reason for including comprehensive guardrails around the use of rate ranges in the proposal and this final rule. To ensure appropriate Federal oversight, we specifically proposed parameters to ensure that rate ranges: (1) Do not inappropriately use IGTs to draw down additional Federal dollars with no correlating benefit to the Federal Government or the Medicaid program; (2) are bounded at the upper and lower ends with rates that are actuarially sound consistent with the regulations at §§ 438.4 through 438.7; and (3) strike the appropriate balance between prudent fiscal and program integrity and state flexibility. With regard to this last point, we specifically proposed that states using rate ranges must document in the rate certification the criteria used to select the specific rate within the range for each managed care plan under contract with the state. The guardrails finalized in § 438.4(c) will enable CMS to review the establishment and use of rate ranges by states and ensure that all rates actually paid to managed care plans are actuarially sound. To address specific concerns about unsound capitation rates, this final rule requires both the upper and lower bounds of the rate range to be actuarially sound; therefore, actuarially unsound rates would not be consistent with § 438.4(c).

We agree with commenters that the existing regulation that permits a +/ − 1.5 percent adjustment to certified rates can help states appropriately address mid-year programmatic changes or mid-year rate adjustments. However, we also believe that the additional option to certify a rate range can be helpful to states, especially in circumstances where states are competitively bidding the capitation rates. We also agree with commenters that rate ranges can obfuscate payment rates, and that is why we included specific guardrails around the use of rate ranges in the proposed rule and are finalizing those requirements. For

example, § 438.4(c)(1)(i) requires that the state's rate certification identify and justify the assumptions, data, and methodologies used to develop the upper and lower bounds of the rate range. Also, § 438.4(c)(2)(i) requires that states document the capitation rates, prior to the start of the rating period, for the managed care plans at points within the rate range, consistent with the state's criteria for paying managed care plans at different points within the rate range. This means that the contract and rate certification must be submitted for CMS approval before the rating period begins. We specifically included this timing requirement to limit the obfuscation of rates. We believe that the guardrails we proposed and are finalizing, such as these two examples, provide a level of transparency on the use of rate ranges and provide a mechanism to avoid obfuscation, especially since this regulation requires the actuary to describe and justify the assumptions, data, and methodologies used to develop the rate range in the actuarial certification.

We understand that several commenters were concerned that rate ranges could be used to lower payments to managed care plans, thereby leading to reduced services for enrollees and instability for managed care plans and providers; however, we have incorporated safeguards to prevent such outcomes. Under § 438.4(c)(1)(ii), both the upper and lower bounds of the rate range must be certified as actuarially sound consistent with the requirements in part 438. Actuarially sound capitation rates must provide for all reasonable, appropriate, and attainable costs that are required under the terms of the contract and for the operation of the managed care plan for the time period and the population covered under the terms of the contract. Since the lower bounds of rate ranges must also be actuarially sound and developed in accordance with the regulations in part 438 governing actuarial soundness and rate development, we believe that rates within the range must all be actuarially sound. Under § 438.4(c) as finalized, states using rate ranges must also document the criteria for paying managed care plans at different points within the rate range and must document the capitation rates prior to the start of the rating period—this means that the criteria used to set managed care plans' capitation rates must be documented prior to the start of the rating period. We believe that these requirements will ensure that states are not arbitrarily reducing payments to managed care plans. We also want to reiterate that the regulations in 42 CFR part 438 contain other beneficiary protections meant to ensure that plans are not arbitrarily reducing services to managed care enrollees. For example, § 438.210 requires that the services covered under the managed care contract must be furnished in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under FFS Medicaid. We would also highlight the requirements in § 438.206 regarding the timely availability of services that states and managed care plans must ensure for all managed care enrollees.

Comment: Several commenters supported the proposal to allow rate ranges but recommended that the range be expanded beyond 5 percent. Some commenters requested that CMS expand the rate range provision to 10 percent. Commenters also requested that CMS restore rate ranges to pre-2016 regulatory levels, noting their belief that limits on a rate range are not necessary if the requirement of paying actuarially sound rates remains in place. Several commenters also recommended a narrower rate range to ensure the actuarial soundness of the final rates and recommended that actuaries be required to consider specific factors in determining the width (or size) of the rate range, such as maturity of the program, credibility/quality of the base data, amount of statistical variability in the underlying claim distribution, and size of the population. Commenters suggested additional rate ranges with a width (or size) of +/−2 percent (total range of 4 percent) or +/−3 percent (total range of 6 percent) from the midpoint, or two times the risk margin reflected in the capitation rates as alternatives to our proposal. Some commenters considered the proposed 5 percent range to be overly broad and recommended smaller ranges for the rates to remain actuarially sound. Some commenters gave specific scenarios by which the proposed 5 percent rate range may be insufficient and recommended that CMS not finalize a prescriptive +/− rate range to permit additional state flexibility.

Response: We are declining to adopt any of these specific recommendations, as some commenters requested wider permissible ranges, while other commenters requested narrower permissible ranges. Because of the mix of public comments on this topic, we believe that we struck the right balance in the proposed rule by permitting a rate range up to 5 percent, or +/−2.5 percent from the midpoint, between the lower and upper bound. We believe that 5 percent, or +/−2.5 percent from the midpoint, is a reasonable rate range to permit the administrative flexibility requested by states and also to ensure that all rates within the entire rate range are actuarially sound. We proposed, and are finalizing, regulatory requirements that the rate certification identify and justify the assumptions, data, and methodologies specific to both the upper and lower bounds of the rate range (paragraph (c)(1)(i)), and that both the upper and lower bounds of the rate range are certified as actuarially sound (paragraph (c)(1)(ii)). We believe that the 5 percent, or +/−2.5 percent from the midpoint, rate range is more appropriate to ensure that these requirements can be satisfied, rather than an unspecified limit, or a limit that is so wide that it would not be possible to find both the upper and lower bounds of the rate range to be actuarially sound.

Regarding comments about the factors used in determining a rate range, such as maturity of the program, credibility/quality of the base data, amount of statistical variability in the underlying claim distribution, and size of the population, we believe that such factors would be permissible for actuaries to consider as part of the assumptions, data, and methodologies specific to both the upper and lower bounds of the rate range in accordance with generally accepted actuarial principles and practices, and the requirements for rate setting in §§ 438.4, 438.5, 438.6, and 438.7. If actuaries use these factors in determining the rate range, it would be appropriate to document these factors in the rate certification as required under § 438.4(c)(1)(i) and (ii). However, we decline to require that actuaries must consider these factors when determining the width (or size) of the rate range, as such an approach is overly prescriptive. We believe that actuaries may consider other factors when identifying and justifying the assumptions, data, and methodologies specific to both the upper and lower bounds of the rate range.

Comment: Some commenters submitted technical recommendations about the rate range option, including that the calculation of the rate range should exclude risk adjustments and pass-through payments, that states should be able to apply or adjust risk adjustment mechanisms outside of setting the certified rate range, that the calculation of rate ranges should not reflect incentive payments for managed care plans, and that state budget factors should not influence the calculation of rates within the rate range. Other commenters recommended that administrative expenses should not be

subject to rate range variances. A few commenters recommended that certain government-mandated costs be considered outside of the rate range, including the Health Insurance Provider Fee (HIPF). One commenter also recommended that rate ranges be limited to include only underlying benefit changes.

Response: Under § 438.4(c)(1)(ii), both the upper and lower bounds of the rate range must be certified as actuarially sound consistent with the requirements of part 438. This means that the calculation of the rate range under § 438.4(c) must include all of the components of the capitation rate that are currently required to be included in the rate development and certification under §§ 438.4, 438.5, 438.6, and 438.7. This includes pass-through payments, administrative expenses, taxes, licensing and regulatory fees, government-mandated costs (including the HIPF and other taxes and fees), and underlying benefit costs, which are all required components of developing the capitation rates under our existing regulations.[4] We agree that it would be inappropriate to include the specific incentive payments for managed care plans made under § 438.6(b)(2) in the calculation of the rate range, as per longstanding policy since the 1990's, those incentive arrangements are provided in excess of the approved capitation rate and are already limited to 105 percent of the approved capitation payments attributable to the enrollees or services covered by the incentive arrangement. We also agree that it would be inappropriate for state budget factors to influence the calculation of rates within the rate range since such factors are not considered valid rate development standards (that is, state budget factors are not relevant to the costs required to be included in setting the capitation rates in accordance with §§ 438.4, 438.5, 438.6, and 438.7).

Regarding comments about risk adjustment, we generally agree with commenters that risk adjustment mechanisms can be applied outside of setting the certified rate range, consistent with existing Federal regulations at § 438.7(b)(5). While the state's actuary is required to certify rate ranges and must describe the risk adjustment methodology in the certification and certify the methodology, the state's actuary is not required to certify *risk-adjusted rate ranges* (that is, the rate ranges with the risk adjustment methodologies applied to reflect the actual payments potentially available to the managed care plan). The Federal requirements for including risk adjustment mechanisms in the capitation rates are found in § 438.7(b)(5). As part of the 2016 final rule, we acknowledged that risk adjustment methodologies can be calculated and applied after the rates are certified (81 FR 27595); therefore, we finalized specific standards for retrospective risk adjustment methodologies at § 438.7(b)(5)(ii). Further, the regulation at § 438.7(b)(5)(iii), which we finalized in the 2016 final rule, provides that a new rate certification is not required when approved risk adjustment methodologies are applied to the final capitation rates because the approved risk adjustment methodology must be adequately described in the original rate certification; payment of rates as modified by that approved risk adjustment methodology would be within the scope of the rate certification that adequately describes the risk adjustment mechanism. We also clarified in the 2016 final rule, under the requirements in § 438.7(c)(3), that the application of a risk adjustment methodology that was approved in the rate certification under § 438.7(b)(5) did not require a revised rate certification for our review and approval (81 FR 27568). However, we noted that the payment term in the contract would have to be updated as required in § 438.7(b)(5)(iii). Requirements for risk adjustment and risk sharing mechanisms in § 438.6 must also be met. Therefore, as long as the Federal requirements are met for risk adjustment, we agree that such mechanisms can be appropriately applied outside of the certified rate range (meaning, applied to the rates after calculation of the rate range), consistent with existing Federal regulations and our analysis in the 2016 final rule.

Comment: One commenter recommended that CMS describe the permitted rate range in terms of a percentage.

Response: We confirm for this commenter that the permissible rate range is expressed as a percentage. Section 438.4(c)(1)(iii), as finalized in this rule, requires that the upper bound of the rate range does not exceed the lower bound of the rate range multiplied by 1.05. This means that the upper bound of the rate range cannot exceed the lower bound of the rate range by more than 5 percent, or +/− 2.5 percent from the midpoint.

Comment: A few commenters requested clarification on the use of the *de minimis* +/− 1.5 percent range that is currently codified in § 438.7(c)(3). Commenters requested detail on whether the proposal to allow rate ranges adds new parameters on the use of the *de minimis* flexibility that is currently codified in § 438.7(c)(3). Commenters also requested clarity on how the new rate range provision and the +/− 1.5 percent flexibility can be used together.

Response: As proposed and finalized, § 438.4(c) does not add or require additional parameters on the use of the +/− 1.5 percent adjustment as permitted under § 438.7(c)(3) for any state that does not use rate ranges. However, under § 438.4(c)(2)(ii), states that use rate ranges are not permitted to modify the capitation rates under § 438.7(c)(3). States are permitted to either use the rate range option under § 438.4(c)(1) or use the *de minimis* +/− 1.5 percent range that is currently codified in § 438.7(c)(3), but states are not permitted to use both mechanisms in combination. As noted in the 2018 proposed rule, we believe that this prohibition on using rate ranges in combination with the *de minimis* revision permitted under § 438.7(c)(3) is necessary to ensure program integrity and guard against other fiscal risks. As finalized at § 438.4(c)(1)(i), the rate certification must identify and justify the assumptions, data, and methodologies specific to both the upper and lower bounds of the rate range. The rate range cannot be wider than 5 percent, or +/− 2.5 percent from the midpoint; the *de minimis* revision permitted under § 438.7(c)(3) cannot be used in combination with this rate range. It is our belief that the upper and lower bounds of a 5 percent rate range can remain actuarially sound as long as all of the Federal requirements for rate development, including the requirements we are finalizing in § 438.4(c), are met. If states were permitted to use rate ranges in combination with the *de minimis* revision permitted under § 438.7(c)(3), this could result in final rates that are outside of the 5 percent range, and this is not permitted. As provided in this rule in a separate response, we continue to believe that 5 percent is a reasonable rate range to permit the administrative flexibility requested by states. We believe that the 5 percent rate range is appropriate to ensure that the rate development requirements in part 438

[4] While proceedings in *Texas* v. *United States*, No. 7:15–cv–151–O, slip op. (N.D. Tex. Mar. 5, 2018), appeal docketed, No. 18–10545 (5th Cir. May 7, 2018) (''Texas''), are ongoing, CMS will not require that the HIPF be accounted for in capitation rates for the six plaintiff states in Texas (Indiana, Kansas, Louisiana, Nebraska, Texas, and Wisconsin) in order for such rates to be approved as actuarially sound under 42 CFR 438.2 & 438.4(b)(1).

can be satisfied, rather than a wider rate range where it may not be possible to find both the upper and lower bounds of the rate range to be actuarially sound.

Comment: Several commenters expressed concern about the requirement to recertify modified rates within the rate range, noting that recertification is too rigid and is burdensome for both states and the Federal Government. One commenter requested that additional documentation could be provided rather than a requirement to recertify rates. A few commenters expressed concern that states cannot modify capitation rate ranges using the *de minimis* flexibility in § 438.7(c)(3) and requested that CMS allow states to employ both approaches to increase flexibility and reduce the need for recertification when rates change because of minor programmatic changes. Some commenters requested that mid-year rate changes be permitted within the rate range during the rating year without the need to recertify the rates to reduce burden and actuarial costs for states. Some commenters also recommended that CMS permit *de minimis* modifications to rates used within the 5 percent rate range.

Response: We disagree with commenters that states should be able to use the *de minimis* rule in § 438.7(c)(3) in combination with a rate range. We proposed and are finalizing a prohibition on such combinations in § 438.4(c)(2)(ii). States may use either the rate range option under § 438.4(c) or use the *de minimis* +/−1.5 percent range that is currently codified in § 438.7(c)(3), but states are not permitted to use both mechanisms in combination. As noted in the 2018 proposed rule, we proposed § 438.4(c)(2)(ii) to enable appropriate state flexibility and administrative simplification without compromising program integrity or other fiscal risks. It is our belief that the upper and lower bounds of a 5 percent, or +/−2.5 percent from the midpoint, rate range should be permissible only as long as all of the Federal requirements for rate development are met. If states were permitted to use rate ranges in combination with the *de minimis* revision permitted under § 438.7(c)(3), this could result in final rates that are outside of the 5 percent range and therefore could result in a rate that is not actuarially sound. We continue to believe that 5 percent is a reasonable rate range to permit the administrative flexibility requested by states, but also to ensure that each rate within the entire rate range is actuarially sound. We believe that the 5 percent rate range is appropriate to ensure that the rate development requirements in part 438 can be satisfied, rather than a wider rate range where it may not be possible to find both the upper and lower bounds of the rate range to be actuarially sound.

However, we are persuaded that our proposal at § 438.4(c)(2)(iii), which required states to recertify capitation rates for modifications of the capitation rates within the rate range, regardless of whether the modification was for minor programmatic changes or a material error, was too rigid and would likely add unnecessary administrative burden and costs for states. We reached this conclusion for minor changes within the rate range that would not result in scenarios where such changes resulted in capitation rates outside of the 5 percent, or +/−2.5 percent from the midpoint, range. Therefore, we are finalizing § 438.4(c)(2)(iii) as permitting changes (increases or decreases) to the capitation rates per rate cell within the rate range up to 1 percent during the rating period without submission of a new rate certification, provided that such changes are consistent with a modification of the contract as required in § 438.3(c) and are subject to the requirements at § 438.4(b)(1). Just as we do not permit rate ranges in combination with the *de minimis* revision permitted under § 438.7(c)(3), we will not permit any changes that could result in final rates that are outside of the 5 percent range or in rate ranges that have upper and lower bounds that are larger than 5 percent apart.

Any modification to the capitation rates within the rate range greater than the permissible +/−1 percent amount will require states to provide a revised rate certification for CMS approval that demonstrates compliance with the criteria proposed and finalized at § 438.4(c)(2)(iii)(A) through (C). We believe that this modification to what we proposed for this regulation will address commenters' concerns related to mid-year programmatic changes or mid-year rate adjustments. We note that the permissible +/−1 percent standard under § 438.4(c)(2)(iii) is slightly smaller than the *de minimis* standard (+/−1.5 percent) for changes that do not require a new rate certification under § 438.7(c)(3) when rate ranges are not used. We believe that it is appropriate to use the smaller amount under § 438.4(c)(2)(iii) when rate ranges are used because when states use rate ranges, they are already afforded additional flexibility, as rates are permissible within the upper and lower bounds of the rate range, than they are afforded when certifying the rates to a specific point. We believe that the ability to make a permissible +/−1 percent change provides states flexibility to make small changes while easing the administrative burden of rate review for both states and CMS. Further, permitting small changes facilitates CMS' review process of rate certifications in accordance with the requirements for actuarially sound capitation rates because we would not require revised rate certifications for minor programmatic changes that result in minor and potentially immaterial changes to the capitation rates; therefore, CMS' review of rate certifications can be more focused on substantial issues that impact the capitation rates.

Comment: Commenters requested clarification on the acceptable criteria for paying managed care plans at different points within the rate range. Specifically, commenters requested if rates can vary based on state negotiations with managed care plans or a competitive bidding process.

Response: We note that capitation rates, including permissible rate ranges under § 438.4(c), must comply with all rate setting requirements in §§ 438.4, 438.5, 438.6, and 438.7. This means, as finalized in § 438.4(b)(1), that capitation rates must have been developed in accordance with the standards specified in § 438.5 and generally accepted actuarial principles and practices. Under this final rule, § 438.4(b)(1) also requires that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations must be based on valid rate development standards that represent actual cost differences in providing covered services to the covered populations (see section I.B.2.b. of this final rule for a discussion of this provision in § 438.4(b)(1)). We clarify this here to ensure that commenters are aware that the standards for capitation rate development, including the development of rate ranges under § 438.4(c), do not change with the use of rate ranges under § 438.4(c). Regarding the acceptable criteria for paying managed care plans at different points within the rate range, which must be documented in the rate certification documents under § 438.4(c)(1)(iv), we confirm that such criteria could include state negotiations with managed care plans or a competitive bidding process, as long as states document in the rate certification how the negotiations or the competitive bidding process produced different points within the rate range. For example, if specific, documentable components of the capitation rates varied because of state negotiations or a competitive bidding process, the rate

certification must document those specific variations, as well as document how those variations produced different points within the rate range, to comply with § 438.4(c)(1)(iv) and (c)(2)(i). We understand that capitation rate development necessarily involves the use of actuarial judgment, such as adjustments to base data, trend projections, etc., and that could be impacted by specific managed care plan considerations (for example, one managed care plan's utilization management policies are more aggressive versus another managed care plan's narrow networks); under this final rule, states must document such criteria as part of the rate certification to comply with § 438.4(c)(1)(iv) and (c)(2)(i).

Comment: Several commenters recommended that CMS add minimum transparency requirements on the use of rate ranges. A few commenters recommended that states be required to provide managed care plans with the CMS approved rate ranges and the data underlying those rate ranges prior to bidding, with sufficient time and opportunity for managed care plans' review and input. Some commenters recommended that states be required to provide a comment period for managed care plans to review the rate ranges. One commenter recommended that CMS engage with managed care plans through a technical expert panel to develop appropriate standards for rate ranges. Another commenter recommended that CMS hold a public comment period during which stakeholders can raise issues related to rate ranges before and during the bidding process each year. Commenters also recommended that CMS require a dispute resolution process when states and managed care plans do not agree on the rate ranges. One commenter recommended that CMS require states to conduct studies to ensure that the rate ranges are sufficient to facilitate patient access to care.

Response: In the proposed rule, we specifically requested public comment on whether additional conditions or limitations on the use of rate ranges would be appropriate to help mitigate the risks we identified. Based on the comments we received, we understand that commenters have significant concerns about the lack of transparency inherent in the use of rate ranges. The lack of transparency in the use of rate ranges has also been a significant concern for us; when we finalized the 2016 final rule, we explained that elimination of rate ranges would make the rate setting and the rate approval process more transparent (81 FR 27567). Further, we explained how the requirement to develop and certify as actuarially sound each individual rate paid per rate cell to each managed care plan with enough detail to understand the specific data, assumptions, and methodologies behind that rate would enhance the integrity of the Medicaid rate setting process (81 FR 27567). We agree with commenters that a significant level of transparency is necessary, particularly if states are using rate ranges for competitive bidding purposes. We believe that managed care plans and other stakeholders should have access to the necessary information and data to ensure that rates are actuarially sound, and we believe that such transparency will also help to ensure that competitive bids are appropriately based on actual experience and appropriately fund the program, and that the bids are actuarially sound. Providing managed care plans with approved rate ranges prior to bidding, with sufficient time and opportunity for managed care plans' review and input, along with the data underlying those rate ranges ensures that there is transparency in the setting and use of rate ranges.

Therefore, we are finalizing a requirement at § 438.4(c)(2)(iv) to require states, when developing and certifying a range of capitation rates per rate cell as actuarially sound, to post specified information. States are required under § 438.10(c)(3) to operate a public website that provides certain information. As finalized, § 438.4(c)(2)(iv) requires that states must post on their websites specified information prior to executing a managed care contract or contract amendment that includes or modifies a rate range. We are including this standard to ensure that managed care plans and stakeholders have access to the information with sufficient time and opportunity for review and input, and to ensure that the information is available to meaningfully inform plans' execution of a managed care contract with the state.

At § 438.4(c)(2)(iv)(A) through (C), we are finalizing the list of information that must be posted on the state's website required by § 438.10(c)(3): (A) The upper and lower bounds of each rate cell; (B) a description of all assumptions that vary between the upper and lower bounds of each rate cell, including for the assumptions that vary, the specific assumptions used for the upper and lower bounds of each rate cell; and (C) a description of the data and methodologies that vary between the upper and lower bounds of each rate cell, including for the data and methodologies that vary, the specific data and methodologies used for the upper and lower bounds of each rate cell. We believe that these requirements ensure that managed care plans and stakeholders have access to a minimum and standard level of information, for reasons outlined in the public comments. We believe that these requirements are also appropriate and necessary to ensure a minimum level of transparency when states utilize rate ranges under § 438.4(c). We also believe that this level of information will help to ensure that capitation rates are appropriately based on actual experience and are actuarially sound since plans will have access to such information prior to executing a managed care contract.

Regarding the public comments recommending public comment periods, technical expert panels, dispute resolution processes, and specific studies on access to care, we decline to adopt these specific recommendations. While we believe that states should seek broad stakeholder feedback, we do not believe that it is necessary to create new and expansive Federal requirements to accomplish this goal. In our experience, states are already working with many stakeholder groups, including their managed care plans, and we believe that states should continue to have discretion in how they convene stakeholder groups and obtain stakeholder feedback to inform Medicaid managed care payment policy. If states want to utilize public comment periods, technical expert panels, or conduct specific studies on access to care to help inform their rate setting, including rate ranges, states are welcome to utilize such approaches. We also understand that commenters are interested in Federal dispute resolution processes; however, we do not believe that is an appropriate role for CMS in the Medicaid program. When plans and/or other stakeholders do not agree on rates, we would refer those groups to the state Medicaid agencies to appropriately address specific rate setting concerns. Since state Medicaid agencies are the direct administrators of the Medicaid program in their respective states, we believe that this approach is more appropriate.

Comment: Some commenters expressed concern that requiring states to document the capitation rates at points within the rate range prior to the start of the rating period is too rigid and unrealistic. Commenters noted that the time and labor-intensive process of developing and certifying actuarially sound rates can, and often does, result in unexpected delays that push the

process into the rating period for which the rates are being developed. Commenters recommended extending flexibility to states around submission timing in a manner that maintains proper CMS oversight and is consistent with current CMS practice. One commenter further recommended that if the timing requirement is finalized, it should be delayed by 3 years.

Response: We acknowledge that our proposed requirement in § 438.4(c)(2)(i) that states document the capitation rates at points within the rate range prior to the start of the rating period means, as a practical matter, that states electing to use rate ranges must submit contracts and rate certifications to us prior to the start of the rating period. We also note that section 1903(m)(2)(A)(iii) of the Act and § 438.806 require that the Secretary must provide prior approval for MCO contracts that meet certain value thresholds before states can claim FFP. This longstanding requirement is implemented in the regulation at § 438.806(c), which provides that FFP is not available for an MCO contract that does not have prior approval from us. This requirement is necessary and appropriate to ensure that rate ranges are not used to shift costs onto the Federal Government and to protect fiscal and program integrity. As we noted in the 2018 proposed rule, one of the goals of the guardrails we proposed, and are finalizing here, for use of rate ranges is to prevent states from using rate ranges to make significant retroactive changes to the contracted rates at or after the end of the rating period; this goal is served by the requirement that rate ranges and the specific rates per cell be documented and provided to CMS prior to the beginning of the rating period. While we are not prohibiting outright all retroactive rate changes, the limits on when rates can be changed under § 438.4(c)(2) will necessarily limit the types of retroactive changes that raise the most issues. As we noted in the 2016 final rule and the 2018 proposed rule, we do not believe that retroactive changes are made to reflect changes in the underlying assumptions used to develop the rates (for example, the utilization of services, the prices of services, or the health status of the enrollee), but rather we are concerned that these changes are used to provide additional reimbursements to the managed care plans or to some providers without adding corresponding new obligations under the contract. We do not believe that such changes are consistent with actuarially sound rates and represent cost-shifting to the Federal Government.

Because of these specific concerns, we decline to adopt commenters' recommendations about the timing guardrails included in § 438.4(c), including the recommendation that we delay this proposal by 3 years. We are finalizing the rule with the requirement in § 438.4(c)(2)(i) that states document the capitation rates (consistent with the requirements for developing and documenting capitation rates) at points within the rate range prior to the start of the rating period. However, since rate ranges were previously prohibited under the 2016 final rule (and before this final rule), we believe a transition period is appropriate to allow states that elect to utilize the rate range option at § 438.4(c) time to appropriately develop rate ranges and submit the rate certifications and contracts in advance of the start of a rating period. Therefore, we are delaying the effective date of this provision to rating periods starting on or after July 1, 2021.

Comment: A few commenters expressed concern about the proposal to prohibit states from paying MCOs, PIHPs, and PAHPs at different points within the certified rate range based on the willingness or agreement of the MCOs, PIHPs, or PAHPs to enter into, or adhere to, intergovernmental transfer (IGT) agreements, or the amount of funding the MCOs, PIHPs, or PAHPs provide through IGTs. One commenter expressed concern that the proposal is too restrictive on states' ability to make use of non-Federal share sources and that our proposal constrains states' authority under sections 1902(a)(2) and 1903(w) of the Act to draw upon a variety of state and local sources to fund the non-Federal share of medical assistance costs, including in the managed care context. One commenter stated that the prohibition on varying payments within a certified rate range based on the existence of IGT arrangements is an expansive Federal restriction on the longstanding ability of states to make use of a variety of non-Federal share sources to improve reimbursement to safety-net providers in managed care. Commenters recommended that the regulation be amended to allow using IGT agreements in conjunction with other criteria for paying managed care plans at different points within the rate range.

Response: We disagree that our proposal unnecessarily constrains states' authority under sections 1902(a)(2) and 1903(w) of the Act to draw upon a variety of state and local sources to fund the non-Federal share of medical assistance costs, as our proposal does not limit states from using permissible sources of the non-Federal share to fund costs under the managed care contract. Under § 438.4(c)(1)(v), the state is not permitted to use as a criterion for paying managed care plans at different points within the rate range either of the following: (1) The willingness or agreement of the managed care plans or their network providers to enter into, or adhere to, IGT agreements; or (2) the amount of funding the managed care plans or their network providers provide through IGT agreements. This prohibition is specific to states using amounts transferred pursuant to an IGT agreement to pay managed care plans at different points within the rate range under § 438.4(c) and is not a prohibition on states' authority to use permissible sources of the non-Federal share to fund costs under the managed care contract. Further, we explicitly clarify here that certain financing requirements in statute and regulation are applicable across the Medicaid program irrespective of the delivery system (for example, fee-for-service, managed care, and demonstration authorities), and are similarly applicable whether a state elects to use rate ranges or not. Such requirements include, but are not limited to, limitations on financing of the non-Federal share applicable to health care-related taxes and bona fide provider-related donations.

We are concerned that without these specific parameters in the regulation, states could try to use rate ranges to inappropriately use IGTs to draw down additional Federal dollars with no correlating benefit to the Federal Government or the Medicaid program. To address commenters' concerns related to increasing levels of provider reimbursement for safety-net providers, we note that states can use the authority for state directed payments under § 438.6(c) to direct specific payments to providers. However, we clarify here that certain financing requirements in statute and regulation are applicable across the Medicaid program irrespective of the delivery system (for example, fee-for-service, managed care, and demonstration authorities), and are similarly applicable whether a state elects to direct payments under § 438.6(c). Such requirements include, but are not limited to, limitations on financing of the non-Federal share applicable to health care-related taxes and bona fide provider-related donations. These financing requirements similarly apply when a state elects to direct payments under § 438.6(c). We understand that safety-

net providers play a critical role in serving underserved populations in states, including Medicaid managed care enrollees. We also understand that safety-net providers are critical to maintaining network adequacy and adequate access to care in many communities, including rural areas of the state, and we do not believe our proposal unnecessarily constrains states' authority under sections 1902(a)(2) and 1903(w) of the Act to draw upon a variety of state and local sources to fund the non-Federal share of medical assistance costs, as our proposal does not limit states from using permissible sources of the non-Federal share to fund costs under the managed care contract.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.4(c) as proposed with the following modifications:

- At § 438.4(c)(2)(iii), we are finalizing authority for a state to make changes to the capitation rates within the permissible rate range of up to 1 percent of each certified rate within the rate range without the need for the state to submit a revised rate certification. Under final § 438.4(c)(2)(iii), a state may increase or decrease the capitation rate per rate cell within the rate range up to 1 percent of each certified rate during the rating period provided that any changes of the capitation rate within the permissible +/−1 percent amount must be consistent with a modification of the contract as required in § 438.3(c) and are subject to the requirements at § 438.4(b)(1). Any modification to the capitation rates within the rate range greater than the permissible +/−1 percent amount will require states to provide a revised rate certification for CMS approval and to meet the requirements listed in paragraphs (c)(2)(iii)(A) through (C).
- At § 438.4(c)(2)(iv), we are finalizing a requirement that states, when developing and certifying a range of capitation rates per rate cell as actuarially sound, must post the following specified information on their public websites: (A) The upper and lower bounds of each rate cell; (B) a description of all assumptions that vary between the upper and lower bounds of each rate cell, including for the assumptions that vary, the specific assumptions used for the upper and lower bounds of each rate cell; and (C) a description of the data and methodologies that vary between the upper and lower bounds of each rate cell, including for the data and methodologies that vary, the specific data and methodologies used for the upper and lower bounds of each rate cell.

States certifying a rate range must document the capitation rates payable to each managed care plan prior to the start of the rating period for the applicable MCO, PIHP or PAHP under § 438.4(c)(2)(i). As noted previously in this final rule, this requirement means that states electing to use a rate range would have to submit rate certifications to us *prior to the start of the rating period* and must comply with all other regulatory requirements including § 438.4, except § 438.4(b)(4) as specified. In order to publish additional guidance needed to implement this requirement, we are delaying the effective date of this provision until the first contract rating period beginning on or after July 1, 2021. States that elect to adopt rate ranges must comply with § 438.4(c) as amended effective July 1, 2021 for Medicaid managed care rating periods starting on or after July 1, 2021.

b. Capitation Rate Development Practices That Increase Federal Costs and Vary With the Rate of Federal Financial Participation (FFP) (§ 438.4(b)(1) and (d))

In the 2016 final rule, at § 438.4(b), we set forth the standards that capitation rates must meet to be approved as actuarially sound capitation rates eligible for FFP under section 1903(m) of the Act. Section 438.4(b)(1) requires that capitation rates be developed in accordance with generally accepted actuarial principles and practices and meet the standards described in § 438.5 dedicated to rate development standards. In the 2016 final rule (81 FR 27566), we acknowledged that states may desire to establish minimum provider payment rates in the contract with the managed care plan. We also explained that because actuarially sound capitation rates must be based on the reasonable, appropriate, and attainable costs under the contract, minimum provider payment expectations included in the contract must necessarily be built into the relevant service components of the rate. We finalized in the regulation at § 438.4(b)(1) a prohibition on different capitation rates based on the FFP associated with a particular population as part of the standards for capitation rates to be actuarially sound. We explained in the 2015 proposed rule (80 FR 31120) and the 2016 final rule (81 FR 27566) that different capitation rates based on the FFP associated with a particular population represented cost-shifting from the state to the Federal Government and were not based on generally accepted actuarial principles and practices.

In the 2016 final rule (81 FR 27566), we adopted § 438.4(b)(1) largely as proposed and provided additional guidance and clarification in response to public comments. We stated that the practice intended to be prohibited in § 438.4(b)(1) was variance in capitation rates per rate cell that was due to the different rates of FFP associated with the covered populations. We also provided an example in the 2016 final rule, in which we explained that we have seen rate certifications that set minimum provider payment requirements or established risk margins for the managed care plans only for covered populations eligible for higher percentages of FFP. Under the 2016 final rule, such practices, when not supported by the application of valid rate development standards, were not permissible. We further explained that the regulation did not prohibit the state from having different capitation rates per rate cell based on differences in the projected risk of populations under the contract or based on different payment rates to providers that were required by Federal law (for example, section 1932(h) of the Act). In the 2016 final rule, we stated that, as finalized, § 438.4(b)(1) provided that any differences among capitation rates according to covered populations must be based on valid rate development standards and not on network provider reimbursement requirements that apply only to covered populations eligible for higher percentages of FFP (81 FR 27566).

Since publication of the 2016 final rule, we have continued to hear from stakeholders that more guidance is needed regarding the regulatory standards finalized in § 438.4(b)(1). At least one state has stated that if arrangements that vary provider reimbursement pre-date the differences in FFP for different covered populations, the regulation should not be read to prohibit the resulting capitation rates. We explained in the 2018 proposed rule that while we believe that the existing text of § 438.4(b)(1) is sufficiently clear, we also want to be responsive to the comments from stakeholders and to eliminate any potential loophole in the regulation. Therefore, we proposed to revise § 438.4(b)(1) and added a new paragraph § 438.4(d) to clearly specify our standards for actuarial soundness. We did not propose changes to the existing regulatory requirement in § 438.4(b)(1) that capitation rates must have been developed in accordance with the standards specified in § 438.5

and generally accepted actuarial principles and practices but proposed to revise the remainder of § 438.4(b)(1).

We proposed that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations must be based on valid rate development standards that represent actual cost differences in providing covered services to the covered populations. Further, we proposed that any differences in the assumptions, methodologies, or factors used to develop capitation rates must not vary with the rate of FFP associated with the covered populations in a manner that increases Federal costs consistent with a new proposed paragraph (d). Our proposal was intended to eliminate any ambiguity in the regulation and clearly specify our intent that variation in the assumptions, methodologies, and factors used to develop rates must be tied to actual cost differences and not to any differences that increase Federal costs and vary with the rate of FFP. The proposed revisions to § 438.4(b)(1) used the phrase ''assumptions, methodologies, and factors'' to cover all methods and data used to develop the actuarially sound capitation rates.

In conjunction with our proposed revisions to § 438.4(b)(1), we also proposed a new paragraph (d) to provide specificity regarding the rate development practices that increase Federal costs and vary with the rate of FFP. We proposed in § 438.4(d) a regulatory requirement for an evaluation of any differences in the assumptions, methodologies, or factors used to develop capitation rates for MCOs, PIHPs, and PAHPs that increase Federal costs and vary with the rate of FFP associated with the covered populations. We explained that this evaluation would have to be conducted for the entire managed care program and include all managed care contracts for all covered populations. We proposed to require this evaluation across the entire managed care program and all managed care contracts for all covered populations to protect against state contracting practices in their Medicaid managed care programs that may cost-shift to the Federal Government. We noted that this would entail comparisons of each managed care contract to others in the state's managed care program to ensure that variation among contracts does not include rate setting methods or policies that would be prohibited under our proposal.

We also proposed at § 438.4(d)(1) to list specific rate development practices that increase Federal costs and would be prohibited under our proposal for § 438.4(b)(1) and (d): (1) A state may not use higher profit margin, operating margin, or risk margin when developing capitation rates for any covered population, or contract, than the profit margin, operating margin, or risk margin used to develop capitation rates for the covered population, or contract, with the lowest average rate of FFP; (2) a state may not factor into the development of capitation rates the additional cost of contractually required provider fee schedules, or minimum levels of provider reimbursement, above the cost of similar provider fee schedules, or minimum levels of provider reimbursement, used to develop capitation rates for the covered population, or contract, with the lowest average rate of FFP; and (3) a state may not use a lower remittance threshold for a medical loss ratio for any covered population, or contract, than the remittance threshold used for the covered population, or contract, with the lowest average rate of FFP. We proposed § 438.4(d)(1) to be explicit about certain rate development practices that increase Federal costs and vary with the rate of FFP. Our proposal was to explicitly prohibit the listed rate development practices under any and all scenarios; we also noted that the rate development practices under § 438.4(d)(1) were not intended to represent an exhaustive list of practices that increase Federal costs and vary with the rate of FFP, as we recognized that there may be additional capitation rate development practices that have the same effect and would also be prohibited under our proposed rule. In the 2018 proposed rule, we explained our goal of ensuring that the regulatory standards for actuarial soundness clearly prevent cost-shifting from the state to the Federal Government.

Finally, in § 438.4(d)(2), we proposed to specify that we may require a state to provide written documentation and justification, during our review of a state's capitation rates, that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations or contracts, not otherwise referenced in paragraph (d)(1), represent actual cost differences based on the characteristics and mix of the covered services or the covered populations. We noted that our proposal was consistent with proposed revisions to § 438.7(c)(3), to add regulatory text to specify that adjustments to capitation rates would be subject to the requirements at § 438.4(b)(1), and to require a state to provide documentation for adjustments permitted under § 438.7(c)(3) to ensure that modifications to a final certified capitation rate comply with our regulatory requirements. We requested public comments on our revisions to § 438.4(b)(1) and new § 438.4(d), including on whether these changes were sufficiently clear regarding the rate development practices that are prohibited in § 438.4(b)(1).

The following summarizes the public comments received on our proposal to revise § 438.4(b)(1) and add § 438.4(d) and our responses to those comments.

Comment: Many commenters supported the proposal to prohibit certain rate development practices and to require a state to provide written documentation that rate variations are based on actual cost differences. Many commenters also opposed this proposal and noted that there are often legitimate and actuarially sound reasons for varying pricing assumptions between rate cells that are independent of differing levels of FFP. Commenters stated that there are valid actuarial reasons where varying rating components would be supported by actuarial experience and data. Commenters recommended that were CMS to finalize the proposed amendments to § 438.4(b)(1) and (d), we do it in a way that would allow states to continue to have differentials in margins, payment levels, and MLR remittance thresholds for higher FFP contracts when those differences are justified in data and actuarial experience.

Commenters stated that valid rate development practices would be prohibited under the proposal, including using a lower margin assumption for populations with more stable costs, varying MLR thresholds based on actual administrative cost differences, adjusting the underwriting gain used, and using higher reimbursement for highly specialized providers or services or in areas where it is difficult to recruit providers. Commenters stated that the proposal is too prescriptive and duplicative of current requirements and recommended that CMS allow states to use assumptions that reflect different levels of risk so that rate cells are appropriately funded. Commenters stated that restricting actuarial variables from being determined by certain program characteristics will result in rates that are not actuarially sound. A few commenters also believed that the proposal could unintentionally result in new cost-shifting to the Federal Government, such as requiring higher margin assumptions for certain populations or requiring higher levels of provider reimbursement in specific

programs. One commenter requested that the regulation differentiate situations where rate development assumptions are intended to increase Federal costs from those where such an outcome is incidental and that CMS should only prohibit the former.

Several commenters recommended that instead of prohibiting certain rate development practices, CMS should instead require documentation and justification that variations related to margin, provider reimbursement, or MLR are actuarially valid. One commenter recommended that CMS only require such documentation in circumstances when we believe that the variation is related to FFP. One commenter expressed concern that the requirement to provide documentation duplicates existing policy. One commenter requested clarification on whether the written justification is part of the rate certification process and supporting documents, the managed care contract review, or is an additional requirement.

Response: Our goal in proposing these revisions to § 438.4(b)(1) and (d) was to clarify the standards that capitation rates must meet to be approved as actuarially sound capitation rates eligible for FFP under section 1903(m) of the Act. Our proposal was also intended to eliminate any ambiguity in the regulations and to clearly specify that variation in the assumptions, methodologies, and factors used to develop rates must be tied to actual cost differences and not to any differences that increase Federal costs and vary with the rate of FFP. We remain committed to these goals, and to our overarching goals of improving fiscal and program integrity within Medicaid managed care rate setting. However, we believe it is appropriate to finalize the proposal with changes to address the concerns of commenters that our proposal was too restrictive and overlooked scenarios by which our prohibited rate development practices under proposed § 438.4(d) may be actuarially appropriate in limited circumstances.

We reiterate that our overarching policy goal of prohibiting variation in capitation rates associated with the FFP for a particular population, which we explained in the 2015 proposed rule, 2016 final rule, and the 2018 proposed rule, has not changed and is not changing as part of this final rule. Specifically, we explained in the 2015 proposed rule (80 FR 31120) that different capitation rates based on the FFP associated with a particular population represented cost-shifting from the state to the Federal Government and were not based on generally accepted actuarial principles and practices. In the 2016 final rule (81 FR 27566), we finalized, at § 438.4(b)(1), a prohibition on different capitation rates based on the FFP associated with a particular population as part of the standards for capitation rates to be actuarially sound. Also in the 2016 final rule (81 FR 27566), we provided additional guidance and clarification in response to public comments that the practice intended to be prohibited in § 438.4(b)(1) was variance in capitation rates per rate cell that was due to the different rates of FFP associated with the covered populations; that discussion included an example where rate certifications set minimum provider payment requirements or established risk margins for the managed care plans only for covered populations eligible for higher percentages of FFP. We note that setting minimum provider payment requirements for covered populations under the managed care contract is permissible as long as such requirements apply broadly, are not selectively applied to only those covered populations eligible for higher percentages of FFP, are supported by valid rate development standards that represent actual cost differences in providing covered services to the covered populations, and do not shift costs to the Federal Government. In the 2016 final rule, we explained how § 438.4(b)(1), as adopted there, required that any differences among capitation rates according to covered populations must be based on valid rate development standards and not on network provider reimbursement requirements that apply only to covered populations eligible for higher percentages of FFP (81 FR 27566). In the 2018 proposed rule (83 FR 57268), we clarified our policy that § 438.4(b)(1) was intended to prohibit variances in capitation rates based on the rate of FFP, even if such variances in capitation rates were the result of variances in provider reimbursement that pre-date the differences in FFP for different covered populations. We explained that our current proposal would eliminate ambiguity on this point and eliminate any potential loophole in § 438.4(b)(1) by more clearly specifying the scope of the prohibition. We reiterate these published statements here as part of this final rule and remind commenters that CMS has not changed our position on this topic. As finalized with the amendments in this final rule, § 438.4(b)(1) prevents states from cost-shifting onto the Federal Government and prohibits any variances in capitation rates associated with the rate of FFP for different covered populations. Further, we explicitly clarify here that § 438.4(b)(1) is not premised on nor require a state's intention to shift costs to the Federal Government; we believe that an intent to cost shift is immaterial compared to the actual effect of cost shifting.

Therefore, as part of this final rule, we are finalizing amendments to § 438.4(b)(1) to codify this policy clearly. Section 438.4(b)(1), as amended, continues to require that capitation rates be developed in accordance with the standards specified in § 438.5 and generally accepted actuarial principles and practices. We are also finalizing the proposed new and revised regulation text that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations must be based on valid rate development standards that represent actual cost differences in providing covered services to the covered populations and that any differences in the assumptions, methodologies, or factors used to develop capitation rates must not vary with the rate of FFP associated with the covered populations in a manner that increases Federal costs. We are not finalizing the text proposed in paragraph (d)(1) to address the concerns from commenters that proposed § 438.4(d)(1) was too restrictive and overlooked scenarios where the proposed list of prohibited rate development practices may be actuarially appropriate.

We will generally use the list of prohibited rate development practices in interpreting the prohibition finalized in paragraph (b)(1) and we will consider the state's documentation and justification in applying the prohibition. We originally proposed § 438.4(d)(1) in conjunction with our proposed revisions to § 438.4(b)(1) to provide specificity regarding the rate development practices that we believed increased Federal costs and varied with the rate of FFP; however, based on public comments, we agree with commenters that there could be legitimate and actuarially sound reasons for varying pricing assumptions between rate cells that are (and must be) independent of differing levels of FFP, and that there could be valid actuarial reasons for an actuary to vary rating components that would be supported by actuarial experience and data. Therefore, as part of this final rule, we are not finalizing the list of rate development practices that we proposed in § 438.4(d)(1). We agree with the commenters that we are unable to

predict every future scenario and there might be situations where one or more of the items on that list of rate development practices is actuarially appropriate. We remind commenters that it is still our view that these rate development practices generally increase Federal costs and vary with the rate of FFP. As such, in situations where one of those practices is not actuarially appropriate and where it increases Federal costs, we will apply § 438.4(b)(1) to deny rates that have been developed based on such practices. To fully evaluate scenarios where differences in the assumptions, methodologies, or factors used to develop capitation rates appear to vary with the rate of FFP, we believe that we will need additional information and explanation from the state. If states or actuaries intend to utilize these rate development practices, we need to be able to require written documentation and justification that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations or contracts represent actual cost differences based on the characteristics and mix of the covered services or the covered populations. We had originally proposed a requirement for submission of information and documentation for this purpose under § 438.4(d)(2). Since we are not finalizing § 438.4(d), we are finalizing this proposed standard as part of the new text in § 438.4(b)(1). To address commenters' request for clarity, we note that such written documentation and justification would be required as part of CMS' review of the rate certification.

We are finalizing the introduction in proposed paragraph (d) as part of the new text in § 438.4(b)(1) that the evaluation of compliance with § 438.4(b)(1) be on a program-wide basis, including all managed care contracts and covered populations. The final rule continues to prohibit any differences in the assumptions, methodologies, or factors used to develop capitation rates that vary with the rate of FFP associated with a covered population in a manner that increases Federal costs. To ensure that this requirement is met, the final rule requires an evaluation of any differences in the assumptions, methodologies, or factors used to develop capitation rates for MCOs, PIHPs, and PAHPs that increase Federal costs and vary with the rate of FFP associated with the covered populations. This evaluation must be conducted for the entire managed care program and include all managed care contracts for all covered populations. We are finalizing this requirement for an evaluation across the entire managed care program and all managed care contracts for all covered populations to protect against any potential loopholes where state managed care contracting practices may cost-shift to the Federal Government. Specifically, as noted in the proposed rule, this requirement would entail comparisons of each managed care contract to others in the state's managed care program to ensure that variation among contracts does not include rate setting methods or policies that would be prohibited under § 438.4(b)(1).

Comment: A few commenters noted that risk margin differences can apply between TANF, ABD, and LTSS populations and expressed concern that the proposal would require inappropriate comparisons between populations that have legitimate cost differences. Other commenters provided that the proposed regulation may have the unintended effect of causing actuaries to increase margins on disabled or LTSS populations to maintain justifiable higher margin assumptions for non-LTSS populations, which could increase Federal and state costs for the Medicaid program. Commenters stated that from an actuarial standpoint, the percentage risk margin may appropriately vary by population characteristics due to insurance risk differences. Commenters also explained that populations may have very different PMPM costs and, in particular, that expansion populations may require higher risk margins to account for unknown risks associated with a population not previously covered by the Medicaid program. Commenters recommended that CMS monitor for inappropriate rate setting practices or require additional documentation if we believe that cost-shifting is occurring, but these commenters recommended that CMS not finalize the proposal prohibiting specific rate development practices. One commenter stated that existing CMS authority enables us to enforce appropriate rate setting and that the proposed revisions to § 438.4(b)(1) and (d) are unnecessary.

Response: We understand the issues raised by commenters and reiterate that to the degree the pricing assumptions are based on actual cost differences in providing covered services to the covered populations under the contract, these varying pricing assumptions would be permissible under § 438.4(b)(1) as valid rate development factors. To the degree that varying pricing assumptions represent actual cost differences in providing covered services to the covered populations, we would find the assumptions to be consistent with valid rate development standards. If a population has documented higher costs, supported by actual experience, we would not find the pricing assumptions to be in violation of finalized § 438.4(b)(1), even if the higher cost population is also one with a higher FFP percentage. However, we emphasize that varying pricing assumptions must not include using a rate development practice that increases Federal costs and varies with the rate of FFP when not supported by valid rate development standards that represent actual cost differences in providing covered services to the covered populations. As finalized in this rule under § 438.4(b)(1), any differences in the assumptions, methodologies, or factors used to develop capitation rates must not vary with the rate of FFP associated with the covered populations in a manner that increases Federal costs unless those variances represent actual cost differences in providing covered services to the covered population.

Under the regulations governing rate setting at §§ 438.4 through 438.7, including as revised in this final rule, states and actuaries can vary the pricing assumptions based on actual cost differences in providing covered services to the covered populations under the contract, but the prohibition on shifting costs to the Federal Government through use of such variances remains. We also believe that there are other tools that can be used to mitigate the issues that were raised by commenters without inappropriately shifting costs onto the Federal Government and running afoul of § 438.4(b)(1). Although we are not finalizing a list of specifically prohibited rate development practices (as proposed at § 438.4(d)), it is still our view that these rate development practices generally increase Federal costs and vary with the rate of FFP, and as such, are generally prohibited under § 438.4(b)(1) as finalized in this rule. If states or actuaries intend to utilize these rate development practices (for example, higher margin assumptions for non-LTSS populations), we will require written documentation and justification that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations or contracts represent actual cost differences based on the characteristics and mix of the covered services or the covered populations.

Comment: Several commenters provided that our proposal to restrict capitation rate development practices that are based on minimum levels of

provider reimbursement would likely result in unintended consequences for states seeking to comply with the provisions under at least two scenarios: (1) States would be required to decrease provider reimbursement rates to the lowest common denominator of the lowest FFP contracts, which could diminish access to care for some Medicaid populations; or (2) States would be required to increase provider reimbursement rates to the highest common denominator of the higher FFP contracts for the lowest FFP contracts, which could increase Federal and state Medicaid expenditures. Commenters also provided that many states have contracts for a specific population, such as a population at the average FMAP rate, with state statute setting the rate structure at the state's FFS rates; in these circumstances, this proposal would make the state's FFS rate structure the standard by which other managed care contracts would be evaluated, which may not be actuarially appropriate. A few commenters also expressed concern that fee schedule variation is limited under the proposal and noted that there is often a need to increase the fee schedules for certain provider types to meet network adequacy and encourage provider participation. These commenters expressed concern that such limitations on provider fee schedules may unfairly burden managed care plans. Commenters urged CMS not to finalize this provision as part of the proposal.

Response: We understand the issues raised by commenters and reiterate that to the degree the pricing assumptions are based on actual cost differences in providing covered services to the covered populations under the contract, these varying pricing assumptions would be permissible under § 438.4(b)(1) as valid rate development factors. To the degree that varying pricing assumptions represent actual cost differences in providing covered services to the covered populations, we would find the assumptions to be consistent with valid rate development standards. If a population has documented higher costs, supported by actual experience, we would not find the pricing assumptions to be in violation of finalized § 438.4(b)(1). However, in our experience in reviewing and approving capitation rates, we have seen rate certifications that set minimum provider payment requirements for the managed care plans for covered populations eligible for higher percentages of FFP. We note here that such practices, when they shift costs to the Federal Government and when not supported by the application of valid rate development standards, are not permissible. Any differences among capitation rates according to covered populations must not shift costs to the Federal Government and must be based on valid rate development standards rather than network provider reimbursement requirements that apply to covered populations eligible for higher percentages of FFP even in cases where provider reimbursement requirements for such populations are mandated by state statute. Furthermore, we reiterate that setting minimum provider payment requirements for covered populations under the managed care contract is not permissible if such requirements shift costs to the Federal Government, even if such differential provider payments are authorized under § 438.6(c). For example, we have seen one state use § 438.4(b)(1) to vary provider reimbursement for covered populations eligible for higher percentages of FFP, as mandated by state law and not on valid rate development standards, and this state has stated that when such arrangements pre-date differences in FFP, the regulation should not be read to prohibit the resulting capitation rates. Our proposal and the amendment to § 438.4(b)(1) we are finalizing here eliminates that particular argument as a potential loophole. Regardless of when the differential rates were started, § 438.4(b)(1) as amended in this rule requires that differential rates be based on valid rate development standards and that they not shift costs to the Federal Government; such non-compliant differential rates must be eliminated. As revised, § 438.4(b)(1) prevents states from cost-shifting onto the Federal Government and prohibits any variances in capitation rates based on the rate of FFP for different covered populations, regardless of whether arrangements that vary provider reimbursement are mandated by state statute and/or pre-date the differences in FFP for different covered populations. We note that this state also stated that the different rates were intended to better align Medicaid rates with commercial rates but did not demonstrate that differential provider payments for one covered population was a valid rate development factor. As noted above in a previous response to public comments in this section, setting minimum provider payment requirements for covered populations under the managed care contract is permissible as long as such requirements apply broadly, are not selectively applied to covered populations eligible for higher percentages of FFP, are supported by valid rate development standards that represent actual cost differences in providing covered services to the covered populations and do not shift costs to the Federal Government. We note that varying pricing assumptions based on provider payment requirements mandated by state legislation that shift costs to the Federal Government do not constitute actual cost differences in providing covered services.

To the extent that states need to enhance reimbursement for specific providers or specific services, we believe that states can utilize other means to accomplish that goal, such as enhancing fees for covered services across all of their programs rather than varying fee schedules only for higher FMAP populations. We also understand that some states may have legislatively mandated fee schedules; however, as long as such states comply with all applicable regulatory requirements and are not including additional costs or mandating higher levels of reimbursement for higher FMAP populations, states can comply with mandated fee schedules and this regulation without a conflict. Mandated fee schedules that comply with all applicable regulatory requirements and do not result in higher payment for higher FMAP populations may be used as the basis for rate setting for the managed care contracts. We emphasize that varying pricing assumptions must not include using a rate development practice that increases Federal costs and varies with the rate of FFP when not supported by valid rate development standards that represent actual cost differences in providing covered services to the covered populations regardless of whether such differences are mandated by state legislation. As finalized in this rule under § 438.4(b)(1), any differences in the assumptions, methodologies, or factors used to develop capitation rates must not vary with the rate of FFP associated with the covered populations in a manner that increases Federal costs.

Although we are not finalizing a list of prohibited rate development practices (as proposed at § 438.4(d)), it is still our view that these rate development practices generally increase Federal costs and vary with the rate of FFP, and as such, are prohibited in most cases under § 438.4(b)(1) as finalized in this rule. If states or actuaries intend to utilize these rate development practices, we will require written documentation and justification that any differences in the assumptions, methodologies, or

factors used to develop capitation rates for covered populations or contracts represent actual cost differences based on the characteristics and mix of the covered services or the covered populations.

Comment: A few commenters expressed concern with the proposal (at proposed § 438.4(d)(1)(iii)) that states may not use a lower MLR remittance threshold for expansion populations than the MLR remittance threshold used for TANF, ABD, and LTSS contracts. Commenters stated that it is impractical and not actuarially sound to use an average MLR remittance threshold without acknowledging the actual costs of each managed care program and covered population. One commenter noted that remittance thresholds vary as a function of the administrative load of a product and is unrelated to the FFP for the program. Some commenters expressed concern that the proposal will force states to reduce MLR remittance thresholds for all managed care contracts, which will increase Federal Medicaid costs. Some commenters also stated that there are valid actuarial reasons to establish a higher MLR remittance threshold for LTSS populations, and that states should not be prohibited from designing such reasonable approaches based on actuarially sound practices. Commenters provided that the administrative costs for an LTSS program as a percent of revenue is lower than an expansion program (managed care plan covering the Medicaid benefits for the expansion population). As such, if a minimum MLR threshold is developed with an equal likelihood of being triggered by each program, the LTSS MLR threshold would need to be higher for the LTSS program.

Response: We agree with commenters and acknowledge that our proposed rule failed to account for varying MLR thresholds for high-cost populations, such as LTSS populations. We agree that if a minimum MLR threshold is developed with an equal likelihood of being triggered, the MLR may need to be higher for LTSS programs because the administrative costs, as a percent of revenue, may be lower. Under § 438.4(b)(1) as finalized here, we will require states to provide valid reasons for varying the MLR threshold component in contracts where the FFP percentages are different. For approval of rates that are developed using such different MLR thresholds, a state could demonstrate that it has used factors to develop rates based on valid rate development standards and not on differences that increase Federal costs and vary with the rate of FFP, and it has applied the same methodologies for developing the administrative costs within the capitation rate, and therefore, the corresponding MLR remittance threshold is based on those same underlying methodologies. In such a situation, we would not find this approach to be a violation of § 438.4(b)(1) despite the different MLR thresholds used in setting the rates for high and low FMAP populations.

We emphasize that varying pricing assumptions must not include using a rate development practice that increases Federal costs and varies with the rate of FFP when not supported by valid rate development standards that represent actual cost differences in providing covered services to the covered populations. We note that varying pricing assumptions based only on provider payment requirements mandated by state legislation do not constitute actual cost differences in providing covered services. As finalized in this rule under § 438.4(b)(1), any differences in the assumptions, methodologies, or factors used to develop capitation rates must not vary with the rate of FFP associated with the covered populations in a manner that increases Federal costs. Although we are not finalizing a list of prohibited rate development practices (as proposed at § 438.4(d)(1)), it is still our view that these rate development practices generally increase Federal costs and vary with the rate of FFP, and as such, are prohibited in most cases under § 438.4(b)(1) as finalized in this rule. If states or actuaries intend to utilize these rate development practices, we will require written documentation and justification that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations or contracts represent actual cost differences based on the characteristics and mix of the covered services or the covered populations.

Comment: One commenter expressed concern that the proposal does not account for recent statutory changes made by section 4001 of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act (Pub. L. 115–271, enacted October 24, 2018), which allows states to retain a larger share of the remittances collected from managed care plans by remitting funds back to the Federal Government for expansion enrollees at the state's standard rate of FFP, provided that certain statutory conditions are met.

Response: Section 4001 of the SUPPORT for Patients and Communities Act, enacted October 24, 2018, amended section 1903(m) of the Act to add a new paragraph (m)(9). Section 1903(m)(9) provides a time-limited opportunity (after fiscal year 2020 but before fiscal year 2024) for states that collect an MLR remittance from their Medicaid managed care plans for the eligibility group described in section 1902(a)(10(A)(i)(VIII) to apply the state's regular Federal medical assistance percentage (FMAP) match rate (calculated pursuant to section 1905(b) of the Act) to determine the Federal share of that remittance instead of the higher FMAP match rate specified under 1905(y) for use in connection with the Medicaid expansion group. Since this statutory provision is limited to requirements on the amounts paid to the Federal Government on certain MLR remittances within the specified parameters of the statute, and not related to varying the remittance thresholds for specific populations or contracts, section 4001 of the SUPPORT for Patients and Communities Act is outside the scope of this final rule. Specifically, we clarify for this commenter that this final rule does not implicate the requirements under section 4001 of the SUPPORT for Patients and Communities Act regarding the amounts paid to the Federal Government on certain MLR remittances.

Comment: A few commenters requested clarification regarding whether the proposal would apply to CHIP programs.

Response: We clarify here that our proposal under § 438.4(d) was never intended to and our amendment of § 438.4(b)(1) does not apply to CHIP programs. The CHIP requirements for rate development are found in § 457.1203, which does not incorporate or reference the Medicaid managed care regulations on actuarial soundness and rate setting.

Comment: A few commenters expressed concern that CMS refers to a list of prohibited rate development practices that are ''including but not limited to'' certain practices. These commenters expressed concern that this non-exhaustive list requires additional clarification and recommended that specific rate development practices be identified through notice and comment rulemaking.

Response: The list of specific rate development practices that we proposed to prohibit outright in proposed § 438.4(d) is not being finalized. However, should such practices be used and result in rates that violate the standard we proposed and are finalizing in the amendment of § 438.4(b)(1), the

resulting rates will not be approved. We confirm for commenters that should we find it necessary to prohibit specific rate development practices in the future, we would do so through notice and comment rulemaking. Here, however, we are limiting how rates must be developed to ensure that differences in the assumptions, methodologies, and factors used to develop rates are based on valid rate development factors that represent actual cost differences and do not vary with the rate of FFP in a manner that increases Federal costs.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing our proposed amendments to § 438.4(b)(1) with modifications and are not finalizing the proposed addition of § 438.4(d); specifically, we are finalizing amendments to § 438.4(b)(1) as follows:

- At § 438.4(b)(1), we are finalizing the proposal to add regulation text to provide that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations must be based on valid rate development standards that represent actual cost differences in providing covered services to the covered populations and that any differences in the assumptions, methodologies, or factors used to develop capitation rates must not vary with the rate of Federal financial participation (FFP) associated with the covered populations in a manner that increases Federal costs.
- At § 438.4(b)(1), we are finalizing that the evaluation of compliance with § 438.4(b)(1) be on a program-wide basis, including all managed care contracts and covered populations. The final rule will require an evaluation of any differences in the assumptions, methodologies, or factors used to develop capitation rates for MCOs, PIHPs, and PAHPs that increase Federal costs and vary with the rate of FFP associated with the covered populations. This evaluation must be conducted for the entire managed care program and include all managed care contracts for all covered populations. This provision was proposed as part of the introduction text to paragraph (d).
- At § 438.4(b)(1), we are also finalizing the authority for CMS to require a state to provide written documentation and justification that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations or contracts represent actual cost differences based on the characteristics and mix of the covered services or the covered populations. This provision was proposed as part of paragraph (d)(2).
- At § 438.4(b)(1), we are not finalizing any references to paragraph (d).

3. Rate Development Standards: Technical Correction (§ 438.5(c)(3)(ii))

In the 2016 final rule, we finalized at § 438.5(c)(3) an exception to the base data standard at § 438.5(c)(2) in recognition of circumstances where states may not be able to meet the standard at paragraph (c)(2) regarding base data. We explained in the 2016 final rule preamble (81 FR 27574) that states requesting the exception under § 438.5(c)(3) must submit a description of why the exception is needed and a corrective action plan detailing how the state will bring their base data into compliance no more than 2 years after the rating period in which the deficiency was discovered.

Regrettably, the regulation text regarding the corrective action timeline at § 438.5(c)(3)(ii) was not as consistent with the preamble or as clear as we intended. The regulation text finalized in 2016 provided that the state must adopt a corrective action plan to come into compliance ''no later than 2 years from the rating period for which the deficiency was identified.'' The preamble text described the required corrective action plan as detailing how the problems ''would be resolved in no more than 2 years after the rating period in which the deficiency was discovered.'' This discrepancy resulted in ambiguity that confused some stakeholders as to when the corrective action plan must be completed and when a state's base data must be in compliance. To remove this ambiguity, we proposed to replace the word ''from'' at § 438.5(c)(3)(ii) with the phrase ''after the last day of.'' The preamble of the 2016 final rule used the term ''discovered'', while the regulatory text used the term ''identified.'' We proposed to retain the term ''identified'' in the regulatory text since we believed this term to be more appropriate in this context. We explained that our proposed change would clarify the corrective action plan timeline for states to achieve compliance with the base data standard; that is, states would have the rating year for which the corrective action period request was made, plus 2 years following that rating year to develop rates using the required base data. For example, if the state's rate development for calendar year (CY) 2018 did not comply with the base data requirements, the state would have 2 calendar years after the last day of the 2018 rating period to come into compliance. This means that the state's rate development for CY 2021 would need to use base data that is compliant with § 438.5(c)(2).

The following summarizes the public comments received on our proposal to revise § 438.5(c)(3)(ii) and our responses to those comments.

Comment: A few commenters supported the proposed language change. One of these commenters supported the proposal to use the term ''identified'' in § 438.5(c)(3)(ii) instead of the word ''discover,'' which was used in the preamble of the 2016 final rule to describe the regulation. One of these commenters also urged CMS to ensure that the base data used by a state submitting a corrective action be improved to meet the standards in § 438.5 and recommended that CMS enforce these requirements. One of these commenters also requested that the base data be required to include all available and emerging experience, such as pharmacy utilization experience.

Response: We agree with commenters that the term ''identified'' in the regulatory text is appropriate, and therefore, we used it in the proposed rule and this final rule. We also agree with commenters that states and actuaries should be utilizing base data that is compliant with the standards and requirements set forth in the 2016 final rule, and we assure commenters that CMS is enforcing those rules. While we also agree with commenters that our base data standards should include the use of appropriate available and emerging experience, we did not propose any changes to the standards governing base data and are not finalizing any changes to those standards in § 438.5(c)(1) and (2). We remind commenters that the general rule for base data at § 438.5(c)(2) already requires states and their actuaries to use the most appropriate data, with the basis of the data being no older than from the 3 most recent and complete years prior to the rating period, for setting capitation rates. Such base data must be derived from the Medicaid population, or, if data on the Medicaid population is not available, derived from a similar population and adjusted to make the utilization and price data comparable to data from the Medicaid population. Data must also be in accordance with actuarial standards for data quality.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the amendment to § 438.5(c)(3)(ii) as proposed.

4. Special Contract Provisions Related to Payment (§ 438.6)

a. Risk-Sharing Mechanism Basic Requirements (§ 438.6(b))

In the ''Medicaid and Children's Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, Medicaid and CHIP Comprehensive Quality Strategies, and Revisions Related to Third Party Liability'' proposed rule (the 2015 proposed rule) (80 FR 31098, June 1, 2015), we proposed to redesignate the basic requirements for risk contracts previously in § 438.6(c)(2) as § 438.6(b). In § 438.6(b)(1), we proposed a non-exhaustive list of risk-sharing mechanisms (for example, reinsurance, risk corridors, and stop-loss limits) and required that all such mechanisms be specified in the contract. In the preamble, we stated our intent to interpret and apply § 438.6(b)(1) to any mechanism or arrangement that has the effect of sharing risk between the MCO, PIHP, or PAHP, and the state (80 FR 31122). We did not receive comments on paragraph (b)(1) and finalized the paragraph as proposed in the 2016 final rule (81 FR 27578) with one modification.

In the 2016 final rule, we included the standard from the then-current rule (adopted in 2002 in the ''Medicaid Program; Medicaid Managed Care: New Provisions'' final rule (67 FR 40989, June 14, 2002) (hereinafter referred to as the ''2002 final rule'')) that risk-sharing mechanisms must be computed on an actuarially sound basis. The 2015 proposed rule inadvertently omitted the requirement that risk-sharing mechanisms be computed on an actuarially sound basis but we finalized § 438.6(b)(1) with that standard included in the 2016 final rule (81 FR 27578). As managed care contracts are risk-based contracts, mechanisms that share or distribute risk between the state and the managed care plan are inherently part of the capitation rates paid to plans for bearing the risk. Therefore, the risk-sharing mechanisms should be developed in conjunction with the capitation rates and using the same actuarially sound principles and practices.

We explained in the 2018 proposed rule how we expect states to identify and apply risk-sharing requirements prior to the start of the rating period because they are intended to address the uncertainty inherent in setting capitation rates prospectively. Because we believed that the 2016 final rule was clear on the prospective nature of risk-sharing and our expectations around the use of risk-sharing mechanisms, we did not specifically prohibit retroactive adoption and use of risk-sharing mechanisms. However, since publication of the 2016 final rule, we have found that some states have applied new or modified risk-sharing mechanisms retrospectively; for example, some states have sought approval to change rates, or revise a medical loss ratio (MLR) requirement, after the claims experience for a rating period became known to the state and the managed care plan. As noted in the 2018 proposed rule, we acknowledge the challenges in setting prospective capitation rates and encourage the use of appropriate risk-sharing mechanisms; in selecting and designing risk-sharing mechanisms, states and their actuaries are required to only use permissible strategies, use appropriate utilization and price data, and establish reasonable risk-sharing assumptions.

We also acknowledged in the 2018 proposed rule how, despite a state's best efforts to set accurate and appropriate capitation rates, unexpected events can occur during a rating period that necessitate a retroactive adjustment to the previously paid rates. We explained that when this occurs, states should comply with § 438.7(c)(2), which provides the requirements for making a retroactive rate adjustment. Section 438.7(c)(2) clarifies that the retroactive adjustment must be supported by an appropriate rationale and that sufficient data, assumptions, and methodologies used in the development of the adjustment must be described in sufficient detail and submitted in a new rate certification along with the contract amendment.

To address the practice of adopting or amending risk-sharing mechanisms retroactively, we proposed to amend § 438.6(b)(1) to require that risk-sharing mechanisms be documented in the contract and rate certification documents prior to the start of the rating period. We also proposed to amend the regulation at § 438.6(b)(1) to explicitly prohibit retroactively adding or modifying risk-sharing mechanisms described in the contract or rate certification documents after the start of the rating period.

In the proposed rule, we acknowledged that our proposed requirement that risk-sharing mechanisms be documented in a state's contract and rate certification documents prior to the start of the rating period meant, as a practical matter, that states electing to use risk-sharing mechanisms would have to submit contracts and rate certifications to us prior to the start of the rating period. We noted that section 1903(m)(2)(A)(iii) of the Act, as well as implementing regulations at § 438.806, require that the Secretary must provide prior approval for MCO contracts that meet certain value thresholds before states can claim FFP. This longstanding requirement is implemented in the regulation at § 438.806(c), which provides that FFP is not available for an MCO contract that does not have prior approval from us. We have, since the early 1990s, interpreted and applied this requirement by not awarding FFP until the contract has been approved and permitting FFP back to the initial date of a contract approved after the start of the rating period if an approvable contract were in place between the state and the managed care plan. This practice is reflected in the State Medicaid Manual, section 2087.

The following summarizes the public comments received on our proposal to amend § 438.6(b)(1) and our responses to those comments.

Comment: Several commenters supported the proposed amendment that risk-sharing mechanisms be documented in a state's contract and rate certification documents prior to the start of the rating period. Commenters noted that doing so would improve transparency and facilitate CMS' oversight of these risk-sharing mechanisms. One commenter noted the proposed amendment to § 438.6(b)(1) would promote a more reliable and predictable method for risk-adjusting payments to managed care plans. Commenters also stated that risk-sharing mechanisms should be documented in the contract prior to the start of the rating period to provide certainty to both states and their contracted managed care plans.

Response: We appreciate commenters' support and agree that risk-sharing mechanisms should be documented in a state's contract(s) and rate certification(s) prior to the start of the rating period for all of the reasons commenters provided. As risk-sharing mechanisms are intended to address the uncertainty inherent in setting capitation rates prospectively, we believe that states should develop risk-sharing requirements prior to the start of the rating period and that risk-sharing mechanisms should be developed in accordance with actuarially sound principles and practices.

Comment: Several commenters stated that retroactive adjustments should not be limited to adjustments to rates but should also apply to risk-sharing mechanisms. These commenters stated that states transitioning new populations or services into managed

care programs, such as LTSS, are more likely to need retroactive adjustments to payment structures due to the unknown risks in covering new populations in managed care for the first time.

Response: We disagree with commenters on permitting retroactive adjustments to risk-sharing mechanisms. We do not believe that it is appropriate to modify risk-sharing mechanisms between states and plans after the claims experience for a rating period is known, because such retroactive changes undercut the need for states and plans to address uncertainty prospectively. We are not foreclosing retroactive adjustments to rates when appropriate. As provided by § 438.7(c)(2), if the state determines that a retroactive adjustment to the capitation rate is necessary, the retroactive adjustment must be supported by a rationale for the adjustment and the data, assumptions, and methodologies used to develop the magnitude of the adjustment must be adequately described with enough detail to allow CMS or an actuary to determine the reasonableness of the adjustment. These retroactive adjustments must be certified by an actuary in a revised rate certification and submitted as a contract amendment to be approved by CMS. These types of changes are distinct from application of a previously set risk-sharing mechanism that is retrospective. While CMS will not permit a retroactive change to the risk-sharing mechanism under this final rule, the state can pursue a retroactive change to the capitation rates if the requirements under § 438.7(c)(2) are satisfied.

Comment: Commenters requested that CMS clarify the difference between risk adjustment and risk mitigation. One commenter requested that CMS create definitions for risk adjustment and risk mitigation. Commenters also requested that CMS clarify that the proposed change in this section does not apply to risk adjustments as permitted in § 438.7(b)(5). Another commenter noted that the new language explicitly prohibiting retroactively adding or modifying risk-sharing mechanisms may be seen as not allowing retroactive rate adjustments and requested that CMS add language to this section that clearly states retroactive rate adjustments under § 438.7(c)(2) are still permitted.

Response: First, we clarify here that risk-sharing mechanisms, which can include a risk mitigation strategy, are a distinct and separate concept from risk adjustment. We note that ''risk mitigation'' is not a phrase used in part 438. Risk adjustment is defined at § 438.5(a) as a methodology to account for the health status of enrollees via relative risk factors when predicting or explaining costs of services covered under the contract for defined populations or for evaluating retrospectively the experience of MCOs, PIHPs, or PAHPs contracted with the state. The requirements regarding risk adjustment are found at §§ 438.5(g) and 438.7(b)(5). Risk-sharing mechanisms, on the other hand, are any means, mechanism, or arrangement that has the effect of sharing risk between the MCO, PIHP, or PAHP, and the state. A risk mitigation strategy is a means to protect the state, or the managed care plan, against the risk that assumptions (not only based on health status of enrollees) underlying the rate development will not match later actual experience. In other words, ''risk-sharing'' is about the aggregate actual experience, while ''risk adjustment'' is about paying based on the health status of enrollees at the individual level and how health status is assumed to result in higher costs.

Second, we explain how the regulations that address these concepts interact or do not interact. We confirm here that § 438.6(b)(1), including the proposed change that we are finalizing here, does not regulate and has no impact on risk adjustment as addressed in §§ 438.5(g) and 438.7(b)(5). We also confirm that our proposed change to § 438.6(b)(1) does not impact states' ability to revise or adjust capitation rates retroactively under § 438.7(c)(2) when unexpected events or programmatic changes occur during a rating period that necessitate a retroactive change or adjustment to the previously paid rates. Section 438.7(c)(2) clarifies that the retroactive adjustment (or change) to capitation rates must be supported by an appropriate rationale and that sufficient data, assumptions, and methodologies used in the development of the adjustment must be described in sufficient detail and submitted in a new rate certification along with the contract amendment. Changes to a risk-sharing mechanism are not changes to the capitation rates themselves; they are changes to an arrangement or mechanism that results in a separate payment from a state to a managed care plan or a remittance to a state from a managed care plan.

Section 438.6(b)(1) applies to any and all mechanisms or arrangements that have the effect of sharing risk between the MCO, PIHP, or PAHP, and the state on an aggregate level. We believe that this concept includes risk mitigation strategies and other arrangements that protect the state or the MCO, PIHP, or PAHP against the risk that the assumptions used in the initial development of capitation rates are different from actual experience. Common risk mitigation strategies include a medical loss ratio (MLR) with a remittance, a risk corridor, or a risk-based reconciliation payment. Under § 438.6(b)(1), we included a non-exhaustive list of risk-sharing mechanisms, such as reinsurance, risk corridors, or stop-loss limits. We also defined risk corridor in § 438.6(a) as a risk-sharing mechanism in which states and MCOs, PIHPs, or PAHPs may share in profits and losses under the contract outside of a predetermined threshold amount. Because the regulations in part 438 do not use the term ''risk mitigation strategy,'' we do not believe it is necessary to define the term or add it to the regulations. Section 438.6(b)(1) is clear that all risk-sharing mechanisms are subject to its scope.

Comment: One commenter requested CMS add risk pools to the list of risk-sharing arrangements in § 438.6(b)(1) to clarify that such arrangements are subject to actuarial soundness requirements and must be documented in the managed care contract prospectively.

Response: If a risk pool is used as a mechanism to share risk between the MCO, PIHP, or PAHP, and the state, then we agree with commenters that a risk pool is subject to the requirements in § 438.6(b)(1). We reiterate that any mechanism, strategy, or arrangement that protects the state or the MCO, PIHP, or PAHP against the risk that the assumptions used in the initial development of capitation rates are different from actual experience is subject to the requirements in § 438.6(b)(1). We decline to add a specific mention of ''risk pools'' into the regulations because we believe that § 438.6(b)(1) adequately indicates that it applies to all risk-sharing mechanisms and only lists certain mechanisms as examples.

Comment: One commenter requested clarification from CMS regarding whether restrictions on profits are to be considered a risk-sharing mechanism, including minimum MLR requirements and contractual profit caps. Another commenter requested that the proposed risk-sharing mechanism be open to modifications while CMS is reviewing the rates, so that if CMS does not accept the initially proposed risk-sharing mechanism, then the state can modify and propose to CMS an alternative, acceptable strategy.

Response: We confirm that a minimum MLR requirement with a remittance would be considered a risk-sharing mechanism and subject to the requirements in § 438.6(b)(1). We also

confirm that additional restrictions on profits or contractual profit caps would also be considered risk-sharing mechanisms under this regulation. To the degree that arrangements (like the examples provided by the commenter or other arrangements) function to explicitly share risk between states and managed care plans, such arrangements would be risk-sharing mechanisms and subject to the requirements in § 438.6(b)(1). Regarding possible modifications to a risk-sharing mechanism while CMS is reviewing the rates, we confirm for commenters that such modifications would only be possible prior to the start of the rating period to comply with the final regulation text. The requirements in § 438.6(b)(1) to document the risk-sharing mechanism in the contract and rate certification documents prior to the start of the rating period, as well the prohibition on adding or modifying risk-sharing mechanisms after the start of the rating period, would apply to states, plans, and CMS. If states are seeking CMS review and approval prior to the start of the rating period, CMS and states can work toward modifications that would ensure that arrangements are reasonable, appropriate, and compliant with Federal requirements, as long as such modifications are in place and documented in the contract and rate certification documents for the rating period prior to the start of the rating period and CMS' approval of such documents.

Comment: Several commenters opposed the proposed change and requested CMS allow states flexibility to retroactively adjust risk-sharing mechanisms. Commenters expressed concern that the proposed section may restrict states from employing important tools for paying plans in a volatile health care environment. Commenters noted that the addition of new technologies, drugs, and populations to the Medicaid managed care program often require retroactive adjustment of plan payments. Commenters further noted that rates may be adjusted, but states have also effectively employed risk-sharing mechanisms to ensure that plans receive appropriate payment. Commenters stated that continuing to allow retroactive addition or modification of risk-sharing mechanisms will allow states to pay plans adequately when substantial coverage changes occur mid-year. A few commenters noted that states often make adjustments to rates to address disease outbreaks, launches of high-cost prescription drugs, other unforeseen circumstances that increase benefit costs, and refinements to risk adjustment methodologies that improve rate accuracy. One commenter requested CMS allow for appropriate flexibility for states to make applicable retroactive modifications to risk-sharing mechanisms through the development of an exception process as an option to account for either lack of performance or unforeseen events that detrimentally impact performance or trend.

Response: We disagree with commenters about permitting retroactive adjustments to risk-sharing mechanisms, and we also disagree with creating an exception process to permit such retroactive adjustments to risk-sharing arrangements. We do not believe that it is appropriate to modify risk-sharing mechanisms between states and plans after the claims experience for a rating period is known, as we believe that this approach undercuts the need for states and plans to address uncertainty prospectively using risk-sharing mechanisms. As discussed in the proposed rule and in our responses here, we have specific concerns that permitting modification of risk-sharing mechanisms after claims experience for a rating period is known could be used inappropriately to shift costs onto the Federal Government.

We note that we are not foreclosing retroactive rate adjustments (that is, changes to the rates themselves as opposed to changes to the risk-sharing mechanism) when appropriate, such as when substantial coverage changes occur mid-year, adjustments are necessary to address disease outbreaks, launches of high-cost prescription drugs, or other unforeseen circumstances that increase benefit costs (some of the examples provided by commenters). We agree that it would be appropriate to implement retroactive rate adjustments to accommodate unexpected programmatic changes; however, modifying existing risk-sharing mechanisms, or adding new risk-sharing mechanisms, after claims experience for a rating period is known is not the appropriate tool for states to use to address such concerns. States should adjust rates using the appropriate requirements under § 438.7(c)(2) to address unexpected events that necessitate a retroactive adjustment (that is, change) to previously paid rates. As provided by § 438.7(c)(2), if the state determines that a retroactive adjustment to the capitation rate is necessary, the retroactive adjustment must be supported by a rationale for the adjustment and the data, assumptions, and methodologies used to develop the magnitude of the adjustment must be adequately described with enough detail to allow CMS or an actuary to determine the reasonableness of the adjustment. These retroactive adjustments must be certified by an actuary in a revised rate certification and submitted as a contract amendment to be approved by CMS.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.6(b)(1) as proposed.

b. Delivery System and Provider Payment Initiatives Under MCO, PIHP, or PAHP Contracts (§ 438.6(a) and (c))

As finalized in the 2016 final rule, § 438.6(c)(1) permits states to, under the circumstances enumerated in § 438.6(c)(1)(i) through (iii), direct the managed care plan's expenditures under the contract. Among other criteria, such directed payment arrangements require prior approval by CMS, per § 438.6(c)(2); our approval is based on meeting the standards listed in § 438.6(c)(2), including that the state expects the directed payment to advance at least one of the goals and objectives in the state's quality strategy for its Medicaid managed care program. We have been reviewing and approving directed payment arrangements submitted by states since the 2016 final rule, and we have observed that a significant number of them require managed care plans to adopt minimum rates, and that most commonly, these minimum rates are those specified under an approved methodology in the Medicaid state plan. We explicitly clarify here that certain financing requirements in statute and regulation are applicable across the Medicaid program irrespective of the delivery system (for example, fee-for-service, managed care, and demonstration authorities), and are similarly applicable whether a state elects to direct payments under § 438.6(c). Such requirements include, but are not limited to, limitations on financing of the non-Federal share applicable to health care-related taxes and bona fide provider-related donations.

Due to the frequency and similarities of these types of directed payment arrangements, we proposed to specifically address them in an amendment to § 438.6. At § 438.6(a), we proposed to add a definition for ''state plan approved rates'' to mean amounts calculated as a per unit price of services described under CMS approved rate methodologies in the state Medicaid plan. We also proposed to revise § 438.6(c)(1)(iii)(A) to specifically reference a directed payment arrangement that is based on an

approved state plan rate methodology. We explicitly noted how, as with all directed payment arrangements under § 438.6(c), a directed payment arrangement established under proposed paragraph (c)(1)(iii)(A) would have to be developed in accordance with § 438.4, the standards specified in § 438.5, and generally accepted actuarial principles and practices.

We explained in the proposed rule that supplemental payments contained in a state plan are not, and do not constitute, state plan approved rates as proposed in § 438.6(a); we proposed to include a statement to this effect under proposed paragraph (c)(1)(iii)(A). We noted in the proposed rule our view that a rate described in the approved rate methodology section of the state plan reflects only the per unit price of particular services. Supplemental payments are not calculated or paid based on the number of services rendered on behalf of an individual beneficiary, and therefore, would be separate and distinct from state plan approved rates under our proposal. We also proposed to define supplemental payments in § 438.6(a) as amounts paid by the state in its FFS Medicaid delivery system to providers that are described and approved in the state plan or under a waiver and are in addition to the amounts calculated through an approved state plan rate methodology.

Further, we proposed to redesignate current paragraph (c)(1)(iii)(A) as paragraph (c)(1)(iii)(B) and to revise the regulation to distinguish a minimum fee schedule for network providers that provide a particular service using rates other than state plan approved rates from those using state plan approved rates. To accommodate our proposal, we also proposed to redesignate current paragraphs (c)(1)(iii)(B) and (C) as paragraphs (c)(1)(iii)(C) and (D), respectively.

We also noted that as we have reviewed and approved directed payment arrangements submitted by states since publication of the 2016 final rule, we have observed that our regulation does not explicitly address some types of potential directed payments that states are seeking to implement. To encourage states to continue developing payment models that produce optimal results for their local markets and to clarify how the regulatory standards apply in such cases, we proposed to add a new § 438.6(c)(1)(iii)(E) that would allow states to require managed care plans to adopt a cost-based rate, a Medicare equivalent rate, a commercial rate, or other market-based rate for network providers that provide a particular service under the contract. We explained how authorizing these additional types of payment models for states to implement would eliminate the need for states to modify their payment models as only minimum or maximum fee schedules to fit neatly into the construct of the current rule.

Along with the proposed changes in § 438.6(c)(1)(iii)(A), we also proposed a corresponding change to the approval requirements in § 438.6(c)(2). In the 2016 final rule, we established an approval process that requires states to demonstrate in writing that payment arrangements adopted under § 438.6(c)(1)(i) through (iii) meet the criteria specified in § 438.6(c)(2) prior to implementation. Since implementing this provision of the 2016 final rule, states have noted that the approval process for contract arrangements that include only minimum provider reimbursement rate methodologies that are already approved by CMS and included in the Medicaid state plan are substantially the same as the approval requirements under the Medicaid state plan. Some states have stated that the written approval process in § 438.6(c)(2) is unnecessary given that a state will have already justified the rate methodology associated with particular services in the Medicaid state plan (or a state plan amendment) to receive approval by us that the rates are efficient, economical, and assure quality of care under section 1902(a)(30)(A) of the Act.

Therefore, to avoid unnecessary and duplicative Federal approval processes, we proposed to eliminate the prior approval requirement for payment arrangements that are based on state plan approved rates. To do so, we proposed to redesignate existing paragraph (c)(2)(ii) as (c)(2)(iii), to add a new paragraph (c)(2)(ii), and to redesignate paragraphs (c)(2)(i)(A) through (F) as paragraphs (c)(2)(ii)(A) through (F), respectively. We also proposed to revise the remaining paragraph at § 438.6(c)(2)(i) to require, as in the current regulation, that all contract arrangements that direct the MCO's, PIHP's, or PAHP's expenditures under paragraphs (c)(1)(i) through (iii) must be developed in accordance with § 438.4, the standards specified in § 438.5, and generally accepted actuarial principles and practices; we proposed to delete the remaining regulatory text from current paragraph (c)(2)(i).

In proposed new paragraph (c)(2)(ii), we specified prior approval requirements for payment arrangements under paragraphs (c)(1)(i) and (ii) and (c)(1)(iii)(B) through (E). We proposed amended paragraph (c)(2)(ii) as explicitly providing that payment arrangements under paragraph (c)(1)(iii)(A) do not require prior approval from us; we proposed to retain the requirement that such payment arrangements meet the criteria in paragraphs (c)(2)(ii)(A) through (F). We justified this proposed revision as a means to reduce administrative burden for many states by eliminating the need to obtain written approval prior to implementation of this specific directed payment arrangement that utilizes previously approved rates in the state plan. With the redesignation of paragraphs (c)(2)(ii)(A) through (F), we proposed to keep in place the existing requirements for our approval to be granted.

In the 2016 final rule, we specified at § 438.6(c)(2)(ii)(C) that contract arrangements which direct expenditures made by the MCO, PIHP, or PAHP under paragraph (c)(1)(i) or (ii) for delivery system or provider payment initiatives may not direct the amount or frequency of expenditures by managed care plans. At that time, we believed that this requirement was necessary to deter states from requiring managed care plans to reimburse particular providers specified amounts with specified frequencies. However, based on our experience in reviewing and approving directed payment arrangements since the 2016 final rule, we now recognize that this provision may have created unintended barriers to states pursuing innovative payment models. Some states have adopted or are pursuing payment models, such as global payment initiatives, which are designed to move away from a volume-driven system to a system focused on value and population health. These innovative payment models are based on the state directing the amount or frequency of expenditures by the managed care plan to achieve the state's goals for improvements in quality, care, and outcomes under the payment model. Therefore, we proposed to delete existing § 438.6(c)(2)(ii)(C) which would permit states to direct the amount or frequency of expenditures made by managed care plans under paragraph (c)(1)(i) or (ii). As a conforming change, we proposed to redesignate existing § 438.6(c)(2)(ii)(D) as § 438.6(c)(2)(iii)(C).

Under existing § 438.6(c)(2)(i)(F) (which we proposed to redesignate as § 438.6(c)(2)(ii)(F)), a contract arrangement directing a managed care plan's expenditure may not be renewed automatically. While § 438.6(c)(2)(i)(F) does not permit an automatic renewal of a contract arrangement described in paragraph (c)(1), it does not prohibit

states from including payment arrangements in a contract for more than one rating period. We have received numerous payment arrangement proposals from states requesting a multi-year approval of their payment arrangement to align with their delivery system reform efforts or contract requirements.

To provide additional guidance to states on the submission and approval process for directed payments, on November 2, 2017, we issued a CMCS Informational Bulletin (CIB) entitled ''Delivery System and Provider Payment Initiatives under Medicaid Managed Care Contracts'' (available at *https://www.medicaid.gov/federal-policy-guidance/downloads/cib11022017.pdf*). The CIB explained that based on our experience with implementation of § 438.6(c)(2), we recognize that some states are specifically pursuing multi-year payment arrangements to transform their health care delivery systems. The CIB also described that states can develop payment arrangements under § 438.6(c)(1)(i) and (ii), which are intended to pursue delivery system reform, over a period of time that is longer than one year so long as the state explicitly identifies and describes how the payment arrangement will vary or change over the term of the arrangement.

In the 2018 proposed rule, we stated that some payment arrangements, particularly value-based purchasing arrangements or those tied to larger delivery system reform efforts, can be more complex and may take longer for a state to implement. We noted that setting the payment arrangement for longer than a one-year term would provide a state with more time to implement and evaluate whether the arrangement meets the state's goals and objectives to advance its quality strategy under § 438.340. We reiterated our position from the CIB that we interpret the regulatory requirements under § 438.6(c) to permit multi-year payment arrangements when certain criteria were met. The CIB identified the criteria for multi-year approvals of certain directed payment arrangements, and we proposed to codify those criteria in a new § 438.6(c)(3).

Specifically, we proposed in new paragraph (c)(3)(i) that we would condition a multi-year approval for a payment arrangement under paragraphs (c)(1)(i) and (ii) on the following criteria: (1) The state has explicitly identified and described the payment arrangement in the contract as a multi-year payment arrangement, including a description of the payment arrangement by year, if the payment arrangement varies by year; (2) the state has developed and described its plan for implementing a multi-year payment arrangement, including the state's plan for multi-year evaluation, and the impact of a multi-year payment arrangement on the state's goal(s) and objective(s) in the state's quality strategy in § 438.340; and (3) the state has affirmed that it will not make any changes to the payment methodology, or magnitude of the payment, described in the contract for all years of the multi-year payment arrangement without our prior approval. If the state determines that changes to the payment methodology, or magnitude of the payment, are necessary, the state must obtain prior approval of such changes using the process in paragraph (c)(2). We noted that in addition to codifying criteria for the approval of multi-year payment arrangements, the proposed new paragraph (c)(3)(i) would address any potential ambiguity on the narrow issue of the permissibility of states to enter into multi-year payment arrangements with managed care plans.

Finally, in alignment with our guidance in the November CIB, we proposed to specify at paragraph (c)(3)(ii) that the approval of a payment arrangement under paragraph (c)(1)(iii) would be for one rating period only. We explained that while we understood that value-based purchasing payment arrangements or those tied to larger delivery system reform efforts can be more complex and may take longer for a state to implement, we believed that more traditional payment arrangements and fee schedules permitted under paragraph (c)(1)(iii) should continue to be reviewed and evaluated on an annual basis by both states and us. We explained how it was important to continue ensuring that such payment arrangements under paragraph (c)(1)(iii) are consistent with states' and our goals and objectives for directed payments under Medicaid managed care contracts.

We proposed several revisions in § 438.6(c) including specifying different types of potential directed payments such as arrangements based on a Medicare equivalent rate, a commercial rate, a cost-based rate, or other market-based rate (§ 438.6(c)(1)(iii)(E)) and permitting states to direct the amount or frequency of expenditures by deleting existing § 438.6(c)(2)(ii)(C). Some commenters were supportive, some were not, and others raised related policy issues with state directed payments that we believe warrant additional consideration. For example, several commenters stated that these proposals increased flexibility for states to design directed payment arrangements which would help drive innovation and enable states to better optimize their programs to accommodate their own unique policy and demographic conditions. Other commenters noted that Medicare, commercial, and market-based rates would, in some cases, reduce provider reimbursement rates and jeopardize quality and access to Medicaid services. A few commenters were concerned about the ability of managed care plans to manage risk as it relates to state-directed payment arrangements. One commenter stated that the regulatory requirements under § 438.6(c) were too rigid for managed care plans and can degrade the utility and effectiveness of value-based arrangements.

Based on the diverse range of public comments and our continued experience with state directed payments since the proposed rule was published in November 2018, we have decided not to finalize the revisions proposed at § 438.6(c)(1)(iii)(E) and (c)(2)(ii)(C) in this final rule. However, we will consider addressing these and other state directed payment policies in future rulemaking. We thank commenters for their valuable input and will use it to inform our future rulemaking.

The following summarizes the public comments received on our proposal to amend § 438.6(a) and (c) and our responses to those comments.

Comment: Several commenters supported the changes to § 438.6(a), including the addition of a definition for state plan approved rates and the additional clarification in § 438.6(c)(1)(iii)(A) that supplemental payments are not, and do not constitute, state plan rates. Several commenters disagreed with proposed § 438.6(c)(1)(iii)(A) and recommended that CMS revise the proposed definitions of state plan approved rates and supplemental payments to acknowledge the legitimacy and importance of supplemental payments in the Medicaid program. One commenter recommended that we define or explain our meaning for ''per unit''. One commenter requested that CMS confirm that state plan approved rates also include state plan approved payments that are based on a provider's actual or projected costs. One commenter requested that CMS clarify whether the proposed definition of supplemental payments in § 438.6(a) included disproportionate share hospital (DSH) or graduate medical education (GME) payments.

Response: We do not agree with commenters that further revisions are needed to address the role of supplemental payments in the Medicaid program; we believe that our policies

finalized in this final rule, specifically to define the term ''supplemental payments'' for purposes of part 438, including § 438.6, and to adopt (in § 438.6(d)(6)) a period for pass-through payments to be used for states transitioning new services or new populations to Medicaid managed care, demonstrate that CMS understands the role of supplemental payments in the Medicaid program. We note that our proposed definition of ''supplemental payments'' may not have been as clear as it could be, so we are finalizing the definition by adding ''or demonstration'' to recognize 1115 demonstration authority as well as waiver authority.

Regarding the definition of ''per unit,'' we have reconsidered the use of that term and acknowledge that this definition may not have been clear. To correct this, we have revised the definition to remove ''per unit'' and instead, reference amounts calculated for specific covered services identifiable as having been provided to an individual beneficiary described under CMS approved rate methodologies in the Medicaid State plan. Moreover, we explicitly clarify here that certain financing requirements in statute and regulation are applicable across the Medicaid program irrespective of the delivery system (for example, fee-for-service, managed care, and demonstration authorities), and are similarly applicable whether a state elects to direct payments under § 438.6(c). Such requirements include, but are not limited to, limitations on financing of the non-Federal share applicable to health care-related taxes and bona fide provider-related donations.

We agree with commenters that clarification is needed regarding whether ''supplemental payments,'' as the term is defined and used in § 438.6, includes DSH or GME payments. It was never our intent to include DSH or GME payments in our definition of supplemental payments for the purposes of Medicaid managed care under part 438. Therefore, we are finalizing the definition of supplemental payments at § 438.6(a) with an additional sentence stating that DSH and GME payments are not, and do not constitute, supplemental payments. We note that DSH and GME payments would not meet the definition, finalized at § 438.6(a), of state plan approved rates because such payments are not calculated as amounts for specific covered services identifiable as having been provided to an individual beneficiary. We are also finalizing a technical change to the definition of supplemental payments by revising the phrase ''amounts calculated through an approved state plan rate methodology'' to ''state plan approved rates.'' This revision eliminates ambiguity and uses terminology that is being finalized in this final rule.

We also believe that the definition of state plan approved rates should include the clarification that was proposed in § 438.6(c)(1)(iii)(A) that supplemental payments are not, and do not constitute, state plan approved rates as they are not directly attributable to a covered service furnished to an individual beneficiary. We are finalizing the definition of the term ''state plan approved rates'' in § 438.6(a) with this clarifying sentence included in the definition instead of at paragraph (c)(1)(iii)(A).

Comment: A few commenters requested clarification on the difference between a state plan approved rate and a supplemental payment. Commenters noted that in some states there are situations where there is a per unit price set at an amount higher than the Medicaid fee schedule for a class of providers, and this higher price has been approved in the state plan. The difference between the higher rate and the Medicaid fee schedule amount is paid retrospectively, but the total payment is still based on the number of units incurred for the applicable services. Commenters questioned whether rates in this situation would be a state plan approved rate or a supplemental payment.

Response: As finalized in this rule, state plan approved rates means amounts calculated for specific covered services identifiable as having been provided to an individual beneficiary described under the CMS approved rate methodologies in the Medicaid state plan. We confirm for commenters that state plan approved rates can include payments that are higher than the traditional Medicaid FFS fee schedule for a specific class of providers when the payment methodology has been approved in the state plan and is for specific covered services identifiable as having been provided to an individual beneficiary. We have also revised the definition to note that supplemental payments are not, and do not constitute, state plan approved rates. Supplemental payments approved under a Medicaid state plan are often made to providers in a lump sum and often cannot be linked to specific covered services provided to an individual Medicaid beneficiary; therefore, supplemental payments are not directly attributable to a covered service furnished to an individual beneficiary. We understand that some payment methodologies are calculated retrospectively for specific reasons, such as when payments are made based on a provider's actual costs. We emphasize that payment amounts calculated for specific covered services identifiable as having been provided to an individual beneficiary must be directly tied to the provision of covered services to Medicaid beneficiaries, which is why these payment amounts are consistent with our definition of ''state plan approved rates'' under part 438, including § 438.6 (and why these payment amounts are not considered supplemental payments for the purposes of § 438.6).

Comment: A few commenters requested clarification that state plan approved rates include FFS payments that are described and approved in the state plan when the payment is for a specific service or benefit provided to enrollees covered under a contract.

Response: As finalized in this rule, state plan approved rates means amounts calculated for specific covered services identifiable as having been provided to an individual beneficiary described under approved rate methodologies in the Medicaid state plan. As defined here, the term ''state plan approved rates'' includes Medicaid FFS payments for a specific service or benefit provided to enrollees when the payment methodology results in amounts calculated for specific covered services identifiable as having been provided to an individual beneficiary and has been approved in the state plan. As long as the payment amounts are calculated for specific covered services identifiable as having been provided to an individual beneficiary and described under CMS approved rate methodologies in the state plan, the payment amounts will meet our definition for state plan approved rates under § 438.6(c).

Comment: Some commenters recommended changing the language in proposed § 438.6(a) to indicate that state plan approved rates means amounts paid on a ''per claim'' basis by the state in its FFS Medicaid delivery system to providers for services as described under CMS approved rate methodologies in the Medicaid state plan. Other commenters recommended changing the language for supplemental payments to mean amounts paid separately by the state in its FFS Medicaid delivery system to providers that are described and approved in the state plan or under a waiver thereof and are in addition to state plan approved rates. One commenter requested that CMS consider changing the proposed definition of supplemental payments to be amounts paid by the state in its FFS

Medicaid delivery system to providers that are described and approved in the state plan or under a waiver thereof; are not for a specific service or benefit provided to a specific enrollee covered under the contract; and are in addition to the amounts calculated through an approved state plan rate methodology.

Response: After reviewing the specific recommendations made by commenters, we do not believe that these specific revisions to the definitions are necessary. However, we have reconsidered the use of ''per unit'' and acknowledge that this may not have been clear. To correct this, we have revised the definition to remove ''per unit'' and instead, reference amounts calculated for specific covered services identifiable as having been provided to an individual beneficiary described under CMS approved rate methodologies in the Medicaid State plan. The recommendation to use the term ''per claim'' instead of ''per unit'' in the definition for state plan approved rates is also not necessary as we are not finalizing the term ''per unit'' as described elsewhere. The other recommendations add the phrases ''paid separately'' and ''are not for a specific service or benefit provided to a specific enrollee covered under the contract'' to the definition of supplemental payments. These recommendations do not add clarity to the definition, and we believe that these same concepts are already present in our proposed definitions in § 438.6(a). For example, in the definition of supplemental payments, we proposed and are finalizing the phrase ''and are in addition to'' which could include whether the payment amounts are paid separately or not. We also do not believe that it is necessary to add the phrase ''are not for a specific service or benefit provided to a specific enrollee covered under the contract'' to the definition of supplemental payments because we believe that our proposed definition is broad enough to include this concept, especially since the definition for state plan approved rates means that payments are calculated as amounts calculated for specific covered services identifiable as having been provided to an individual beneficiary and supplemental payments are paid in addition to those state plan approved rates. We are also finalizing a technical change to the definition of supplemental payments by revising the phrase ''amounts calculated through an approved State plan rate methodology'' to ''State plan approved rates.'' This revision eliminates ambiguity and uses terminology that is being finalized in this final rule.

Comment: Many commenters supported the proposals that eliminate the prior approval requirement for payment arrangements that use state plan approved rates, allowing states to mirror FFS rates in their managed care plans and develop rates tied to a variety of payment options. Commenters noted that the proposals reduce states' and CMS' administrative burden and create greater flexibility for states to develop stable, long-term payment strategies that can be applied equally in both FFS and managed care delivery systems. Commenters noted that the proposals allow for flexibility that can help states and CMS focus on those payment methodologies that are truly unprecedented or novel, while bringing financial predictability to safety-net providers who rely on Medicaid funding. Some commenters opposed the proposed changes to eliminate prior approval for state plan approved rates, stating that the proposals do not provide a mechanism for frequent and consistent oversight or ensure that the proposals will provide access to care.

Response: We agree that our modifications to § 438.6(c)(2)(ii) will reduce state and Federal burden by eliminating the requirement that states obtain written prior approval for payment arrangements that have already been approved by CMS in the Medicaid state plan. We disagree with commenters that our proposed changes would increase unintended risk or a lack of Federal oversight because we are only eliminating the prior approval requirement for those payment arrangements which have already been reviewed and approved by CMS under the Medicaid state plan. We do not believe that a duplicative review and approval process has value or provides any necessary additional Federal oversight. We believe that prudent program management is necessary to efficiently and effectively administer the Medicaid program and eliminating unnecessary and duplicative review processes will improve states' efforts to implement payment arrangements that meet their local goals and objectives. To ensure appropriate oversight and prudent program management, we have initiated a review of state-directed payments and may issue future guidance and/or rulemaking based on the findings of this evaluation. This review was initiated based on our experience reviewing state requests for state-directed payments, as we have seen proposals for significant changes to provider reimbursement, which may in turn have an impact on program expenditures.

Comment: A few commenters requested clarification on whether prior approval under § 438.6(c) would be required if a state implemented a uniform percentage increase for managed care plan provider payments concurrently with an increase to the state's FFS rates. These same commenters noted that the managed care plan provider payments would not match the state's FFS rates and that the per unit prices of services for managed care and FFS would vary.

Response: In the scenario described by the commenters, the state's requirement for managed care plans to provide a uniform increase to health care providers would be consistent with § 438.6(c)(1)(iii)(C) as proposed and finalized, which permits states to require their managed care plans to provide a uniform dollar or percentage increase for providers that provide a particular service covered under the contract, provided that the other requirements in § 438.6(c) are met. Section 438.6(c)(2)(ii), as finalized in this rule, requires that contract arrangements that direct the managed care plan's expenditures under § 438.6(c)(1)(iii)(B) through (D) must have written approval from CMS prior to implementation. This means that the uniform percentage increase for managed care plan provider payments would require prior approval. We note that a state-directed payment mandating a managed care plan pay the state's FFS rates is authorized under § 438.6(c)(1)(iii)(A) and prior approval would not be required under § 438.6(c)(2)(ii), as amended in this rule under this section.

Comment: A few commenters requested clarification on the requirement of written approval for state-directed payments under proposed § 438.6(c)(1)(iii)(A). These commenters noted that the proposed regulation states that these arrangements ''do not require written approval prior to implementation'' and questioned if these arrangements ever require written approval from CMS.

Response: If the state requires managed care plans to adopt a minimum fee schedule for network providers that provide a particular service covered under the contract using state plan approved rates as defined in § 438.6(a), written approval is not required from us under § 438.6(c)(2)(ii), as amended in this rule. This means that states may implement these specific payment arrangements, which have already been reviewed and approved by CMS under the Medicaid state plan,

without obtaining any additional approvals from CMS under § 438.6(c). However, this exemption from the prior approval requirement only applies to required use by managed care plans of the state plan approved rates for the FFS program. If the state requires a managed care plan to apply increases or other adjustments to those state plan approved rates, it is not an arrangement described in paragraph (c)(1)(iii)(A), and therefore, paragraph (c)(2)(ii) would apply and require prior written approval.

Comment: One commenter requested that CMS confirm that the evaluation requirement at § 438.6(c)(2)(ii)(D) and the prohibition against automatic renewal at § 438.6(c)(2)(ii)(F) are inapplicable to state direction that a managed care plan use the state plan minimum fee schedules under § 438.6(c)(1)(iii)(A). If CMS will still require documentation of these factors, this commenter recommended CMS allow that documentation to be incorporated into the traditional rate certification submission to avoid duplicative administrative review processes.

Response: Under § 438.6(c)(2)(ii), contract arrangements that require managed care plans to adopt a minimum fee schedule for network providers that provide a particular service under the contract using state plan approved rates do not require prior approval from us; however, we proposed and are finalizing that such directed payment arrangements must meet the criteria described in § 438.6(c)(2)(ii)(A) through (F). These criteria include that states have an evaluation plan that measures the degree to which the payment arrangement advances at least one the state's quality goals and objectives, and that such payment arrangements are not renewed automatically. We confirm here, only for payment arrangements that utilize minimum fee schedules based on state plan approved rates (as specified in § 438.6(c)(1)(iii)(A)), that while there is no regulatory requirement for the submission of any documentation from the state to demonstrate that state directed arrangements described in § 438.6(c)(1)(iii)(A) meet the criteria described in § 438.6(c)(2)(ii)(A) through (F), these criteria apply and CMS may require states to submit evidence of compliance with the criteria in § 438.6(c)(2)(ii)(A) through (F) if we have reason to believe the state is not complying with the requirements. Because the requirement to comply with these criteria, even if written approval from us is not required, applies nonetheless to arrangements described in § 438.6(c)(1)(iii)(A), we expect that states will maintain their evaluation plans and will continue monitoring and evaluating these payment arrangements. Further, the other criteria listed in § 438.6(c)(2)(ii), such as the prohibition related to IGTs, continue to apply even if we do not require the state to document that compliance to us, and we may require states to submit evidence of compliance with the criteria in § 438.6(c)(2)(ii)(A) through (F) if we have reason to believe the state is not complying with the requirements. Under the plain language of § 438.6(c)(2)(ii), all contract arrangements that direct a managed care plan's expenditures, regardless of whether the payment arrangement requires prior approval under § 438.6(c)(2), must meet the criteria listed in paragraphs (c)(2)(ii)(A) through (F). In addition, we clarify here that certain financing requirements in statute and regulation are applicable across the Medicaid program irrespective of the delivery system (for example, fee-for-service, managed care, and demonstration authorities). Such requirements include, but are not limited to, limitations on financing of the non-Federal share applicable to health care-related taxes and bona fide provider-related donations. These financing requirements similarly apply when a state elects to direct payments under § 438.6(c), including § 438.6(c)(1)(iii)(A).

Comment: One commenter recommended that CMS provide guidance to states on adopting the Medicaid FFS outpatient drug reimbursement methodology as a minimum fee schedule or a separate and distinct cost-based rate for pharmacy payments in the Medicaid managed care program.

Response: Under § 438.6(c)(1)(iii)(A), states are permitted to contractually require their managed care plans to adopt a minimum fee schedule for providers that provide a particular service covered under the contract using state plan approved rates. The state plan approved rates, under the definition finalized at § 438.6(a), can include the Medicaid FFS outpatient drug reimbursement methodologies that are approved by CMS and in the Medicaid state plan. States may implement payment arrangements under paragraph (c)(1)(iii)(A), which have already been reviewed and approved by CMS under the Medicaid state plan, without obtaining any additional approvals from us under § 438.6(c). If cost-based rate methodologies are approved in the Medicaid state plan, states could implement the payment arrangements under paragraph (c)(1)(iii)(A) if the contract requirement is implemented as a minimum fee schedule and if it comports with other regulatory requirements. We note that after consideration of the overall goals and purposes of § 438.6(c), we have reconsidered our proposal in § 438.6(c)(1)(iii)(E) to permit states to direct their Medicaid managed care plans to use a cost-based rate, Medicare-equivalent rate, commercial rate, or other market-based rate as explained elsewhere in this regulation.

Comment: Commenters requested that CMS finalize the proposals at § 438.6(c) with the condition that such arrangements only be applied in a manner that accounts for potential adverse effects on access to care or other unintended impacts to dental benefits. Commenters requested that states be required to consult and seek public comment from dental plans and providers prior to including dental services in a value-based payment model.

Response: We proposed and are finalizing additional types of payment arrangements that states may direct their managed care plans to use for paying providers that furnish covered services, to enable states to achieve specific state goals and objectives related to Medicaid payment, access to care, and other delivery system reforms at a local level. Under § 438.6(c)(2), we require that states demonstrate that the arrangement complies with specific criteria prior to implementing the payment arrangements. One of those criteria is that the payments advance at least one of the goals and objectives in the state's Medicaid managed care quality strategy (such as an access to care, or quality of care, goal and/or objective); another is that the state has an evaluation plan to assess the degree to which the payment arrangements achieve the state's objectives. While it might be theoretically possible for a state to design and mandate a particular provider payment arrangement that does not consider access to care as part of setting the provider payment, there are other regulatory requirements (such as required quantitative network adequacy standards) in part 438 that ensure that states consider access to care in contracting with managed care plans. We believe that our regulations, including § 438.6(c) and other requirements in part 438, are sufficient to ensure that payment arrangements account for potential adverse effects on access to care or other unintended impacts; therefore, we decline to adopt

additional conditions as part of this final rule.

We also decline to adopt new regulations or new requirements that states consult and seek public comment from plans and providers before mandating a payment arrangement that is permitted under § 438.6(c). While we believe that states should be seeking broad stakeholder feedback when developing and implementing delivery system reforms and performance payment initiatives, we do not believe that it is necessary to create new Federal requirements to accomplish this goal. In our experience, states are already working with many stakeholder groups when designing and implementing new payment requirements for providers in the managed care context, and we believe that states should continue to have discretion in how they convene stakeholder groups and obtain stakeholder feedback to inform state Medicaid policy in this specific area.

Comment: One commenter requested that CMS clarify that states may set minimum payment rates for providers within a class that meet certain criteria. The commenter noted that such criteria could include the provision of a particular type of service, such as a public health service.

Response: We agree that states are permitted to establish state-directed payments and direct them equally, and using the same terms of performance, for a class of providers providing services under a contract. We explained this in the 2016 final rule (81 FR 27586) and our position on this standard has not changed since the 2016 final rule, and we agree that states could develop minimum payment rates under § 438.6(c) for a class of providers in accordance with the requirements in § 438.6(c)(2)(ii)(B).

Comment: A few commenters were concerned about the ability of managed care plans to manage risk as it relates to state-directed payment arrangements. Commenters recommended that CMS confirm that managed care plans retain the ability to manage risk effectively and have discretion in managing their contracts relating to minimum fee schedules and pay increases, as well as maximum fee schedules. Commenters recommended that CMS require states to consult with managed care plans prior to implementing state directed payments. One commenter stated that the regulatory requirements under § 438.6(c) were too rigid for managed care plans and can degrade the utility and effectiveness of value-based arrangements. Commenters also noted that plans, similar to states, should be given the flexibility to deploy specific tactics aimed at encouraging the provision of high-quality and cost-efficient care, and that CMS can continue to add value in this area by disseminating various state approaches and sharing both policy and operational best practices.

Response: We agree with commenters that managed care plans should have adequate authority and flexibility to be able to effectively manage risk and have discretion in managing their contracts with providers. This was part of our rationale for adopting the limits on pass-through payments and state-directed payments in § 438.6 in the 2016 final rule (81 FR 27587–27592). We also agree with commenters that plans should be able to deploy specific tactics aimed at encouraging the provision of high-quality and cost-efficient care. However, while we do not agree with commenters that additional revision to § 438.6(c) is necessary at this time, after consideration of the overall goals and purposes of § 438.6(c) and public comments, we have reconsidered our proposal to delete existing § 438.6(c)(2)(ii)(C) which prohibits states from directing the amount or frequency of expenditures made by managed care plans under § 438.6(c)(1)(i) or (ii). While we stated in the proposed rule that this provision may have created unintended barriers to states pursuing innovative payment models, after further consideration, we believe the § 438.6(c) criteria established in the 2016 final rule struck the appropriate balance between the need for autonomy by managed care plans and flexibility for state Medicaid agencies (81 FR 27582 and 27583). Further, we believe retaining this provision will achieve our goal of ensuring managed care plans have the authority and flexibility to effectively manage risk and discretion in managing their contracts with providers. We acknowledge that state direction of provider payments by managed care plans, as permitted under § 438.6(c), can require that managed care plans adopt specific payment parameters for specified providers and can require that managed care plans participate in specified value-based purchasing or performance improvement initiatives; however, we believe that managed care plans retain the ability to reasonably manage risk and still have adequate discretion in managing their contracts with providers, even in circumstances where states may require managed care plans to adopt specific parameters for provider payment. We discussed these issues in the 2016 final rule and why the specific permitted payment arrangements and criteria identified in § 438.6(c) struck the appropriate balance between the need for autonomy by managed care plans and flexibility for state Medicaid agencies (81 FR 27582 and 27583).

Section § 438.6(c) is not intended to take discretion away from managed care plans in managing their risk; rather, § 438.6(c) is intended to help states implement delivery system and provider payment initiatives under Medicaid managed care contracts and permit states to direct specific payments made by managed care plans to providers under certain circumstances to assist states in furthering the goals and priorities of their Medicaid programs. We believe that the payment requirements under § 438.6(c) can assist both states and managed care plans in achieving their overall objectives for delivery system and payment reform and performance improvement without compromising managed care plans' ability to manage risk with their providers. We also note that the requirements under § 438.6(c) do not prohibit managed care plans from adopting their own (or additional) value-based payment arrangements that are aimed at encouraging the provision of high-quality and cost-efficient care. We expect states and managed care plans to work together in developing and implementing delivery system reforms that will be the most impactful for each state's local needs.

We also decline to require that states consult managed care plans before implementing a payment arrangement under § 438.6(c). While we believe that states should be seeking broad stakeholder feedback, including from managed care plans, when developing and implementing delivery system reforms and performance payment initiatives, we do not believe that it is necessary to create new Federal requirements to accomplish this goal. In our experience, states are already working with many stakeholder groups, including managed care plans, when designing and implementing new payment requirements under § 438.6(c), and we believe that states should continue to have discretion in how they convene stakeholder groups and obtain stakeholder feedback to inform state Medicaid policy.

Comment: Several commenters supported the allowance of multi-year approval of directed payment arrangements under certain conditions in § 438.6(c)(3). Commenters praised the added flexibility, citing that these payment arrangements encourage providers to make multi-year commitments to quality outcomes and

savings goals, reduce administrative burden, and support the expansion of value-based payment models. A few commenters urged CMS to expand the proposal permitting multi-year approvals at § 438.6(c)(3)(i) to include payment arrangements under paragraph (c)(1)(iii); commenters suggested that this would require a state to explicitly identify the payment arrangement in a contract as multi-year, describe its implementation plan including multi-year evaluation, and seek CMS approval for changes. Commenters noted that annual approvals for directed payments are challenging for states because of the lack of data to support the required annual evaluation to renew payment arrangements. One commenter requested that CMS reconsider the requirement that state-directed payments under § 438.6(c)(1)(iii) be approved annually because states generally implement minimal changes to fee schedules from one year to the next and delays in CMS approval of directed payments create uncertainty for states, managed care plans, and the provider community.

Response: We agree with commenters that multi-year approval of specific payment arrangements listed at paragraphs (c)(1)(i) and (ii) can reduce administrative burden and support the expansion of value-based payment models. We also agree that multi-year approval of payment arrangements listed at paragraphs (c)(1)(i) and (ii) can encourage providers to make multi-year commitments to quality outcomes. We also understand that commenters would like the option for multi-year approval for payment arrangements listed at paragraph (c)(1)(iii); however, we decline to adopt this recommendation. We continue to believe that the approval of a payment arrangement under paragraph (c)(1)(iii) should be for one rating period. As we explained in our proposed rule (83 FR 57272), while we understand and acknowledge that value-based purchasing payment arrangements and those tied to larger delivery system reform efforts can be more complex, we believe that more traditional payment arrangements and fee schedules under paragraph (c)(1)(iii) should continue to be reviewed and evaluated on an annual basis by both states and CMS to ensure that the payments are consistent with states' and CMS' goals and objectives for directed payments under Medicaid managed care contracts. Based on our experience with implementing state directed payments, states have been submitting proposals to CMS for significant changes to provider fee schedules under § 438.6(c)(1)(iii), particularly for uniform dollar or percentage increases, and we believe at this time that we should continue to monitor these payment arrangements on an annual basis. Moreover, to ensure appropriate oversight and prudent program management, we have initiated a review of state-directed payments and may issue future guidance and/or rulemaking based on the findings. This review was initiated based on our experience reviewing state requests for state-directed payments, as we have seen proposals for significant changes to provider reimbursement, which may in turn have an impact on program expenditures.

Regarding commenters' concerns about the lack of data to support the required annual evaluation in § 438.6(c)(2), we understand that states will not always have finalized evaluation results before requesting the next year's approval; however, we expect states to have a finalized evaluation plan. As noted in the November 2017 CIB, directed payments must have an evaluation plan to assess the degree to which the directed payment arrangement achieves its objectives. The basis and scope of the evaluation plan should be commensurate with the size and complexity of the payment arrangement. For example, a state implementing a minimum fee schedule to promote access to care may be able to utilize existing mechanisms to evaluate the effectiveness of the payment arrangement, such as external quality review (EQR) or an existing consumer or provider survey. States also have the ability to identify performance measures that are most appropriate for this evaluation and may wish to consider using performance measures currently being used by the state or other existing measure sets in wide use across the Medicaid, CHIP, and Medicare programs to facilitate alignment and reduce administrative burden.

Regarding commenters' concerns related to delays in CMS approval of directed payments, we committed in our November 2017 CIB to a timely review process for states. CMS committed to process § 438.6(c) preprints that do not contain significant policy or payment issues within 90 calendar days after receipt of a complete submission. Since publishing this CIB, we have continued to be committed to this timeframe, and in our recent experience in processing and approving § 438.6(c) payment arrangements, we are generally working with states to approve these payments within 90 calendar days.

Comment: Some commenters recommended that CMS consider automatic renewals of payment arrangements if either the state or the managed care plan can attest that the key characteristics of the payment arrangement that were used to make the initial determination remain in place. Commenters stated that an automatic renewal option would encourage more participation among physicians and physician specialty groups in various value-based contracts.

Response: We do not agree with commenters that we should permit automatic renewals of payment arrangements under § 438.6(c). Section 438.6(c)(2)(ii)(F), which was adopted in the 2016 final rule, prohibits payment arrangements under § 438.6(c) from being renewed automatically. In the 2016 final rule, we explained that because we sought to evaluate and measure the impact of these payment reforms, such agreements could not be renewed automatically (81 FR 27583). Automatic renewal is not consistent with our view that these payment arrangements must be reviewed to ensure that the requirements in § 438.6(c)(2) are met and continue to be met. Our policy on this issue has not changed. Under § 438.6(c)(3), we are finalizing in this rule, the option for states to seek multi-year approval of specific payment arrangements listed at paragraphs (c)(1)(i) and (ii), as we believe this will encourage more providers to make commitments to quality outcomes and support the expansion of value-based payment models. These payment arrangements will continue to be reviewed on a periodic basis.

Comment: One commenter requested that CMS clarify in § 438.6(c)(3) that a state does not need prior CMS approval to adjust for inflation or rebase an approved multi-year payment threshold.

Response: We do not agree with commenters that prior approval is not needed to adjust rates for inflation or when states rebase rates for an approved payment methodology, as this is not consistent with paragraph (c)(3)(i)(C) as proposed and finalized. Under this final rule, the state must affirm that it will not make changes to the payment methodology, or magnitude of the payment, described in the managed care contract for all years of the multi-year payment arrangement without our prior approval. If a state plans to adjust the payments for inflation or rebase a previously approved payment arrangement, the state must obtain prior approval of such changes under paragraph (c)(2), consistent with the text in paragraph (c)(3)(i)(C). This approach is consistent with our view that these payment arrangements must be

reviewed to ensure that the requirements in § 438.6(c)(2) are met, including that the payments continue to be consistent with § 438.4, the standards specified in § 438.5, and generally accepted actuarial principles and practices.

Comment: One commenter requested clarification on whether state directed payments under § 438.6(c)(1)(iii)(A) are subject to approval for one rating period or are excluded from this limitation because they are already approved under the state plan rate methodology.

Response: Under § 438.6(c)(2)(ii) as finalized, payment arrangements under paragraph (c)(1)(iii)(A) do not require written prior approval from CMS; therefore, the approval timeframes in § 438.6(c)(3) are not applicable to those payment arrangements.

Comment: A few commenters requested that CMS establish time parameters for CMS' review and approval of state directed payment proposals.

Response: While we decline to adopt commenters' request to establish specific time parameters for our review and approval of payment arrangements under § 438.6(c), we committed in our November 2017 CIB to a timely review process for states. We committed to process § 438.6(c) preprints that do not contain significant policy or payment issues within 90 calendar days after receipt of a complete submission. Since publishing this CIB, we have continued to be committed to this timeframe, and in our recent experience in processing and approving § 438.6(c) payment arrangements, we are generally working with states to approve these payments within 90 calendar days.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.6(a) and (c) as proposed with the following modifications:

- At § 438.6(a), included a sentence in the definition of supplemental payments that states DSH and GME payments are not, and do not constitute, supplemental payments; and included a technical change to the definition of supplemental payments by revising the phrase ''amounts calculated through an approved State plan rate methodology'' to ''State plan approved rates.''
- At § 438.6(a), included a sentence (which had been proposed to be codified in § 438.6(c)(1)(iii)(A)) in the definition of state plan approved rates that a state's supplemental payments contained in a state plan are not, and do not constitute, state plan approved rates under our definition.
- At § 438.6(a), deleted the phrase ''per unit price for services'' and replaced it with ''for specific services identifiable as having been provided to an individual beneficiary''.
- At § 438.6(c)(1)(iii)(A), finalizing the provision without the sentence that states supplemental payments contained in a state plan are not, and do not constitute, state plan approved rates.

c. Pass-Through Payments Under MCO, PIHP, and PAHP Contracts (§ 438.6(d))

In the 2016 final rule, and the 2017 ''Medicaid Program; The Use of New or Increased Pass-Through Payments in Medicaid Managed Care Delivery Systems'' final rule (82 FR 5415), we finalized a policy to limit state direction of payments, including pass-through payments, at § 438.6(c) and (d). We defined pass-through payments at § 438.6(a) as any amount required by the state, and considered in calculating the actuarially sound capitation rate, to be added to the contracted payment rates paid by the MCO, PIHP, or PAHP to hospitals, physicians, or nursing facilities that is not for the following purposes: A specific service or benefit provided to a specific enrollee covered under the contract; a provider payment methodology permitted under § 438.6(c)(1)(i) through (iii) for services and enrollees covered under the contract; a subcapitated payment arrangement for a specific set of services and enrollees covered under the contract; graduate medical education (GME) payments; or federally-qualified health center (FQHC) or rural health clinic (RHC) wrap around payments. We noted in our 2017 pass-through payment final rule that a distinguishing characteristic of a pass-through payment is that a managed care plan is contractually required by the state to pay providers an amount that is disconnected from the amount, quality, or outcomes of services delivered to enrollees under the contract during the rating period of the contract (82 FR 5416).[5] We noted that when managed care plans only serve as a conduit for passing payments to providers independent of delivered services, such payments reduce managed care plans' ability to control expenditures, effectively use value-based purchasing strategies, implement provider-based quality initiatives, and generally use the full capitation payment to manage the care of enrollees.

In the 2016 final rule, we also noted that section 1903(m)(2)(A) of the Act requires that capitation payments to managed care plans be actuarially sound and clarified our interpretation of that standard as meaning that payments under the managed care contract must align with the provision of services to beneficiaries covered under the contract. We clarified the statutory and regulatory differences between payments made on a FFS basis and on a managed care basis (81 FR 27588). We provided an analysis and comparison of section 1902(a)(30)(A) of the Act regarding FFS payments and implementing regulations that impose aggregate upper payment limits (UPL) on rates for certain types of services or provider types to section 1903(m)(2)(A) regarding the requirement that capitation payments in managed care contracts be actuarially sound and implementing regulations that require payments to align with covered services delivered to eligible populations. Based on that analysis, we concluded that pass-through payments were not consistent with our regulatory standards for actuarially sound rates because they do not tie provider payments to the provision of specific services. Despite this conclusion, we acknowledged in the 2016 final rule that, for many states, pass-through payments have been approved in the past as part of Medicaid managed care contracts and served as a critical source of support for safety-net providers caring for Medicaid beneficiaries (81 FR 27589). We therefore adopted a transition period for states that had already transitioned services or eligible populations into managed care and had pass-through payments in their managed care contracts as part of the regulations that generally prohibit the use of pass-through payments in actuarially sound capitation rates. Although § 438.6(d) was not explicitly limited to pass-through payments in the context of an established managed care program, the use of pass-through payments in place as of the 2016 final rule as an upper limit on permitted pass-through payments during the transition periods described in § 438.6(d) effectively precludes new managed care programs from adopting pass-through payments under the current law.

We used the 2016 final rule to identify the pass-through payments in managed care contract(s) and rate certification(s) that were eligible for the pass-through payment transition period. We provided a detailed description of the policy rationale (81 FR 27587 through 27592) for why we established

[5] Medicaid Program; The Use of New or Increased Pass-Through Payments in Medicaid Managed Care Delivery Systems, Final Rule, (82 FR 5415–5429, January 18, 2017).

pass-through payment transition periods and limited pass-through payments to hospitals, nursing facilities, and physicians, and this policy rationale has not changed. We focused on the three provider types identified in § 438.6(d) because these were the most common provider types to which states made supplemental payments within Federal UPLs under state plan authority in Medicaid FFS.

Since implementation of the 2016 and 2017 final rules, we have worked with many states that have not transitioned some or all services or eligible populations from their FFS delivery system into a managed care program. We have understood that some states would like to begin to transition some services or eligible populations from FFS to managed care but would also like to continue to make supplemental payments to hospitals, physicians, or nursing facilities. In the 2018 proposed rule, we acknowledged the challenges associated with transitioning supplemental payments into payments based on the delivery of services or value-based payment structures. We acknowledged the transition from one payment structure to another requires robust provider and stakeholder engagement, broad agreement on approaches to care delivery and payment, establishing systems for measuring outcomes and quality, planning, and evaluating the potential impact of change on Medicaid financing mechanisms. We also recognized that implementing value-based payment structures or other delivery system reform initiatives, and addressing transition issues, including ensuring adequate base rates, are central to both delivery system reform and to strengthening access, quality, and efficiency in the Medicaid program.

To address states' requests to continue making supplemental payments for certain services and assist states with transitioning some or all services or eligible populations from a FFS delivery system into a managed care delivery system, we proposed to add a new § 438.6(d)(6) that would allow states to make pass-through payments under new managed care contracts during a specified transition period if certain criteria are met. We explained that when we refer to transitioning services from FFS Medicaid to Medicaid managed care plan(s) for purposes of our proposal at § 438.6(d)(6), we are referring to both when a state expands the scope of its managed care program in terms of services (for example, covering behavioral health services through Medicaid managed care that were previously provided under Medicaid FFS for populations that are already enrolled in managed care) and populations (that is, adding new populations to Medicaid managed care when previously those populations received all Medicaid services through FFS delivery systems).

Specifically, we proposed in § 438.6(d)(6)(i) through (iii) that states may require managed care plans to make pass-through payments, as defined in § 438.6(a), to network providers that are hospitals, nursing facilities, or physicians, when Medicaid populations or services are initially transitioning or moving from a Medicaid FFS delivery system to a Medicaid managed care delivery system, provided the following requirements are met: (1) The services will be covered for the first time under a Medicaid managed care contract and were previously provided in a Medicaid FFS delivery system prior to the first rating period, as defined in § 438.2, of the specified transition period for pass-through payments (''pass-through payment transition period''); (2) the state made supplemental payments, as defined in § 438.6(a), to hospitals, nursing facilities, or physicians during the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period for those specific services that will be covered for the first time under a Medicaid managed care contract (this 12-month period is identified in § 438.6(d)(2) and used in calculating the base amount for hospital pass-through payments under § 438.6(d)(3)); and (3) the aggregate amount of the pass-through payments that the state requires the managed care plan to make is less than or equal to the amounts calculated in proposed paragraph (d)(6)(iii)(A), (B), or (C) for the relevant provider type for each rating period of the pass-through payment transition period—this requirement means that the aggregate amount of the pass-through payments for each rating period of the specified pass-through payment transition period that the state requires the managed care plan to make must be less than or equal to the payment amounts attributed to and actually paid as FFS supplemental payments to hospitals, nursing facilities, or physicians during the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period for each applicable provider type.

We also proposed at § 438.6(d)(6)(iv) that the state may require the MCO, PIHP, or PAHP to make pass-through payments for Medicaid populations or services that are transitioning from a FFS delivery system to a managed care delivery system for up to 3 years from the beginning of the first rating period in which the services were transitioned from payment in a FFS delivery system to a managed care contract, provided that during the 3 years, the services continue to be provided under a managed care contract with an MCO, PIHP, or PAHP.

We proposed paragraphs (d)(6)(iii)(A) through (C) to address the maximum aggregate pass-through payment amounts permitted to be directed to hospitals, nursing facilities, and physicians for each rating period of the specified 3-year pass-through payment transition period; that is, we proposed three paragraphs to identify the maximum aggregate amount of the pass-through payments for each rating period of the 3-year pass-through payment transition period that the state can require the managed care plan to make to ensure that pass-through payments under proposed § 438.6(d)(6) are less than or equal to the payment amounts attributed to and actually paid as FFS supplemental payments to hospitals, nursing facilities, or physicians, respectively, during the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period for each applicable provider type. This means that the aggregate pass-through payments under the new 3-year pass-through payment transition period must be less than or equal to the payment amounts attributed to and actually paid as FFS supplemental payments in Medicaid FFS.

To include pass-through payments in the managed care contract(s) and capitation rates(s) under new paragraph (d)(6), we proposed that the state would have to calculate and demonstrate that the aggregate amount of the pass-through payments for each rating period of the pass-through payment transition period was less than or equal to the amounts calculated as described in proposed paragraph (d)(6)(iii)(A), (B), or (C) for the relevant provider type. In § 438.6(d)(6)(iii), we proposed that for determining the amount of each component for the calculations contained in proposed paragraphs (d)(6)(iii)(A) through (C), the state must use the amounts paid for services during the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period. As a practical matter, the proposed calculation would require the state to use Medicaid Management Information System (MMIS) adjudicated claims data from the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period. This

timeframe and use of 2-year old data was chosen so that the state has complete utilization data for the service type that would be subject to the pass-through payments. Under our proposal for this calculation, the state would also be required to restrict the amount used in each component of the calculation to the amount actually paid through a supplemental payment for each applicable provider type. Our proposal referred to the most common provider types to which states made supplemental payments within Federal UPLs under state plan authority in Medicaid FFS. In the proposed rule, we provided the following four basic steps for making the calculation:

- *Step 1:* For each applicable provider type, identify the actual payment amounts that were attributed to and actually paid as FFS supplemental payments during the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period.
- *Step 2:* Divide (a) the payment amounts, excluding supplemental payments, paid for the services that are being transitioned from payment in FFS to the managed care contract for each applicable provider type by (b) the total payment amounts paid through payment rates for services provided in FFS for each applicable provider type to determine the ratio. In making these calculations, the state must use the amounts paid for each provider type during the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period.
- *Step 3:* Multiply the amount in Step 1 by the ratio produced by Step 2.
- *Step 4:* The aggregate amount of pass-through payments that the state may require the MCO, PIHP, or PAHP to make for each rating period of the 3-year pass-through payment transition period must be demonstrated to be less than or equal to the result achieved in Step 3.

In the proposed rule, we provided the following formula to help illustrate the aggregate amount of pass-through payments for each rating period of the pass-through payment transition period for each applicable provider type:

$$Permissible\ Aggregate\ Payment\ Amounts = (Medicaid\ FFS\ Supplemental\ Payments\ Paid\ to\ Provider\ Type\ X) \times \left(\frac{Amounts\ Paid\ in\ Medicaid\ FFS\ to\ Provider\ Type\ X\ through\ Medicaid\ for\ Transitioning\ Services}{Total\ Amounts\ Paid\ in\ Medicaid\ FFS\ to\ Provider\ Type\ X\ for\ All\ Services}\right)$$

In the proposed rule, we also provided an example to help demonstrate how the calculation would be performed. In the example, we assumed that a state Medicaid program paid $60 million in claims in FFS for inpatient hospital services in CY 2016. To acknowledge the Medicaid FFS UPL, we assumed that those same services would have been reimbursed at $100 million using Medicare payment principles. The difference between the amount that Medicare would have paid and the amount Medicaid actually paid in claims is $40 million.

For Step 1, of the $40 million difference, the state actually paid $20 million in supplemental payments to inpatient hospitals in CY 2016. For this example, we assumed that CY 2016 was the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period in which inpatient hospital services would be transitioned to a managed care contract; therefore, we assumed the pass-through payments were to be made during CY 2018. This transition to managed care could be either by moving Medicaid beneficiaries from FFS to coverage under managed care contracts that cover inpatient hospital services or by moving inpatient hospital services into coverage under an existing managed care program (that is, for enrollees who are already enrolled in managed care for other services).

Next, in Step 2, the state determines the ratio of the payment amounts paid in FFS for inpatient hospital services that will be transitioned from payment in a FFS delivery system to the managed care contract for the specific provider category and requisite period in relation to the total payment amounts paid in FFS for all inpatient hospital services within the same provider category during the same period. For example, if the state paid $36 million in FFS for inpatient hospital services for a specific population out of the $60 million in total claims paid in FFS for inpatient hospital services during 2016, and the state wants to transition the population associated with the $36 million in paid claims to the managed care contract, then the ratio is $36 million divided by $60 million, or 60 percent.

In Step 3, the state multiplies the $20 million in actual supplemental payments paid by 60 percent (the ratio identified in step 2), resulting in $12 million. The $12 million is the amount used in Step 4 as the total amount that the state would be permitted under our proposal to require the managed care plans to make in pass-through payments to inpatient hospitals for each rating period during the pass-through payment transition period.

In an effort to provide network providers, states, and managed care plans with adequate time to design and implement payment systems that link provider reimbursement with services, we also proposed, in § 438.6(d)(6)(iv), to allow states a transition period of up to 3 years to transition FFS supplemental payments into payments linked to services and utilization under the managed care contract. We proposed the 3-year pass-through payment transition period to provide states with time to integrate pass-through payment arrangements into allowable payment structures under actuarially sound capitation rates, including value-based purchasing, enhanced fee schedules, Medicaid-specific delivery system reform, or the other approaches consistent with § 438.6(c). We noted that a state may elect to use a shorter transition period but would be permitted a maximum of 3 years to phase out the pass-through payments. We explained that we believed that the proposed 3-year pass-through payment transition period was appropriate because the services (and corresponding supplemental payments) would not yet have been transitioned at all into managed care contracts; therefore, we believed that states should be in a better position to design payment structures that appropriately account for these payments during the transition to managed care (unlike the current pass-through payments rules, which only provide transition periods for pass-through payments that have already been incorporated into managed care contracts and rates prior to the adoption of specific limits on the state direction

of payments made by managed care plans). We specifically invited comment on whether the 3-year pass-through payment transition period was an appropriate amount of time.

Unlike the 2016 final rule, our proposal did not set a specific calendar date by which states must end pass-through payments; rather, our proposal provided a transition period for up to 3 years from the beginning of the first rating period in which the services were transitioned from payment in a FFS delivery system to a managed care contract, provided that during the 3 years, the services continue to be provided under a managed care contract with an MCO, PIHP, or PAHP. We noted that by providing states, network providers, and managed care plans time and flexibility to integrate current pass-through payment arrangements into permissible managed care payment structures, states would be able to avoid disruption to safety-net provider systems that they have developed in their Medicaid programs.

The following summarizes the public comments received on our proposal to amend § 438.6(d)(6) and our responses to those comments.

Comment: Many commenters supported the proposal to allow states to include new pass-through payments which encourage providers to participate in new managed care arrangements. Commenters noted that allowing states to have a set period of time to transition away from existing FFS supplemental payment programs when the state moved services (or populations) into a managed care program will be helpful in preventing abrupt reductions in services or access to providers because of the lack of supplemental payments. Commenters noted that pass-through payments are critical for ensuring that safety-net providers remain profitable enough to continue to treat their patients. Commenters also noted that states have long used these payments to combat provider shortages in areas of need by increasing reimbursement for providers who accept a proportionally large number of Medicaid patients.

Response: We agree that the new pass-through payment transition period under § 438.6(d)(6) can assist states with transitioning some or all services or eligible populations from a FFS delivery system into a managed care delivery system. We believe the new pass-through payment transition period will provide states, network providers, and managed care plans time and flexibility to integrate such payment arrangements into permissible managed care payment structures. States can use the transition period to avoid unnecessary disruption to any safety-net provider systems that they have developed in their Medicaid programs when the state moves services or populations into managed care. We understand that some states have previously used pass-through payments to increase reimbursement for safety-net providers; however, we note that there are other mechanisms that states can use to increase reimbursement to providers in a managed care program that do not implicate the pass-through payment restrictions. For example, states can use the payment arrangements under § 438.6(c) to direct managed care plans to link the delivery of services and quality outcomes for Medicaid managed care enrollees under the managed care contract. However, we reiterate here that certain financing requirements in statute and regulation are applicable across the Medicaid program irrespective of the delivery system (for example, fee-for-service, managed care, and demonstration authorities), and are similarly applicable whether a state elects to direct payments under § 438.6(c). Such requirements include, but are not limited to, limitations on financing of the non-Federal share applicable to health care-related taxes and bona fide provider-related donations. These financing requirements similarly apply when a state elects to direct payments under § 438.6(c) or the payment transition periods under § 438.6(d). We continue to view pass-through payments as problematic and not consistent with our regulatory standards for actuarially sound rates because they do not tie provider payments with the provision of services to Medicaid beneficiaries covered under the contract. Therefore, while we proposed and are finalizing a pass-through payment transition period under § 438.6(d)(6), that transition period is limited and the amount of pass-through payments permitted during that period is subject to restrictions as outlined in the regulation. In the proposed rule, we provided the 4 step calculation noted above and the proposed regulation text incorporated the steps in paragraphs (d)(6)(iii)(A) through (C) and in paragraph (d)(6)(iv) without affirmatively identifying the process as steps 1 through 4. We are finalizing the regulation with a technical edit to § 438.6(d)(6)(iii)(A) through (C) to clarify that both the numerator and denominator of the ratio described in Step 2 should exclude any supplemental payments as defined in § 438.6(a) made to the applicable providers and counted in Step 11. In paragraphs (d)(6)(iii)(A) through (C), we are also finalizing the text using the phrase ''State plan approved rates'' instead of ''payment rates'' to clarify how those ratios do not include supplemental payments.

We encourage states to plan for how FFS supplemental payments can be incorporated into standard capitation rates or permissible payment arrangements in a managed care program as quickly as possible.

Comment: A few commenters requested that CMS clarify how DSH payments will be considered when determining the amount of FFS supplemental payments that can be continued as pass-through payments in managed care. Commenters noted that it appears from the preamble discussion that the new pass-through payment provision is intended to be limited to non-DSH supplemental payments, but the proposed definition of supplemental payments in § 438.6(a) could be interpreted as including DSH payments. A few commenters also requested clarity on the treatment of GME payments when determining the amount of FFS supplemental payments that can be continued as pass-through payments in managed care. Several commenters recommended that CMS allow for GME funding to be distributed to providers directly by the state.

Response: We never intended for DSH or GME payments to be included in our proposed definition of supplemental payments in § 438.6(a) and therefore never intended for the pass-through payments subject to the limits in paragraph (d) to apply to DSH or GME payments. As proposed in the 2018 proposed rule, one of the requirements for the new pass-through payment transition period was that the state had previously made supplemental payments, as defined in § 438.6(a), to hospitals, nursing facilities, or physicians during the 12-month period immediately 2 years prior to the first rating period of the transition period. As noted in this final rule in the responses to comments for § 438.6(a) (Definitions), we agree with commenters that the definition of supplemental payments must be revised to clarify that DSH and GME payments are not supplemental payments as that term is defined and used for part 438. DSH and GME payments are made under separate and distinct authorities in the Medicaid program under 42 CFR part 447. As discussed in I.B.4.b. of this final rule, we are finalizing the definition of supplemental payments at § 438.6(a) with a modification to include a sentence in the definition that states

DSH and GME payments are not, and do not constitute, supplemental payments.

The existing definition of pass-through payment in § 438.6(a) excludes GME payments. We have not revised that definition since the 2016 final rule so the prohibition on pass-through payments in § 438.6(d) does not apply to GME payments. Further, under existing § 438.60, state Medicaid agencies may make direct payments to network providers for GME costs approved under the state plan without violating the prohibition of additional payments for services covered under managed care contracts.

Comment: Some commenters requested that CMS confirm the standard ''12-month period immediately 2 years prior'' that is used in § 438.6(d)(6)(ii) and (iii). These commenters requested that CMS confirm that the first month of the 12-month period used to calculate the maximum aggregate payment is 24 months (and not 36 months) before the first month of the first rating period for the managed care contract into which the new services or populations are moving. Commenters also requested that additional flexibility be applied to the term ''relevant provider type'' to consider more granular provider classifications relevant to a specific supplemental payment mechanism, such as academic medical hospitals. Commenters also requested clarity on whether the transition mechanism will require three equal reductions (33⅓ percent annually) to the calculated aggregate supplemental payment maximum or whether reductions are required under the new transition period.

Response: We confirm that the standard ''12-month period immediately 2 years prior'' that is used in § 438.6(d)(6)(ii) and (iii), as well as the standard that is currently codified in existing pass-through payment regulations at § 438.6(d)(2) in relation to the calculation of the base amount for hospital pass-through payments under § 438.6(d)(3), means that the first month of the twelve-month period used to calculate the maximum aggregate payment is twenty-four months before the first month under managed care. In the 2018 proposed rule, we provided an example that illustrates our response here: in the example we assumed that CY 2016 was the 12-month period immediately 2 years prior to the first rating period of the pass-through payment transition period in which inpatient hospital services were to be transitioned to a managed care contract; therefore, we noted in the example that the pass-through payments were for CY 2018 (83 FR 57274). If the first month of the managed care contract is January 2018, the first month of the 12-month period described in § 438.6(d)(6)(ii) and (iii) is January 2016.

We understand that commenters would like us to include additional provider types under § 438.6(d)(6)(iii), or that we expand the phrase ''relevant provider type'' that is used in § 438.6(d)(6)(iii) to include more granular provider classifications; however, we decline to make these modifications. As noted in the 2016 final rule (81 FR 27590) and the 2018 proposed rule (83 FR 57272), we focused on the three provider types identified in § 438.6(d) because these were the most common provider types for which states made supplemental payments within Federal UPLs under state plan authority, and we note that these are the provider types for which states have typically sought to continue making payments as pass-through payments under managed care programs. Further, the rules at § 438.6(d)(6) need to be consistent with the existing pass-through payment regulations at § 438.6(d)(3) and (5), which currently recognize pass-through payments for hospitals, nursing facilities, and physicians. We focused on the three provider types identified in § 438.6(d) because these were the most common provider types to which states made supplemental payments within Federal UPLs under state plan authority in Medicaid FFS.

Unlike existing hospital pass-through payments made under § 438.6(d)(3), which requires a phasedown of the pass-through payment amounts over the transition period (up to 10 years), we confirm for commenters that the pass-through payment transition period of 3-years at § 438.6(d)(6) does not require three equal reductions to the calculated aggregate payment maximum. We also confirm that the pass-through payment transition period under § 438.6(d)(6) does not require any reductions or a phase-down across the 3-year transition period. As noted in the proposed rule, a state may elect to use a shorter transition period but would be permitted a maximum of 3-years to phase out the pass-through payments. The regulation does not require any reductions from one year to the next during the 3-year transition period in § 438.6(d)(6), but once the 3-year transition period ends, all of the pass-through payments must be completely phased out of the managed care contracts and rates because the prohibition in § 438.6(d) applies. We note that states are permitted to phase the pass-through payments down by three equal reductions or otherwise to the aggregate payment maximum, but the regulation we are finalizing does not require or discourage states use of this approach.

Comment: A few commenters noted that a state's transition to phasing out pass-through payments may take longer than 3 years and suggested that CMS increase the transition period to 5 years. One commenter urged CMS to allow pass-through payments for network hospitals to be phased out on a longer timeline than the proposed 3-year transition period, until at least July 1, 2027. One commenter suggested that the 3-year transition period was inadequate and that a 10-year transition period was more appropriate under § 438.6(d)(6).

Response: We do not agree with commenters that we should increase the length of the pass-through payment transition period under § 438.6(d)(6). We continue to view pass-through payments as problematic and not consistent with our regulatory standards for actuarially sound rates because they do not tie provider payments with the provision of services. However, as noted in the 2018 proposed rule, we understand that network providers, states, and managed care plans need adequate time to design and implement payment systems that link provider reimbursement with services when the state is transitioning new services or new populations to a managed care contract. We proposed and are finalizing this amendment to § 438.6(d) to assist with that. However, we still believe that the 3-year pass-through payment transition period provides states with a reasonable amount of time to integrate pass-through payment arrangements into allowable payment structures under actuarially sound capitation rates, including value-based purchasing, enhanced fee schedules, Medicaid-specific delivery system reform, or the other approaches consistent with § 438.6(c). Further, states that have not yet transitioned these services (and corresponding supplemental payments) into managed care contracts should be in a better position to design payment structures that appropriately account for these payments during the transition to managed care. We find the commenters' recommended timeframes of 5 years, 10 years, and through July 1, 2027 to be unreasonably long, and we believe that a transition period of these lengths would unnecessarily delay the transition of these payments into allowable payment structures under actuarially sound capitation rates. Therefore, we decline to make modifications to the length of the

transition period and will finalize 3-years at § 438.6(d)(6).

Comment: Some commenters stated that pass-through payments should not be prohibited so long as the overall payments made to Medicaid managed care plans are actuarially sound. One commenter noted that our proposal would redefine state supplemental FFS payments and could exclude transitioning pass-through payments to state directed payment arrangements in the future. This commenter requested clarification on whether these pass-through payments under the new transition period could be transitioned into state directed payments at the end of the 3-year transition period. Commenters also requested that CMS collect and make pass-through payment data publicly available so that stakeholders can examine the amount of pass-through payments and to whom they are being made.

Response: We disagree with commenters that pass-through payments, beyond those payments permitted under a pass-through payment transition period, should be permissible under Medicaid managed care. As explained in our proposed rule, pass-through payments are not consistent with our regulatory standards for actuarially sound rates because they do not tie provider payments with the provision of services. When managed care plans only serve as a conduit for passing payments to providers independent of delivered services, such payments reduce managed care plans' ability to control expenditures, effectively use value-based purchasing strategies, implement provider-based quality initiatives, and generally use the full capitation payment to manage the care of enrollees. We have also previously provided a detailed description of our policy rationale (81 FR 27587 through 27592) related to pass-through payments and our position has not changed. Therefore, we will not amend or eliminate the prohibition against pass through payments in § 438.6(d) beyond the specific change we proposed for § 438.6(d)(6) to assist states with transitioning new populations or new services to managed care.

We also disagree with commenters that § 438.6(d)(6) limits the state's ability to transition pass-through payments to state-directed payment arrangements under § 438.6(c). We believe that the pass-through payment transition period under § 438.6(d)(6) provides states with a reasonable amount of time to integrate pass-through payment arrangements into allowable payment structures under actuarially sound capitation rates, including value-based purchasing, enhanced fee schedules, Medicaid-specific delivery system reform, or the other approaches consistent with § 438.6(c). Since the 2016 final rule, we have worked with many states to transition some or all of the state's pass-through payments into actuarially sound capitation rates that do not limit the plan's discretion or permissible payment arrangements under § 438.6(c). States can work with their managed care plans and network providers to transition the amounts currently provided through pass-through payments in approvable ways, such as actuarially sound capitation rates that do not limit the plan's discretion or the approaches consistent with § 438.6(c).

Regarding the recommendation that CMS collect and make pass-through payment data publicly available, we have traditionally deferred to states for making specific components of rate development publicly available. We note that pass-through payments are added to the contracted payment rates and considered in calculating the actuarially sound capitation rate; therefore, pass-through payments are a specific component of capitation rate development. As such, we will continue to defer to states on making these amounts publicly available.

Comment: A few commenters noted that current CMS regulations apply only to hospitals, nursing facilities, and physicians. These commenters requested that CMS change the terminology from ''physician'' to ''provider'' to ensure that all health care providers are eligible for the pass-through payments. Some commenters requested clarity on whether nurse practitioners are included in the physician pass-through payment category.

Response: We understand that commenters would like us to include additional provider types under § 438.6(d)(6)(iii) (such as by replacing the term ''physician'' as used in § 438.6(d)(6)(iii)(C) to the more general and broader term ''provider'') to recognize additional health care providers; however, we decline to make these modifications. As noted in the 2016 final rule (81 FR 27590) and the 2018 proposed rule (83 FR 57272), we focused on the three provider types identified in § 438.6(d) because these were the most common provider types for which states made the majority of supplemental payments within Federal UPLs under state plan authority, and we note that these are the provider types for which states have typically sought to continue making payments as pass-through payments under managed care programs. We also do not want our rules at § 438.6(d)(6) to be inconsistent with the existing pass-through payment regulations at § 438.6(d)(3) and (5), which currently recognize pass-through payments for hospitals, nursing facilities, and physicians.

Regarding the request for clarity on whether nurse practitioners are included in the physician pass-through payment category, we clarify here that nurse practitioners are not included in the physician category for purposes of the pass-through payment transition periods under § 438.6(d). While CMS has not defined the term ''physician'' in regulation for purposes of the pass-through payment transition periods under § 438.6(d), we rely on section 1905(a)(5) of the Act, which incorporates the definition for physician from sections 1861(r)(1) and (r)(2) of the Act, and the implementing regulation at 42 CFR 440.50 to provide meaning for physicians' services for the purpose of medical assistance under Title XIX. Under sections 1861(r)(1) and 1861(r)(2) of the Act, the term ''physician'' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state in which he or she performs such services, and a doctor of dental surgery or of dental medicine who is legally authorized to practice dentistry by the state in which he or she performs such services and who is acting within the scope of his or her license, to the extent that such services may be performed under state law either by a doctor of medicine or by a doctor of dental surgery or dental medicine if furnished by a physician.

Comment: One commenter suggested updating the language in § 438.6(d)(6)(i) to read: ''The Medicaid populations or services will be covered for the first time under a managed care contract and were previously provided in a FFS delivery system prior to the first rating period of the transition period.'' One commenter suggested that § 438.6(d)(6)(i) be clarified to allow new pass-through payments for geographic areas that are newly transitioning to Medicaid managed care.

Response: We decline to add the phrase ''The Medicaid population or'' at the beginning of § 438.6(d)(6)(i) because it is not necessary. As proposed and finalized, § 438.6(d)(6) used the phrase ''when Medicaid populations or services are initially transitioning from a FFS delivery system to a managed care delivery system.'' Therefore, we believe that the rule is clear on this point.

Regarding pass-through payments for geographic areas that are newly transitioning to Medicaid managed care,

we confirm that the pass-through payment transition period at § 438.6(d)(6) would be appropriate as long as the conditions and requirements under § 438.6(d)(6)(i) through (iv) are met, including that the populations or services will be covered for the first time under a managed care contract and were previously provided in a FFS delivery system prior to the first rating period of the transition period. When states transition a new geographic area into Medicaid managed care, the services and populations in that new geographic area are newly moving into managed care.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.6(d)(6) as proposed with the following modifications:

- At § 438.6(d)(iii)(A) through (C), included the following sentence, ''Both the numerator and denominator of the ratio should exclude any supplemental payments made to the applicable providers'' and using the phrase ''State plan approved rates'' instead of ''payment rates'' to clarify how those ratios do not include supplemental payments.

To ensure states have adequate time to plan and implement a transition from a fee-for-service system to a managed care delivery system, we are delaying the effective date of this provision. States that are initially transitioning populations and services from fee-for-service to managed care must comply with § 438.6(d)(6) as amended effective July 1, 2021 for Medicaid managed care rating periods starting on or after July 1, 2021.

d. Payments to MCOs and PIHPs for Enrollees That Are a Patient in an Institution for Mental Disease (IMD) (§ 438.6(e))

Under the policies we adopted in the 2016 final rule at § 438.6(e), we permitted FFP for a full monthly capitation payment to an MCO or PIHP for an enrollee aged 21 to 64 who received inpatient treatment in an institution for mental diseases (IMD) for part of the month when certain requirements are met, including a requirement that the stay in the IMD be for no more than 15 days in the month for which the capitation payment is made (81 FR 27563). Since publication of the 2016 final rule, we have heard from states and other stakeholders that FFP should be provided for capitation payments made for months that include stays longer than 15 days, especially on behalf of Medicaid enrollees who may require substance use disorder (SUD) treatment as a result of the ongoing opioid crisis.

We considered proposing changes to the regulation at § 438.6(e) but, after careful review, did not do so because of our belief that the underlying analysis regarding the transfer of risk that underpinned the policy in the 2016 final rule was appropriate. We also conducted a literature and data review and did not identify any new data sources other than those we relied upon in the 2016 final rule that supported 15 days (81 FR 27560). We requested public comment on additional data sources that we should review.

The following summarizes the public comments received and our responses to those comments.

Comment: Several commenters supported the policy to not extend the availability of FFP for capitation payments made for months that include stays longer than 15 days. Commenters stated that making payments under those circumstances would incentivize the provision of care in institutions rather than community-based settings. Other commenters disagreed with the CMS decision to not extend the availability of FFP for capitation payments made for months that include stays longer than 15 days. These commenters noted that the 15-day limit is not based on an individual's care needs and suggested that the 15-day limitation creates inappropriate incentives around the timing of admissions. Other commenters recommended alternatives to the 15-day policy, such as adjusting the length of stay in the IMD to 25 days.

Response: We remind commenters that we did not propose changes to the regulation because we continue to believe that the underlying analysis regarding the transfer of risk that underpinned the policy in the 2016 final rule is appropriate. Our detailed analysis and explanation of the rule can be found in the 2016 final rule at 81 FR 27555 through 27563. In the 2018 proposed rule, we requested public comment on additional data sources that we should review, and these commenters did not provide such data. We also remind commenters that we have developed section 1115(a) demonstration initiatives aimed at (1) improving access to and quality of treatment for Medicaid beneficiaries to address substance use disorders (SUDs) and the ongoing opioid crisis; [6] and (2) designing innovative service delivery systems, including systems for providing community-based services, for adults with a serious mental illness (SMI) or children with a serious emotional disturbance (SED) who are receiving medical assistance.[7] These demonstrations enable states to receive FFP for longer lengths of stay in IMDs within specified parameters. We also note that section 5052 of the SUPPORT for Patients and Communities Act, which provides a state plan option to provide Medicaid coverage for certain individuals with substance use disorders who are patients in certain IMDs from October 1, 2019 through September 30, 2023, may also provide mechanisms to receive FFP for longer lengths of stay in IMDs consistent with section 5052 of the SUPPORT for Patients and Communities Act.

Comment: One commenter noted that the 15-day policy has caused confusion in the industry, stating some managed care plans have interpreted this part of the 2016 final rule to mean IMDs should reimburse the managed care plans for the care provided for only the first 15 days if a patient stays beyond day 15. Given the confusion around this issue, the commenter requested that CMS clarify that repayments between IMDs and managed care plans are not covered by the 2016 final rule.

Response: There is no requirement in § 438.6(e) that requires IMDs to reimburse managed care plans for the care provided for only the first 15 days if a patient stays beyond day 15; nor does § 438.6(e) address repayment arrangements between a Medicaid managed care plan (that is, a MCO or PIHP) and a provider that is an IMD. Section 438.6(e) only governs the availability of FFP when states make capitation payments to an MCO or PIHP for enrollees aged 21–64 receiving inpatient treatment in an IMD. The rule permits FFP to the state for the capitation payment only if specified conditions are met, including that the length of stay in the IMD is for a short term stay of no more than 15 days during the period of the monthly capitation payment. Any requirements for repayment from IMDs to managed care plans are not governed by this rule, but instead appear to be within the scope of the contractual arrangements between IMDs and managed care plans.

Comment: One commenter requested that CMS confirm that states are not precluded from using the flexibility afforded by § 438.6(e) to collect FFP on

[6] SMD #17–003: Strategies to Address the Opioid Epidemic; available at *https://www.medicaid.gov/federal-policy-guidance/downloads/smd17003.pdf.*

[7] SMD #18–011: Opportunities to Design Innovative Service Delivery Systems for Adults with a Serious Mental Illness or Children with a Serious Emotional Disturbance; available at *https://www.medicaid.gov/federal-policy-guidance/downloads/smd18011.pdf.*

capitation payments made for enrollees under age 21 in an IMD when an individual is receiving substance use disorder (SUD) services.

Response: CMS does not agree with the commenter that § 438.6(e) permits states to collect FFP on capitation payments made for enrollees under age 21 in an IMD when that individual is receiving SUD services. Section 438.6(e) permits FFP when the state makes a capitation payment to an MCO or PIHP for an enrollee aged 21–64 receiving inpatient treatment in an IMD so long as certain conditions outlined in the regulation are met. While § 438.6(e) is not the appropriate authority for enrollees under the age of 21, many states provide inpatient psychiatric and SUD services for individuals under age 21 as part of their state plan, which can include stays in an IMD, subject to the requirements at part 441 Subpart D. In accordance with § 438.3(c) and part 438 subpart J, if the service provided to enrollees under the age of 21 is a Medicaid state plan service and included under the managed care contract, FFP would be available for the monthly capitation payment.

Comment: A few commenters made recommendations for additional data sources that CMS should review to support the availability of FFP for capitation payments made for months that include stays in an IMD. One commenter recommended that CMS use the data that we collect as required by the 21st Century Cures Act (Cures Act) (Pub. L. 114–255, enacted December 13, 2016) to study the effects of the 15-day in-lieu-of provision, which also requires CMS to issue a report in December 2019. One commenter also recommended that CMS use data that becomes available through approved section 1115(a) SUD demonstrations.

Response: We agree with commenters that once data becomes available through these potential sources, such data should be used to inform future policy decisions and rulemaking. We will take these recommendations under advisement.

As we did not propose any modifications to § 438.6(e), we are not finalizing any changes to § 438.6(e) under this final rule.

5. Rate Certification Submission (§ 438.7)

Section 438.7(c)(3) gives states flexibility to make *de minimis* rate adjustments during the contract year by enabling states to increase or decrease the capitation rate certified per rate cell by 1.5 percent without submitting a revised rate certification. We stated in the 2016 final rule that a rate that is within +/− 1.5 percent of a certified rate is also actuarially sound as that percentage is generally not more than the risk margin incorporated into most states' rate development process (81 FR 27568). By giving states the flexibility to make small adjustments around the certified rate, we intended to ease the administrative burden of rate review on states while meeting our goals of transparency and integrity in the rate-setting process.

Since the publication of the 2016 final rule, some stakeholders have expressed a desire for us to clarify that once a state has certified the final capitation rate paid per rate cell under each risk contract, the state can adjust the certified rate +/− 1.5 percent at any time within the rating period without submitting justification to us. We clarified in the 2018 proposed rule that when states are adjusting a final certified rate within the contract year within the range of 1.5 percent up or down from the final certified rate, states do not need to submit a revised rate certification or justification to us, unless documentation is specifically requested by us in accordance with our proposed revisions in paragraph (c)(3) (83 FR 57275).

We proposed to amend § 438.7(c)(3) to clarify the scope of permissible changes to the capitation rate per rate cell and the need for a contract modification and rate certification. Proposed § 438.7(c)(3) included the existing text authorizing the state to increase or decrease the capitation rate per rate cell up to 1.5 percent without submitting a revised rate certification. Proposed paragraph (c)(3) also retained the remaining text in current § 438.7(c)(3) that such adjustments to the final certified rate must be consistent with a modification of the contract as required in § 438.3(c) and included new text to specify that the adjustments would be subject to the requirements at § 438.4(b)(1) and to authorize us to require a state to provide documentation for adjustments permitted under § 438.7(c)(3) to ensure that modifications to a final certified capitation rate comply with the requirements in §§ 438.3(c) and (e) and 438.4(b)(1). We reiterate here that all capitation rates, regardless of whether they are established through the initial rate certification or through a contract amendment, must comply with the requirements in §§ 438.3(c) and (e) and 438.4 through 438.7. Further, we explicitly clarify here that certain financing requirements in statute and regulation are applicable across the Medicaid program irrespective of the delivery system (for example, fee-for-service, managed care, and demonstration authorities). Such requirements include, but are not limited to, limitations on financing of the non-Federal share applicable to health care-related taxes and bona fide provider-related donations.

In the 2016 final rule, we highlighted our concerns that different capitation rates based on the FFP associated with a particular population could be indicative of cost shifting from the state to the Federal Government and were not consistent with generally accepted actuarial principles (81 FR 27566). The rate development standards we instituted with the final rule sought to eliminate such practices. The +/− 1.5 percent rate changes permitted in § 438.7(c)(3) were not intended to be used by states to shift costs to the Federal Government. To protect against cost shifting and eliminate any potential loophole in § 438.7(c)(3), we proposed that any changes of the capitation rate within the permissible 1.5 percent would be subject to the requirements in § 438.4(b)(1), which prohibits differing capitation rates based on FFP and requires that any proposed differences among capitation rates according to covered populations be based on valid rate development standards and not vary with the rate of FFP associated with the covered populations (see also section I.B.2.b. of this final rule for a discussion of § 438.4(b)(1) and this prohibition on rates varying with the FFP percentage). In addition, § 438.4(b)(1) requires that rates be developed in accordance with § 438.5 and generally accepted actuarial principles and practices; we noted in our proposal that using this cross-reference to regulate mid-year changes of capitation rates within the +/− 1.5 percent range would ensure that such changes were not arbitrary or designed to shift costs to the Federal Government. The proposed amendment to § 438.7(c)(3) would permit us to require documentation that the adjusted rate complied with our proposed requirements and other criteria related to the actuarial soundness of rates.

We also proposed § 438.7(e), which commits us to issuing annual guidance that describes: (1) The Federal standards for capitation rate development; (2) the documentation required to determine that the capitation rates are projected to provide for all reasonable, appropriate, and attainable costs that are required under the terms of a contract; (3) the documentation required to determine that the capitation rates have been developed in accordance part 438; (4) any updates or developments in the rate review process to reduce state burden and facilitate prompt actuarial reviews;

and (5) the documentation necessary to demonstrate that capitation rates competitively bid through a procurement process have been established consistently with the requirements of §§ 438.4 through 438.8. We noted in our proposal that such guidance would interpret and provide guidance on the part 438 regulations and specify procedural rules for complying with the regulations; we specifically explained how the guidance would therefore address the information required to be in rate certifications. This guidance will be published as part of the annual rate guide for Medicaid managed care under the PRA package, CMS–10398 #37, OMB control number 0938–1148.

We solicited comments on our proposals and whether additional areas of guidance would be helpful to states.

The following summarizes the public comments received on our proposal to amend § 438.7 and our responses to those comments.

Comment: A few commenters supported the proposal to allow *de minimis* adjustments without further rate justifications. A few commenters recommended that CMS always require documentation accompanying *de minimis* rate changes as well as certification that revised rates are actuarially sound. A few commenters recommended that CMS should also require documentation that disclosed other *de minimis* changes made during the year that may not have changed the capitation rates. A few commenters requested clarification that the +/−1.5 percent was intended to be calculated as a percentage of the certified rate. One commenter requested that CMS clarify that states cannot use the *de minimis* rate adjustment to reduce rates in this final rule beyond the lower bound of the newly proposed five percent rate range.

Response: We disagree with commenters that recommended that CMS always require documentation or a rate certification for any change in the rate, even for *de minimis* rate changes within the +/−1.5 percent threshold, as this approach is not consistent with either our position (explained in the 2016 final rule) that *de minimis* changes of +/−1.5 percent do not affect the actuarial soundness of the capitation rate or our intent to provide additional state flexibility under this final rule. Adopted in the 2016 final rule, § 438.7(c)(3) provides states with the flexibility to make *de minimis* rate adjustments during the contract year by enabling states to increase or decrease the capitation rate certified per rate cell by 1.5 percent without submitting a revised rate certification. We determined that the fluctuation of +/−1.5 percent did not change the actuarial soundness of a capitation rate and reasoned that the resulting rate will remain actuarially sound (81 FR 27568). Providing states this flexibility to make *de minimis* adjustments around the certified rate eases the administrative burden of rate review on states while meeting our goals of transparency and integrity in the rate-setting process. We also decline to add new regulation text requiring states to document other changes made during the year that may not have changed rates because any changes would have to be included as modifications to the managed care plan contract and submitted to CMS for approval under § 438.3(a). We do not believe that requiring additional documentation is necessary and believe that our existing processes for the submission of contract modifications is sufficient without adding a new documentation requirement for states.

We confirm that the +/−1.5 percent is to be calculated as a percentage of the certified rate. Section 438.7(c)(3) permits rate adjustments during the contract year by increasing or decreasing the capitation rate certified per rate cell by 1.5 percent without submitting a revised rate certification. This means that the certified rate per rate cell can be adjusted by the +/− 1.5 percent without a revised certification. However, states cannot use both the *de minimis* rate adjustment under § 438.7(c)(3) and the newly proposed 5 percent, or +/− 2.5 percent from the midpoint, rate range under proposed § 438.4(c). As proposed and finalized, § 438.4(c)(2)(ii) prohibits a state that is using a rate range from also modifying capitation rates under § 438.7(c)(3) by +/−1.5 percent (see also section I.B.2.a. of this final rule for a discussion of § 438.4(c)).

Comment: Several commenters described the regulation under § 438.7(c)(3) as permitting *de minimis* rate changes during the contract year or during the rating period.

Response: While these commenters did not specifically recommend a revision to the regulation, the public comments highlighted a need for CMS to clarify this issue here. In developing our responses to the public comments, we noticed a technical error in the regulatory text in § 438.7(c)(3). In the 2018 proposed rule, we described our proposal by stating that § 438.7(c)(3) gives states flexibility to make *de minimis* rate adjustments *during the contract year* by enabling states to increase or decrease the capitation rate certified per rate cell by 1.5 percent (resulting in an overall 3 percent range) without submitting a revised rate certification (83 FR 57275). In the 2016 final rule, when we originally finalized § 438.7(c)(3), we described the final rule as providing the ability for the state to adjust the actuarially sound capitation rate *during the rating period* by +/−1.5 percent (81 FR 27568). However, we noticed that the regulatory text in § 438.7(c)(3) does not actually contain this language, even though the preamble of the 2016 final rule does describe the rate changes under § 438.7(c)(3) as changes made during the rating period or during the contract year. Therefore, we are finalizing a revision to § 438.7(c)(3) to include the language ''during the rating period'' as part of the standard for using the 1.5 percent adjustment. A retroactive adjustment to the capitation rate must meet the requirements in § 438.7(c)(2) as there is no regulatory provision carving *de minimis* rate changes out of the scope of § 438.7(c)(2) and the preamble discussions in the 2016 final rule and 2018 proposed rule limited the *de minimis* rate changes to those changes made during the contract year or rating period.

Comment: Several commenters appreciated the proposal to provide annual rate development and documentation guidance for capitation rates, documentation requirements, updates in the rate review process, and demonstrating competitive bidding. Some commenters requested that states be provided the opportunity to give feedback on proposed changes prior to implementation. Some commenters recommended that the following topics be addressed in any subregulatory guidance: value-added benefits, changes to rates with changes in scope of services, the role of states versus CMS in certifying rates, guidelines for documentation, calculation definitions, and information on the appropriateness of withholds. One commenter requested that guidance be issued with sufficient time for managed care plans to negotiate payment rates with providers.

Response: We will take these comments under advisement as we develop and publish future subregulatory guidance. As we noted in the 2018 proposed rule, we have published rate review guidance every year since 2014, and we proposed § 438.7(e) to demonstrate our commitment to efficient review and approval processes. We will continue to work with states and managed care plans to ensure greater transparency regarding the rate review process and ensure that states are optimally informed to prepare and submit rate

certifications for our review and approval.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.7(c)(3) and (e) as proposed, with a modification in § 438.7(c)(3) to include the language ''during the rating period'' as part of the standard for using the 1.5 percent adjustment.

6. Medical Loss Ratio (MLR) Standards: Technical Correction (§ 438.8)

The MLR numerator is defined in § 438.8(e); the numerator of an MCO's, PIHP's, or PAHP's MLR for a MLR reporting year is the sum of the MCO's, PIHP's, or PAHP's incurred claims; the MCO's, PIHP's, or PAHP's expenditures for activities that improve health care quality; and fraud prevention activities. In the 2015 proposed rule (80 FR 31109), we proposed at § 438.8(e)(4) that expenditures related to fraud prevention activities, as set forth in § 438.608(a)(1) through (5), (7), and (8) and (b), may be attributed to the numerator but would be limited to 0.5 percent of MCO's, PIHP's, or PAHP's premium revenues. This proposal was never finalized and does not align with the MLR requirements for Medicare Part C or Part D or the private market. We also proposed at that time a corresponding requirement, at paragraph (k)(1)(iii), for submission by each managed care plan of data showing the expenditures for activities described in § 438.608(a)(1) through (5), (7), and (8) and (b). In the 2016 final rule (81 FR 27530), we did not finalize § 438.8(e)(4) as proposed, and instead finalized § 438.8(e)(4) to provide that MCO, PIHP, or PAHP expenditures on activities related to fraud prevention, as adopted for the private market at 45 CFR part 158, will be incorporated into the Medicaid MLR calculation in the event the private market MLR regulations were amended. However, we erroneously finalized § 438.8(k)(1)(iii) as proposed instead of referencing the updated finalized regulatory language in § 438.8(e)(4). Therefore, in the 2018 proposed rule, we proposed to revise § 438.8(k)(1)(iii) to replace ''expenditures related to activities compliant with § 438.608(a)(1) through (5), (7), (8) and (b)'' with ''fraud prevention activities as defined in § 438.8(e)(4)'' to be consistent with our changes to § 438.8(e)(4) in the previous final rule. We also proposed to correct a technical error in paragraph (e)(4) by removing the phrase ''fraud prevention as adopted'' and adding in its place the phrase ''fraud prevention consistent with regulations adopted'' to clarify the regulatory text.

The following summarizes the public comments received on our proposal to amend § 438.8 and our responses to those comments.

Comment: Several commenters supported the proposal to revise § 438.8(k)(1)(iii) to replace ''expenditures related to activities compliant with § 438.608(a)(1) through (5), (7), (8) and (b)'' with ''fraud prevention activities as defined in § 438.8(e)(4),'' consistent with how § 438.8(e)(4) was finalized in the 2016 final rule. One commenter stated that it was pleased that CMS did not substantially modify the MLR requirements for Medicaid and CHIP managed care plans.

Response: We believe that it is critical for our rules to be technically accurate and our proposed revisions correct technical errors from the 2016 final rule.

Comment: One commenter requested clarification on what activities CMS expects states to require their MCOs, PIHPs, and PAHPs to report on as a result of the revision to § 438.8(k)(1)(iii). One commenter requested clarification on whether the technical correction to § 438.8(k)(1)(iii) would allow Medicaid and CHIP plans' fraud-related costs to be included in the Quality Improvement Activities (QIAs) portion of the numerator. Several commenters also recommended that CMS align Medicaid policy with Medicare Advantage and permit fraud prevention expenditures as QIAs in the MLR numerator.

Response: Our proposed rule did not propose any policy changes for the Medicaid MLR regulation. The technical amendments were proposed to correct errors from the 2016 final rule and ensure that § 438.8 is internally consistent. Section 438.8(e) provides, irrespective of the corrections adopted here, that fraud prevention activities, as defined in paragraph (e)(4), are included in the numerator. With the revision we are finalizing to § 438.8(e)(4), the regulation is clear that MCO, PIHP, or PAHP expenditures on activities related to fraud prevention will be incorporated into the Medicaid MLR calculation, using the same standards for identifying fraud prevention activities in the private market MLR regulations at 45 CFR part 158. We intend that if and when those part 158 regulations defining fraud prevention activities are amended in the future, the updated standards will likewise be used for the Medicaid MLR requirements. The correction to § 438.8(k)(1)(iii) makes the Medicaid MLR requirements consistent by requiring reporting from MCOs, PIHPs, and PAHPs of fraud prevention activities as defined in paragraph (e)(4), which are the activities that are used in the MLR calculation.

We are aware that Medicare Advantage adopted different regulations on the treatment of fraud prevention expenditures and expanded the definition of QIA in §§ 422.2430 and 423.2430 to include all fraud reduction activities, including fraud prevention, fraud detection, and fraud recovery. We note that when we finalized the MLR requirements in the 2016 final rule, we specifically aligned Medicaid MLR standards with the regulations for the private market at 45 CFR part 158. As such, the Medicaid MLR rules do not reference the QIAs in Medicare Advantage, and instead we adopted the terminology used in the private market MLR regulations in part 158 related to activities that improve health care quality as specified in § 438.8(e)(3). While we will take commenters' recommendations to align with Medicare Advantage on this point under advisement, we are not finalizing such modifications as part of this final rule. We note, however, that fraud prevention activities, subject to the different definitions and limitations specified for the different programs, are ultimately included in the numerator for the MLR for Medicaid managed care plans, private market insurance, Medicare Advantage plans, and Medicare Part D plans.

Comment: Commenters opposed the proposed technical clarification and recommended that CMS reconsider our alignment with regulations in the private market at 45 CFR part 158.

Response: We disagree with commenters and believe that it is critical for our rules to be technically accurate. Our proposed revisions only correct technical errors from the 2016 final rule and we did not propose to reconsider our alignment with regulations in the private market. We do not see a reason to reconsider or change that alignment.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the technical amendments to § 438.8(e)(4) and (k)(1)(iii) as proposed.

7. Non-Emergency Medical Transportation PAHPs (§ 438.9)

In the 2016 final rule, at § 438.9(b)(2), we inadvertently failed to exempt NEMT PAHPs from complying with § 438.4(b)(9). Section 438.9(b) generally exempts NEMT PAHPs from complying with regulations in part 438 unless the requirement is listed. Under the regulation, NEMT PAHPs are not

required to comply with the MLR standards. The inclusion of all of § 438.4 in § 438.9(b)(2) causes a conflict because § 438.4(b)(9) specifically addresses states' responsibility to develop capitation rates to achieve a medical loss ratio of at least 85 percent. To eliminate that conflict, we proposed to revise § 438.9(b)(2) by adding ''except § 438.4(b)(9).''

The following summarizes the public comment received on our proposal to amend § 438.9 and our responses to those comments.

Comment: One commenter supported the proposal to amend § 438.9(b)(2) to clarify that NEMT PHAPs are not required to comply with the MLR standards.

Response: Amending § 438.9(b)(2) will conform the regulation text to our policy for how rates for NEMT PAHPs are developed and ensure that there isn't a Federal requirement for such plans to develop and report an MLR.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the amendment to § 438.9(b)(2) as proposed.

8. Information Requirements (§ 438.10)

a. Language and Format (§ 438.10(d))

In the 2016 final rule, we finalized provisions at § 438.10(d)(2) and (3) and (d)(6)(iv), requiring that states and managed care plans include taglines in prevalent non-English languages and in large print on all written materials for potential enrollees and enrollees. Based on print document guidelines from the American Printing House for the Blind, Inc., we defined large print to mean no smaller than 18-point font (81 FR 27724).[8] Taglines required to be large print are those that explain the availability of written translation or oral interpretation, how to request auxiliary aids and services for individuals who have limited English proficiency or a disability, and the toll-free phone number of the entity providing choice counseling services and the managed care plan's member/customer service unit.

We explained in the November 2018 proposed rule how our goal remains to ensure that materials for enrollees and potential enrollees are accessible for individuals who are vision-impaired. However, since the publication of the 2016 final rule, states and managed care plans have found that requiring taglines in 18-point font size sometimes increases overall document length, thereby decreasing the ease of use by enrollees and eliminating the use of certain effective formats such as postcards and trifold brochures.

To address these issues, we proposed to revise § 438.10(d)(2) by deleting the definition of large print as ''no smaller than 18-point'' and adopting the ''conspicuously visible'' standard for taglines that is codified at 45 CFR 92.8(f)(1), a regulation implementing section 1557 of the Patient Protection and Affordable Care Act of 2010 (PPACA) (Pub. L. 111–148, enacted March 23, 2010 as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted March 30, 2010)).[9] Section 1557 of the PPACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs, including Medicaid. We explained our rationale that adopting a more flexible requirement would encourage states to use effective forms of written communication and avoid unnecessarily long documents. For example, taglines in a font size smaller than 18-point would permit states to more easily use postcards and tri-fold brochures, which may be more effective for relaying certain information since they are shorter and offer more design options for visual appeal. We noted as well how states would retain the ability to create additional requirements for greater specificity of font size for taglines for written materials subject to § 438.10 as long as they meet the standard of conspicuously-visible and comply with all other Federal non-discrimination standards, including providing auxiliary aids and services to ensure effective communication for individuals with disabilities.

Additionally, we proposed to replace the requirement to include taglines on ''all written materials'' with a requirement for taglines only on materials for potential enrollees that ''are critical to obtaining services'' in § 438.10(d)(2). This proposed change would align the documents that require taglines with the documents that must be translated into prevalent non-English languages and would facilitate the use of smaller, more user-friendly documents. We note that states would have the ability to require taglines on any additional materials that they choose, as including taglines only on documents that are critical to obtaining services would be a minimum standard.

In § 438.10(d)(3), we proposed to make the same substantive changes proposed for § 438.10(d)(2), as well as to reorganize the paragraph for clarity. We believed that combining the requirements for the provision of alternative formats, taglines, and inclusion of the managed care plan's member/customer service unit telephone number into one sentence in paragraph (d)(3), would improve readability and clarity.

Section 438.10(d)(6) addresses requirements for all written materials provided by states and MCOs, PIHPs, PAHPs, primary care case management (PCCM) and PCCM entities to enrollees and potential enrollees. As we proposed to limit the tagline requirement to materials that are critical to obtaining services, we proposed to delete § 438.10(d)(6)(iv).

The following summarizes the public comments received on our proposal to amend § 438.10 and our responses to those comments.

Comment: Many commenters supported the proposal to adopt the ''conspicuously visible'' standard for taglines in place of the ''no smaller than 18-point'' large print definition. Many commenters stated that the proposal would provide greater flexibility for communicating with beneficiaries, increase readability for beneficiaries, reduce costs and logistical efficiencies associated with printing and mailing, and provide greater consistency with overlapping Federal regulations. Many commenters supported the proposal to amend § 438.10(d)(2), (3), and (6) but requested that CMS define ''conspicuously visible.''

Response: We continue to believe that a more flexible requirement for taglines will continue to put enrollees and potential enrollees on notice of the availability of written translation, oral interpretation, and auxiliary aids and services for people who have limited English proficiency or a disability while helping to avoid unnecessarily long documents. We decline to include a specific definition or minimum font size in § 438.10, other than as specified in current § 438.10(d)(6)(iii). When adopting 45 CFR 92.8(f)(1), a regulation implementing section 1557 of the PPACA, the Office for Civil Rights (OCR), clarified that assessing the effectiveness of taglines ''is whether the content is sufficiently conspicuous and visible that individuals seeking services from, or participating in, the health program or activity could reasonably be expected to see and be able to read the

[8] American Printing House for the Blind, Inc. Print Document Guidelines. *http://www.aph.org/research/design-guidelines/*.

[9] Nondiscrimination in Health Programs and Activities final rule (81 FR 31376 (May 18, 2016).

information.'' [10] We believe that definition is appropriate for Medicaid managed care programs, and we will use this in interpreting and enforcing the standards in § 438.10(d)(2) and (3) as revised. Notwithstanding this change in the regulation text, states and managed care plans have continuing obligations under Federal disability rights laws that in some circumstances require the provision of large print materials as an appropriate auxiliary aid or service, including materials in 18-point or larger font size, unless certain exceptions apply.[11] Additionally, we remind states and managed care plans of their obligations to comply with all Federal and state laws as specified at §§ 438.3(f) and 438.100(d) and that enrollment discrimination is expressly prohibited in § 438.3(d). States that elect to change the required font size for taglines should work with their managed care plans and stakeholders and local experts on disabilities to gather input on selecting the most appropriate characteristics of ''conspicuously visible.''

We note that OCR issued a notice of proposed rulemaking on June 14, 2019,[12] that proposed to eliminate § 92.8 and thus the use of the term ''conspicuously visible.'' In doing so, HHS stated that the proposed elimination of § 92.8 was intended in part to reduce redundancies while maintaining enforcement of civil rights statutes (84 FR at 27887). HHS did not intend in that proposed rule to direct the parameters of tagline requirements set forth in regulations such as § 438.10(d), which derive from statutory authorities other than section 1557 of the PPACA. Consequently, the intent of the proposed 1557 rule is not inconsistent with Medicaid's exercise of discretion in amending these regulations. We believe ''conspicuously visible'' reflects an appropriate level of protection for enrollees of Medicaid managed care plans and of the flexibility that we desire to provide to states and managed care plans. Therefore, regardless of whether that proposed rule is finalized, we are finalizing ''conspicuously visible'' in § 438.10(d)(2), (3), and (6) as explained in this final rule.

A typographical error was made in the proposed regulatory text at § 438.10(d)(2). The word ''language'' was erroneously written as singular: ''Written materials that are critical to obtaining services for potential enrollees must include taglines in the prevalent non-English language . . .'' It was not our intention to propose a change along those lines and 'language'' should have remained plural in the 2018 proposed rule. We are correcting this error in this final rule and finalizing the amendment to § 438.10(d)(2) with ''languages.''

Comment: Many commenters disagreed with the proposal to adopt the ''conspicuously visible'' standard for tag lines in place of the ''no smaller than 18-point'' large print definition. Commenters stated that this change would result in reduced access to plan information by enrollees and potential enrollees with visual impairment and the harm caused by this result should outweigh any possible benefit to other stakeholders. One commenter suggested that 12-point Times New Roman be adopted as the minimum. Several commenters stated that while aligning requirements across the health system is favorable, the ''conspicuously visible'' requirement adopted under the PPACA is overly vague and requested CMS provide greater clarity to the requirement to eliminate ambiguity. One commenter recommended that CMS include a requirement for states to provide a sample to CMS of what they determine meets the ''conspicuously visible'' standard.

Response: We acknowledge that adopting ''conspicuously visible'' is less descriptive and specific than ''no less than 18-point'' but do not believe that states will apply the conspicuously visible standard in a way that will reduce access to information or cause harm to beneficiaries with disabilities. States and managed care plans understand the importance of the information required by § 438.10 and benefit when beneficiaries read and utilize the information. We note that current § 438.10(d)(6)(iii) requires that all written materials for potential enrollees and enrollees use a font size no smaller than 12 point. We do not believe that it will be necessary for us to review a sample of what states determine to be conspicuously visible; we expect states and managed care plans to exercise due diligence in gathering input from experts in disabilities and other stakeholders in developing their materials to comply with the regulation as revised in this final rule.

We note that states and managed care plans were required to comply with § 438.10(d) by the beginning of rating periods that started on or after July 1, 2017 and finalizing the ''conspicuously visible'' standard in place of the 18-point font standard does not require states and managed care plans already in compliance to make changes. Continued use of 18-point font will comply with the regulation as amended here. This revision simply provides states and managed care plans with an option to select and use a different conspicuously visible font size to achieve the desired outcome. We remind states and managed care plans that they will be held accountable for compliance with § 438.10(d)(2) through (6) and with ensuring that all necessary steps are taken to adequately accommodate enrollees and potential enrollees that request information in large print or that request other formats or auxiliary aids and services. States and managed care plans have continuing obligations under Title VI and section 1557 of the PPACA to take reasonable steps to provide meaningful access to programs to individuals who have limited English proficiency. This may require states and managed care plans to provide documents and information in other languages to LEP individuals, including documents and information that are not ''critical to obtaining services''. Further, in assessing whether states and managed care plans have met this obligation, the Department considers whether recipients of Federal financial assistance take steps to identify LEP persons with whom it has contact, by providing notice of the availability of language assistance. HHS, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-vi/index.html.*

Comment: Several commenters stated that CMS failed to provide any evidentiary basis for how vision-impaired persons would be able to access plan information under this standard and stated that vision impairment is more common among the Medicaid-eligible population. Some commenters stated that this proposal violates section 1557 of the PPACA, which prohibits discrimination on the basis of race, color, national origin, sex, age, and disability.

Response: Persons with disabilities, including vision impairments, make up a significant proportion of the Medicaid population. Under regulations implementing the ADA, section 504 of the Rehabilitation Act of 1973 and section 1557 of the PPACA, states and

[10] 81 FR 31397.

[11] See, for example, 28 CFR 35.104 (defining ''auxiliary aids or services'') and 35.160(a) through (b); 28 CFR part 164; 28 CFR 36.303(a) through (c) and (h); 45 CFR 84.52(d) and 92.202(a).

[12] Docket No.: HHS–OCR–2019–0007 (*https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities*).

managed care plans must take appropriate steps to provide effective communication to people with disabilities. This includes providing appropriate auxiliary aids and services to individuals with disabilities ''where necessary to afford individuals with disabilities, . . . [] an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.'' (28 CFR 35.160(b)(1); see also 28 CFR 36.303; 45 CFR 84.52(d) and 92.202.) ''Auxiliary aids and services'' is defined to include large print, and many other alternative formats used by individuals who are blind and vision-impaired. (28 CFR 35.104; 28 CFR 36.303(b)(1); 45 CFR 92.4.) Thus, separate and apart from these regulations, states and managed care plans have an obligation to make materials and information accessible to blind and visually impaired individuals. Regardless of how states and managed care plans apply the ''conspicuously visible'' standard, they must provide auxiliary aids and services, including large-print type under certain circumstances, to potential enrollees and enrollees upon request and at no cost under § 438.10(d)(3), (d)(5)(ii), and (d)(6)(iii). While we did not provide any empirical studies to address the use of a ''conspicuously visible'' standard, we do not believe that is necessary because it is a qualitative and not a quantitative standard; using a standard that focuses on whether the information is sufficiently conspicuous and visible that enrollees could reasonably be expected to see and be able to read the information avoids the ''one size fits all'' hazard that a quantitative standard that focuses only on font size could raise. We expect that states and managed care plans will be able to use size, font, color and other elements of their printed materials to make information conspicuously visible. It may be that for some materials, the font and color used are as effective, if not more effective, than merely making the font larger for individuals with disabilities to be able to see and read the information.

Comment: One commenter expressed concern that the proposed ''conspicuously visible'' standard will result in additional challenges for managed care plans if states create standards that greatly exceed the proposed requirement and as a result, requested that CMS adopt safeguards that would allow managed care plans to work with states to define standards that balance enrollee accessibility with administrative burden.

Response: We decline to include further criteria or safeguards in § 438.10. We encourage states to collaborate with their managed care plans, experts in older adults and persons with disabilities, and other stakeholders to determine appropriate characteristics of ''conspicuously visible''. However, we also remind stakeholders that states, under their own authority and state law, may impose higher or more protective standards to ensure enrollee access to information than the minimum imposed by § 438.10(d).

Comment: Many commenters agreed with the proposal to only require taglines on materials critical to obtaining services. They agreed that putting taglines on all written materials was unnecessary, impeded the use of certain effective forms of written communication, and created unnecessarily long documents that were not easy for enrollees to use.

Response: We agree that requiring taglines only on materials critical to obtaining services will help states and managed care plans create consumer-friendly documents that maximize effectiveness for the enrollee.

Comment: Many commenters disagreed with the proposal to replace the requirement to include taglines on ''all written materials'' with the requirement for taglines only on materials for potential enrollees and enrollees that ''are critical to obtaining services.'' Many commenters stated that taglines have proven to be a low-cost and effective means of communicating information to individuals with limited English proficiency (LEP) and people with disabilities and that this change would weaken beneficiary protections and result in reduced access to plan information by some enrollees and potential enrollees. Commenters also stated that the proposed requirement would give managed care plans or state agencies the ability to decide what materials meet this requirement, possibly resulting in important materials failing to be included, thereby reducing access and ability to make well-informed plan decisions for disabled, or LEP individuals. Many commenters further stated that this change is inconsistent with section 1557 of the PPACA and regulations implemented by HHS' OCR that ''covered entities'' must provide taglines on all ''significant'' documents and creates conflicting standards.

Response: As noted in this rule, ''conspicuously visible'' will be used to assess the effectiveness of taglines based on whether the content is sufficiently conspicuous and visible that enrollees and potential enrollees in the Medicaid managed care plan could reasonably be expected to see and be able to read the information.

In addition, we expect that states and managed care plans will exercise due diligence in determining which documents are critical to obtaining services. Requiring taglines on less than all written materials is consistent with Medicare Advantage, qualified health plans in the Marketplace, and current implementing regulations for section 1557 of the PPACA as issued by the HHS and OCR. While requiring taglines only on materials that are critical to obtaining services is a change from the 2016 final rule, we do not believe that it will disadvantage certain populations. Further, the availability of other resources for assistance such as a state's beneficiary support system or a managed care plan's phone lines and websites provide additional opportunities for potential enrollees and enrollees to access the information they need or want. We remind states and managed care plans that they have independent obligations under Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, section 1557 of the PPACA, and the ADA that may require them to do more than what 42 CFR part 438 requires.

We do not believe that we are creating a conflicting standard between documents that are ''critical to obtaining services'' versus requiring taglines on ''significant documents'' as used in § 92.8. The standard ''critical to obtaining services'' cuts to the heart of the role of Medicaid managed care plans: The provision of services to enrollees. By adopting a different standard, we preserve for the Medicaid program the ability to make different determinations about which documents must contain taglines. Therefore, we are finalizing the amendments to § 438.10 using the standard ''critical to obtaining services'' to identify the documents that must contain taglines. We believe states are in the best positon to apply the standard since they have the necessary information and familiarity with the documents to analyze the scope and purpose of each document. This standard and the lack of a definitive list provides the means to ensure that the proper documents used in each program and managed care plan contain taglines, based on the use and audience of each document.

Comment: A few commenters requested that CMS provide a targeted list of publications that require taglines. Many commenters requested that CMS include additional definitions clarifying which materials are ''critical to obtaining services'' to remove ambiguity to the greatest extent possible; however,

commenters did not provide specific examples. One commenter requested that CMS consider permitting taglines and non-discrimination statements be provided annually on at least one document that is critical to obtaining services, as opposed to on all ''significant'' publications.

Response: Section 438.10(d)(3) includes a non-exhaustive list of documents that are critical to obtaining services; we decline to further list documents that are ''critical to obtaining services.'' We do not believe that an exhaustive list can be provided in the § 438.10(d)(3) regulation as each state and managed care plan produces different types of documents and that states and managed care plans must apply the standard in the regulation to determine which documents are critical to obtaining services. Providing a list also runs the risk that regulated entities focus only on the list without conducting the necessary analysis to think through the purpose and scope of each document to identify each document that is critical to obtaining services. We clarify here that including taglines only on documents critical to obtaining services is a minimum standard, and therefore, states and managed care plans have the option to continue requiring (and including) taglines on all written materials. We also decline to adopt the commenter's suggestion that taglines only be required annually on at least one document that is critical to obtaining services. Finalizing the text as proposed provides states and managed care plans with sufficient responsibility and authority to identify the documents that require taglines. Only providing taglines annually and on as few as one document is not sufficient notification to enrollees.

Comment: One commenter expressed concern that the proposed changes to § 438.10(d)(2) and (3) seemed to be in conflict. Commenter stated that paragraph (d)(2) requires that written materials that are critical to obtaining services for potential enrollees include taglines explaining the availability of written translations or oral interpretation to understand the information provided and the toll-free telephone number of the entity providing choice counseling services as required by § 438.71(a). The commenter noted that paragraph (d)(3) requires that written materials that are critical to obtaining services include taglines explaining the availability of written translation or oral interpretation to understand the information provided and include the toll-free and TTY/TDY telephone number of the MCO's, PIHP's, PAHP's or PCCM entity's member/customer service unit. Commenter stated that if the written materials that are critical to obtaining services for potential enrollees overlap with written materials for enrollees, it is unclear what the tagline should say and requested clarification.

Response: As the tagline information required in § 438.10(d)(2) and (3) is the same except for the telephone number, we believe the commenter is requesting clarification on that aspect. As such, we clarify that if documents are intended for use with both potential enrollees and enrollees, the documents would need to comply with the requirements in both § 438.10(d)(2) and (3); that is, the document would need to include both the toll-free telephone number of the entity providing choice counseling services and the toll-free and TTY/TDY telephone number of the MCO's, PIHP's, PAHP's or PCCM entity's member/customer service unit.

Comment: Commenters expressed concern that allowing managed care plans to decide which documents are critical to obtaining services has the potential to result in adverse selection, whereby plans would discourage enrollment by persons with significant health needs.

Response: States and managed care plans must comply with all applicable laws under § 438.3(f). Enrollment discrimination, including on the basis of health status, as well as on other prohibited bases, is expressly prohibited in § 438.3(d). Section 438.3(f) requires compliance with applicable civil rights laws, which prohibit discrimination more broadly than just with regard to enrollment. We believe that these requirements are sufficient to address this issue and remind stakeholders that nothing in our amendment to § 438.10 changes these other obligations.

Comment: One commenter expressed concern that the proposal to delete § 438.10(d)(6)(iv) appeared to delete the requirement that information on how to request auxiliary aids and services be included in a tagline and sought clarification as to whether that was CMS' intent.

Response: Our intent was to delete the requirement that the tagline be large print in a font size no smaller than 18-point, not to delete the requirement that a tagline provide information on how to access auxiliary aids and services. Instructions on how to access auxiliary aids and services is important information that should be included in a tagline. To correct this inadvertent error, we are finalizing additional revisions in paragraphs (d)(2) and (3) so that the list of information required to be included in taglines in § 438.10(d)(2) and (3) includes information on how enrollees can request auxiliary aids and services. We believe having all of the tagline elements in one sentence in each paragraph makes the requirements clear and easy to understand. We acknowledge that the availability of auxiliary aids and services is already addressed as a requirement in § 438.10(d)(3), (d)(5)(ii), (d)(6)(iii), and (g)(2)(xiii) but those references do not specifically require that the information be provided in a tagline nor precisely how a potential enrollee or enrollee can make a request. We believe revising the lists in § 438.10(d)(2) and (3) is the most effective way to ensure that the information on how to request auxiliary aids and services is provided as a tagline on all documents critical to obtaining services.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing amendments to § 438.10(d)(2) and (3) and (d)(6)(iv) substantially as proposed with a modification to § 438.10(d)(2) and (3) to add how enrollees can request auxiliary aids and services to the list of information required to be included in taglines and to make ''language'' plural in § 438.10(d)(2).

b. Information for All Enrollees of MCOs, PIHPs, PAHPs, and PCCM Entities: General Requirements (§ 438.10(f))

In the comprehensive revision to Federal regulations governing Medicaid managed care in 2002, we required notice to certain specified enrollees of a provider's termination within 15 days of a covered plan's receipt or issuance of the termination notice (67 FR 41015, 41100). We established the 15-day time-period following receipt of notice because we wanted to ensure that enrollees received notice of the provider terminations in advance given the reality that providers often give little notice of their plans to terminate participation in a network (67 FR 41015). Currently, § 438.10(f)(1) requires that a managed care plan must make a good-faith effort to provide notice of the termination of a contracted in-network provider to each affected enrollee within 15 days of receipt or issuance of the termination notice. However, there can be circumstances when plans or providers send a termination notice to meet their contractual obligations but continue negotiating in an effort to resolve the issue(s) that triggered the decision to commence termination procedures. If the issue(s) can be

amicably resolved, then the termination notice is usually rescinded and the provider remains in the network. In these situations, the issuance of notices by a state to enrollees before resolution efforts have been attempted, can cause alarm and confusion for enrollees who believe that they need to locate a new provider.

In an effort to prevent unnecessary notices from being sent to enrollees, we proposed at § 438.10(f)(1) to change the requirement that managed care plans issue notices within 15 calendar days after receipt or issuance of the termination notice to the later of 30 calendar days prior to the effective date of the termination or 15 calendar days after the receipt or issuance of the notice. For example, if the plan receives a termination notice from a provider on March 1 for a termination that is effective on May 1, the proposed regulation would require that written notice to enrollees be provided by April 1 (30 days prior to effective date) or by March 16 (within 15 days of receipt of the termination notice), whichever is later. In this example, the managed care plan would have to issue a notice to the enrollees by April 1, since it is later.

The following summarizes the public comments we received on our proposal to amend § 438.10(f) and our responses to those comments.

Comment: Many commenters supported the proposal to change the requirement that managed care plans issue termination notices within 15 calendar days after receipt or issuance of the termination notice to the later of 30 calendar days prior to the effective termination date or 15 calendar days after the receipt or issuance of the notice. Many commenters agreed with CMS' rationale that it would reduce beneficiary confusion by reducing the number of unnecessary notices that they receive. Commenters also noted that the proposal aligns with commercial coverage practices and provides additional flexibility for managed care plans to negotiate with providers who are considering terminating their network contract and attempt to resolve the provider's underlying issue. One commenter stated that CMS should work with states to develop, implement, and deploy enforcement measures for this provision. One commenter recommended that CMS should monitor implementation of the new timeline.

Response: We believe it is prudent to allow managed care plans time to work with providers to potentially resolve the underlying issue and maintain a provider's network participation to avoid disrupting care for enrollees. To the extent that the new timelines for this notice that we are finalizing in this rule will permit Medicaid managed care plans to align their processes across different lines of business, we believe that is a bonus benefit to our goal of reducing the potential for confusion to enrollees. We do not believe that states nor CMS will need to develop new or unique enforcement mechanisms for this provision. States have existing oversight and monitoring processes which should be updated to reflect these new timeframes.

Comment: One commenter suggested that CMS require states or plans to maintain a hotline that enrollees can call to ask questions about and better understand notices of provider terminations to reduce confusion.

Response: States are required to have beneficiary support systems under § 438.71 and managed care plans customarily use their member/customer service units to assist enrollees with questions and information to comply with § 438.10(c)(7), which requires plans to have mechanisms to help enrollees and potential enrollees understand the requirements and benefits of the plan. We do not believe it is necessary to mandate a separate mechanism to address questions about provider termination notices. We encourage plans to be proactive in notifying enrollees about the availability of the call center and other existing resources to deal with a provider's termination from the plan's network.

Comment: Many commenters disagreed with the proposal to change the requirement that managed care plans issue termination notices within 15 calendar days after receipt or issuance of the termination notice to the latter of 30 calendar days prior to the effective termination date or 15 calendar days after the receipt or issuance of the notice. Many commenters stated that patients should be given as much notice as possible to find a replacement provider to avoid disruptions in continuity of care which can have negative health outcomes and increase costs, especially with regard to specialists, patients with chronic conditions, disabilities, or linguistic challenges, and patients in rural areas. A few commenters stated that the risk of beneficiary confusion is outweighed by the risk to patients who may experience gaps in care as they seek alternative providers. Another commenter stated that the currently approved timeline is not adequate to maintain continuity of care and should instead be lengthened to at least 90 days. A few commenters provided additional recommendations, including ensuring that authorizations for services and the established timeframe be honored for patients transitioning to new providers.

Response: We understand that in some situations, permitting managed care plans to issue notices of certain provider terminations within the later of 30 calendar days prior to the effective date of the termination or 15 calendar days after the receipt or issuance of the notice, will result in an enrollee notification period that is shorter than the notification period currently required by § 438.10(f). We clarify here that the new timeframe finalized in § 438.10(f) is a minimum notification period; managed care plans are encouraged to provide enrollees more than the minimum required notification period to reduce the possibility of disruption in care. Additionally, enrollees should be educated and encouraged to utilize the numerous resources that can assist them with locating providers, such as their managed care plans member/customer service units, the state's beneficiary support system, and their managed care plan's provider directory. Some enrollees also have a case manager or care coordinator from whom they can receive assistance in locating a comparable provider. Managed care plans often include the contact information for comparable providers near the enrollee in the notice of termination and some plans utilize proactive outreach calls to assist enrollees in these situations. We encourage all plans to provide customized information and assistance to prevent disruptions in care from occurring. We agree with commenters that managed care plans should review existing authorizations for enrollees affected by a provider termination to ensure that disruptions in care are prevented. We remind states and managed care plans of their obligations under § 438.206 to ensure that all covered services must be available and accessible in a timely manner and that if a provider network is unable to provide necessary services covered under the contract, the managed care plan must timely and adequately provide them out-of-network. States also have program monitoring obligations under § 438.66 that should be used to monitor for access and continuity of care issues that arise from this change in notification time frame and adjust program policies accordingly.

Comment: One commenter recommended that notification of provider termination should include information on how the affected beneficiary can disenroll or select a plan

in which his or her provider participates.

Response: Section 438.56(c) and (d) list the reasons for which disenrollment from a Medicaid managed plan (including to switch to another plan, if offered) may be requested by an enrollee; termination of a provider from the plan network is not cause for disenrollment except in limited circumstances under that regulation. Aside from those reasons, and subject to certain limitations, states have the authority to determine additional reasons or periods for disenrollment. States and managed care plans have been addressing changes in provider networks based on provider terminations since the beginning of network-based managed care programs. In the absence of significant, systemic problems that need a Federal solution, we do not believe that additional regulation of states and plans in this way is necessary.

After consideration of public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the amendment to § 438.10(f)(1) as proposed.

c. Information for All Enrollees of MCOs, PIHPs, PAHPs, and PCCM Entities: Enrollee Handbooks (§ 438.10(g))

In the 2016 final rule, an erroneous reference was included in § 438.10(g)(2)(ii)(B) to paragraph (g)(2)(i)(A) which does not exist. We proposed in this rule to correct the reference to paragraph (g)(2)(ii)(A), which describes the applicable services to which paragraph (g)(2)(ii)(B) refers.

We received no public comments on this proposal and will finalize § 438.10(g)(2)(ii)(B) as proposed.

d. Information for All Enrollees of MCOs, PIHPs, PAHPs, and PCCM Entities: Provider Directories (§ 438.10(h))

In the 2016 final rule, we added the requirement at § 438.10(h)(1)(vii) requiring each managed care plan to include information in its provider directory on whether the provider has completed cultural competence training. We added this requirement to the final rule in recognition of the linguistic and cultural diversity of Medicaid beneficiaries (81 FR 27724). After the final rule was published, the Cures Act amended section 1902 of the Act,[13] to add requirements for publication of a FFS provider directory.[14] Now that the Congress has established new standards for provider directories in FFS Medicaid, we believe that it is beneficial to Medicaid managed care enrollees to align the requirements for Medicaid managed care directories with the FFS directories, especially since many managed care enrollees also receive some services on a FFS basis. The proposed amendment would require that the information in a directory include a provider's cultural and linguistic capabilities, including the languages spoken by the provider or by the skilled medical interpreter providing interpretation services at the provider's office. The statute does not require information on whether the provider has completed cultural competence training; therefore, we proposed to amend § 438.410(h)(1)(vii) to eliminate the phrase 'and whether the provider has completed cultural competence training.''

In the 2016 final rule, we finalized at § 438.10(h)(3) requirements that information in a paper directory must be updated at least monthly and that information in an electronic directory must be updated no later than 30 calendar days after the managed care plan receives updated provider information. In paragraph (h)(1), we clarified that paper provider directories need only be provided upon request, and we encouraged plans to find efficient ways to provide accurate directories within the required timeframes (81 FR 27729).

Since the publication of the 2016 final rule, states and managed care plans have raised concerns about the cost of reprinting the entire directory monthly. While the final rule did not require that the directory be reprinted in its entirety monthly, many managed care plans were forced to do so to recognize savings from printing in large quantities. To address this inefficiency, as well as to provide managed care plans with another option for reducing the number of paper directories requested by enrollees due to the lack of access to a computer, we proposed to modify the requirements for updating a paper provider directory that would permit less than monthly updates if the managed care plan offers a mobile-enabled, electronic directory.

We noted in the 2018 proposed rule that research has shown that 64 percent of U.S. adults living in households with incomes less than $30,000 a year owned smartphones in 2016 (83 FR 57278); using updated data, research has shown that 67 percent of U.S. adults living in households with incomes less than $30,000 a year owned smartphones in 2018.[15] We discussed access to information through smartphones in the proposed rule: Lower-income adults are more likely to rely on a smartphone for access to the internet, because they are less likely to have an internet connection at home [16] and recent studies show that the majority of Americans have used their smartphones to access information about their health,[17] and consider online access to health information important.[18] We explained our belief that providing mobile-enabled access to provider directories may provide additional value to enrollees by allowing them to access the information anytime, anywhere—which is not feasible with a paper directory. Mobile applications for beneficiaries are increasingly available in programs serving older adults and individuals with disabilities and include access to Medicare marketing materials [19] and medical claims on Blue Button [20] to empower enrollees to better manage and coordinate their healthcare. For enrollees that request a paper directory, we opined that quarterly updates would not significantly disadvantage them as other avenues for obtaining provider information are readily available, such as the managed care plan's customer service unit or the state's beneficiary support system.

To reflect this change in access to data and modify the requirements for updating a paper provider directory to permit less than monthly updates if the managed care plan offers a mobile-enabled directory, we proposed several revisions to § 438.10(h)(3). First, we proposed to add paragraphs (h)(3)(i) and (ii) to § 438.10 which would delineate requirements for paper directories from those for electronic directories. Second, we proposed to add paragraphs (h)(3)(i)(A) and (B) which would reflect, respectively, that monthly updates are required if a plan does not offer a mobile enabled directory and that only quarterly updates would be required for plans that do offer a mobile enabled directory. Lastly, we proposed to make ''directories'' singular (''directory'') at

[13] Section 1902(a)(83)(A)(ii)(II) of the Act.

[14] Section 5006 of the Cures Act added paragraph (83)(A)(ii)(II) to section 1902(a) of the Act.

[15] *http://www.pewinternet.org/fact-sheet/mobile/.*

[16] *Id.*

[17] *http://www.pewresearch.org/fact-tank/2015/04/30/racial-and-ethnic-differences-in-how-people-use-mobile-technology/.*

[18] *https://www.ncbi.nlm.nih.gov/pubmed/27413120.*

[19] 2016 Medicare Marketing Guideline 100.6. *https://www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/Downloads/2017MedicareMarketingGuidelines2.pdf.*

[20] *http://bluebuttonconnector.healthit.gov/.*

§ 438.10(h)(3)(ii) which would avoid implying that a managed care plan must have more than one directory of providers.

In the proposed rule, we explicitly reminded managed care plans that some individuals with disabilities, who are unable to access web applications or require the use of assistive technology to access the internet, may require auxiliary aids and services to access the provider directory. In keeping with the requirement that managed care plans must provide auxiliary aids and services to ensure effective communication for individuals with disabilities consistent with section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, enacted on September 26, 1973) and section 1557 of the PPACA, these individuals should, upon request, be given the most current provider directories in the same accessible format (paper or electronic) that they receive other materials.

We also encouraged managed care plans to perform direct outreach to providers on a regular basis to improve the accuracy of their provider data and to ensure that all forms of direct enrollee assistance (such as telephone assistance, live web chat, and nurse help lines) are effective, easily accessible, and widely publicized.

The following summarizes the public comments we received on our proposal to amend § 438.10(h)(1)(vii) and our responses to those comments.

Comment: Several commenters supported the proposal to no longer require provider directories to note whether a provider has completed cultural compliance training and noted that doing so would ease administrative burden on plans and providers by better aligning the Medicaid managed care policy with the amendment to section 1902(a)(83) of the Act, made by the Cures Act. One commenter noted that completion of the cultural competency course was not an indicator of a provider's cultural capabilities for any particular culture and that many beneficiaries do not understand the significance of the notation in the provider directory, thereby reducing its importance.

Response: We appreciate the support for no longer requiring managed care plans to include an indication of cultural competence training as a required element in a provider directory. The statute does not require information on whether the provider has completed cultural competence training and we believe it's important to facilitate states aligning the requirements for their FFS directories with those of their managed care plans.

Comment: One commenter suggested that provider self-reported data be acceptable to meet the proposed requirement for the directory to report linguistic and cultural capabilities and that, if after solicitation, no capabilities are reported, the directory should list ''none reported'' as the cultural capabilities of that provider.

Response: We decline to amend the regulation to specify how to collect cultural competence data, including the degree to which self-reported data is reliable, and how a provider's cultural competencies or lack of cultural competencies should be displayed in a provider directory. We believe states are better suited to determine how to collect this information and how it should be displayed, particularly given that some states may elect to use a consistent format for their FFS and managed care programs.

Comment: Several commenters disagreed with the proposal to eliminate the phrase ''and whether the provider has completed cultural competence training'' from provider directories. These commenters stated that the change is unnecessary, removes important information for many beneficiaries seeking new providers and providers seeking to make effective referrals for existing patients, removes the incentive for providers to complete cultural competency training, and may increase health disparities in underserved beneficiary populations by potentially limiting a patient's confidence in choosing a provider that is best suited for them and preventing adequate access to healthcare services. Commenters noted that inclusion of the phrase would help ensure that a provider is sensitive to a patient's beliefs, practices, and culture, thereby strengthening the patient-provider relationship and improving the possibility of better health outcomes.

Response: We understand that some commenters consider an indication of cultural competence training in provider directories as useful information for enrollees and providers. However, we do not believe that removing a ''yes'' or ''no'' indicator reflecting the completion of training impacts the usefulness of the other information presented about cultural competencies nor that it necessarily indicates whether a provider is more sensitive to patients' beliefs, practices, and culture. Given that states are required to also display a provider's cultural and linguistic capabilities—which is far more descriptive than a ''yes/no'' indicator about training—in their FFS directories, we believe that they will select clear, consistent, and meaningful ways to display the information and ensure that their managed care plans do so as well.

Comment: A few commenters noted that displaying a provider's cultural and linguistic capabilities without also indicating whether the provider took a cultural competence training is not enough to adequately convey whether the individual has the skills or training to effectively communicate or provide language assistance. One commenter suggested that states should be required to maintain a list of providers who have completed cultural competency training.

Response: We clarify that displaying whether a provider has completed cultural competence training is not prohibited, it is merely not required under the amendment to § 438.10(h)(1)(vii) that we are finalizing in this rule. If managed care plans determine that displaying the information is useful, they may continue including it in their directory; similarly, states can adopt standards to require the directory to include more information than the Federal minimum adopted in § 438.10(h)(1). Additionally, if enrollees do not find a provider's linguistic competency adequate for effective communication, we encourage them to contact their managed care plan immediately for assistance. Under § 438.206(b)(1) plans are required to ensure adequate access to all services covered under the contract for all enrollees, including those with limited English proficiency or physical or mental disabilities. We decline to require states and managed care plans to maintain a list of providers who have completed training and defer to states and managed care plans to decide if doing so would be useful for their enrollees.

After consideration of public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the amendment to § 438.10(h)(1)(vii) as proposed.

The following summarizes the public comments received on our proposal to amend § 438.10(h)(3) and our responses to those comments.

Comment: Many commenters supported the proposal to require only quarterly updates for paper directories for plans that offer a mobile enabled directory in lieu of monthly updates. These commenters stated that the proposal strikes a suitable balance for streamlining access between electronic and print formats, increases consistency with the Medicare Advantage program, reduces administrative burden and environmental impact while having

minimal negative impact to enrollees, and incentivizes plans to invest in mobile enabled features that improve beneficiary experience.

Response: We believe enrollees will appreciate the increased ease of access to provider directory information and believe that decreasing the rate of updates to paper directories when there is a mobile-enabled electronic alternative to the paper provider directory is an appropriate way to ensure enrollee access to information about the network of providers.

Comment: Several of the commenters cited concerns with potential ambiguity regarding the term ''mobile-enabled'' and requested CMS provide a definition of the term to ensure that states and plans are able to take full advantage of the offered flexibility while reducing administrative burden for plans that may be required to meet different standards across multiple states. Several commenters recommended that CMS not limit rulemaking to mobile ''applications'' and that ability to access an online printable directory, search tool, or provider directory formatted for viewing on a mobile device should be considered compliant with the proposed requirement.

Response: We use the term ''mobile-enabled'' to mean a mobile website or a mobile application; we defer to states and managed care plans to determine whether a mobile website or application is most appropriate for each applicable managed care program and managed care plan, provided that the end result is that the provider directory is mobile-enabled as explained here. As we outlined in the proposed rule, we believe that making the provider directory information usable for smartphone or mobile technology users is the key point, not the technology or format used to accomplish that. A mobile-enabled website could include a mobile friendly, mobile optimized, or a responsive design. A true mobile enabled website will automatically detect what environment each visitor is using to access the website, then display it in the format best for that device, whether a smartphone, tablet, or other mobile device is used. With a mobile-enabled website, the navigation and content are reorganized so that the web page fits the browser window for the device used, and the pages are made ''lighter,'' so they download more quickly. Our goal with proposing to reduce the frequency of paper directory updates if a mobile-enabled directory is available is to improve the enrollee's ability to navigate and utilize the directory information when accessing it on a mobile device. We would expect features such as small image sizes to allow for fast loading, simplified navigation that is ''thumb'' friendly, reduced graphics that do not interrupt access to critical information, and text-based phone numbers, physical addresses, or email addresses that can trigger a call, directions, or email message from the mobile device to be included in a mobile-enabled provider directory. Managed care plans may find it helpful to visit HHS' website for Building and Managing websites; it sets out different stages of ''mobile'' that could serve as a useful guide when determining which enhancements would be useful to the end user.[21] HHS guidance notes that when developing exclusively mobile versions of websites, these ''microsites'' should be designed for mobile accessibility. These sites should contain code specific to, and designed for, mobile web tasks and browsing. These microsites often contain pared down information on the same topics covered on the main site. Additionally, content should be written in such a way as to be read easily on a mobile device, usually in small text groupings of about three to four lines of text and provide the most important information at the top of the page, so that the site user has access to the most important information quickly.

By providing guidance on what it means for the provider directory to be mobile-enabled, we aim to establish a base for the characteristics of a mobile-enabled website without restricting website developers. States and managed care plans can determine whether a mobile website or application is most appropriate to provide access that meets the regulatory standard.

We do not consider merely being able to access a managed care plan's provider directory from its website on a mobile device or a printable online directory to be mobile-enabled. A website that is not mobile-enabled, is usually very difficult to read when accessed using a mobile device, often requiring the user to zoom, scroll, and manipulate the image to view it. Additionally, we clarify that § 438.10(c)(6) already requires that required enrollee information, which would include a provider directory, provided electronically by a managed care plan must be in an electronic format which can be retained and printed; the standard for mobile-enabled provider directories, which are only relevant for purposes of identifying the frequency of updates to the paper provider directory, is different than what is required by § 438.10(c)(6).

[21] *https://www.hhs.gov/web/building-and-managing-websites/mobile/index.html.*

Comment: Commenters recommended that CMS clarify that the proposed changes apply to duals programs, including Dual Eligible Special Needs Plans (D–SNP) and Medicare-Medicaid Plans (MMP).

Response: To the extent Part 438 applies to (1) a D–SNP (if it is also a Medicaid MCO, PIHP, PAHP, and, in some cases, PCCM, or PCCM entity), or (2) a MMP under the capitated financial alignment model demonstrations, § 438.10(h)(3)(i)(B) would also apply.

Comment: One commenter recommended that CMS require electronic notification to enrollees and providers of availability of updates and another commenter recommended that CMS work with states to develop, implement and deploy enforcement measures for these provisions.

Response: We are not finalizing a new rule to require electronic notification to enrollees and providers of updates to the provider directory. We believe the commenter is referencing updates necessary for mobile applications. If so, the use of a mobile enabled application is at the option of the state and managed care plan as a means to provide a mobile-enabled provider directory as described in § 438.10(h)(3). However, if a software application is used and updates to the application are required, we would expect the necessary notifications to be sent to users of the application. We do not believe that states will need to develop new or unique enforcement mechanisms for this provision.

Comment: Several commenters expressed that CMS should only require that printed provider directories be distributed upon request.

Response: Managed care plans must provide paper directories upon request per § 438.10(h)(1), which provides that each MCO, PIHP, PAHP, and when appropriate the PCCM entity, must make available in paper form upon request and electronic form. We remind managed care plans that if required information is provided electronically instead of on paper, § 438.10(c)(6) applies. Therefore, use of a mobile-enabled directory will not satisfy the requirement to provide the provider directory in electronic form; use of a mobile-enabled provider directory is relevant only for purposes of identifying the updating schedule with which a managed care plan must comply under § 438.10(h).

Comment: A few commenters recommended that CMS require managed care plans that meet the condition for quarterly updates to produce update flyers upon request or a customer support phone line with after-

hours capacity. Some of these commenters also expressed that the customer support phone line should not only provide contact information for providers, but also assist in making appointments and allow for patients and providers to update Medicaid managed care plan network records.

Response: We are not incorporating these suggestions into the regulatory requirements for managed care plans as we do not believe that they are necessary to ensure enrollee access to the provider directory. We encourage managed care plans to insert errata sheets into paper directories to reflect the most up-to-date provider information, provide extended customer service hours, offer appointment setting assistance, and utilize effective electronic mechanisms for collecting provider directory information.

Comment: One commenter recommended that printed provider directories be provided in a format that permit directories for certain geographic areas—as Medicare permits—rather than by the entire managed care plan's service area. This commenter further noted that in a large state, provider information for the entire state may not be useful to members in a specific region and that member's need provider information on a reasonable service area based on where they access health services. Another commenter recommended that printed directories for an entire service region of a managed care plan should only be required annually.

Response: Section 438.10(h) requires that each MCO, PIHP, PAHP, and when appropriate PCCM and PCCM entity make available—in paper form upon request and electronic form—certain specified information about the providers in its network. There is no requirement in § 438.10(h) for a single directory to be printed for a managed care plan's entire service area. States can permit or require their managed care plans to print directories for areas less than the entire service area if the state has determined that best meets the needs of their enrollees given known utilization and travel patterns within the state. This would allow more customized, consumer friendly directories to be sent and is well suited to on-demand printing rather than bulk printing. On-demand printing allows managed care plans to print the directory data from the current on-line version, thus allowing enrollees using printed versions to receive the same information as enrollees using an electronic directory. We remind managed care plans that enrollees must be able to access information on a plan's entire network if they choose to and that all information required by § 438.10 must be provided in paper form upon request, at no cost, and within five business days. Plans subject to this requirement can provide paper versions of directories that cover smaller areas (if permitted by the state) so long as, in aggregate, the paper directories provide the necessary information for the plan's entire service area and entire network.

Comment: A few commenters requested that CMS consider alternatives to the proposed requirements for printing provider directories such as providing monthly updates or inserts.

Response: We believe the commenter is suggesting that errata sheets alone should be permitted to be sent to enrollees in lieu of an entire directory but the comment is not clear as an errata sheet is merely an update to what is included in the provider directory, so sending only the errata sheet would not seem useful if the paper directory that was being updated with new provider information had not first been provided. If being used to meet the monthly paper director update requirement in § 438.10(h)(3), errata sheets must be inserted into a paper directory. We point the commenter to the response in this final rule which clarifies another option that states may permit; specifically, that the printing of partial directories is permissible when requested by an enrollee and if allowed by the state.

Comment: One commenter stated that managed care plans exempted from the requirement to timely update their paper directories should be required to display conspicuously on their paper directories and websites that real-time assistance is available along with the number to call to obtain such assistance.

Response: We do not believe that additional revision to paragraph (h)(3) along these lines is necessary. The phone number for assistance is already required in § 438.10(d)(3) which specifies that managed care plans must include a tagline on all provider directories and that taglines must contain the toll-free and TTY/TDY telephone number of the plan's customer/member services unit. This requirement for providing the tagline about the customer/member services unit applies regardless whether the managed care plan makes available a mobile-enabled provider directory and regardless of the updating schedule for the provider directory.

Comment: Many commenters disagreed with the proposal to only require quarterly updates to paper provider directories if mobile enabled directories are available. Many commenters stated that there continues to be too high a percentage of people among the Medicaid-eligible population and among people with disabilities that do not have sufficient understanding of or have access to mobile devices or broadband internet service [22] to justify reducing the frequency of updates to paper directories and that this proposal would result in increased difficulty and burden navigating the healthcare system and accessing care. Several commenters cited census data indicating half of households with annual incomes under $25,000 lack a computer, broadband internet access, or both, expressed that the proposed changes are premature given the absence of research on enrollee preferences for print versus mobile/electronic formats, and stated that CMS should engage in active compliance monitoring and enforcement actions when plans fail to meet existing standards. One commenter cited the National Association of Insurance Commissioners' (NAIC) recent update to their network adequacy model act which included provisions requiring plans to update their provider directory at least monthly.

Response: We acknowledge that not all Medicaid enrollees have a smartphone or internet access, but studies have shown that 67 percent of U.S. adults living in households with incomes less than $30,000 a year owned smartphones in 2018.[23] We understand that the challenges of paper printing do not diminish a segment of the population's need for paper directories, nor should it diminish plans' efforts to produce accurate paper directories.[24] However, we do not believe those issues lessen the value of increasing access to the directory for those portions of the population that choose to utilize electronic methods. Per § 438.10(h)(3), managed care plans must update paper provider directories at least monthly after the managed care plan receives updated provider information. Managed care plans could take steps to alleviate discrepancies between directory updates such as inserting an errata sheet before mailing, printing on demand a directory that covers less than a plan's entire service area when requested by an enrollee, and ensuring that their customer service, care management, and nurse help line (if applicable) staff have

[22] *https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/.*

[23] *http://www.pewinternet.org/fact-sheet/mobile/.*

[24] *https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/.*

access to the most updated data and are prepared to assist enrollees with locating network providers. Managed care plans should also ensure that their network primary care providers have easy access to updated provider directory information since primary care providers are frequently the source of specialty referrals for enrollees. Lastly, managed care plans should be sensitive to the disparities in the use of electronic information when providing resources for their telephone hotline, and providing auxiliary aids and services to people with disabilities.

After consideration of public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the amendments to § 438.10(h)(3) as proposed.

9. Disenrollment: Requirements and Limitations (§ 438.56)

We inadvertently included PCCMs and PCCM entities in § 438.56(d)(5) related to grievance procedures. Because PCCMs and PCCM entities are not required by § 438.228, which does impose such a requirement on MCOs, PIHPs and PAHPs, to have an appeals and grievance process, we proposed to revise § 438.56(d)(5) to delete references to PCCMs and PCCM entities. We note that states may impose additional requirements on their managed care plans but believe that our regulations should be internally consistent on this point.

No public comments were received on this provision. For the reasons outlined in the proposed rule, we are finalizing the amendment to § 438.56(d)(5) as proposed.

10. Network Adequacy Standards (§ 438.68)

Currently, § 438.68(b)(1) requires states to develop time and distance standards for specified provider types if covered under the contract. In the 2016 final rule, we declined to set other national requirements or specific benchmarks for time and distance (for example, 30 miles or 30 minutes) as we believed it best not to be overly prescriptive and we wanted to give states the flexibility to build upon the required time and distance standards as they deemed appropriate and meaningful for their programs and populations. (81 FR 27661). We proposed revisions to § 438.68(b)(1) to require states to use a quantitative standard, rather than only a time and distance standard, for providers. We explained in the proposed rule how as states have worked to comply with the 2016 final rule, they have alerted us to increasing concerns about the appropriateness of uniformly applying time and distance standards to the specified provider types across all programs. In some situations, time and distance may not be the most effective type of standard for determining network adequacy and some states have found that the time and distance analysis produces results that do not accurately reflect provider availability. For example, a state that has a heavy reliance on telehealth in certain areas of the state may find that a provider to enrollee ratio is more useful in measuring meaningful access, as the enrollee could be well beyond a normal time and distance standard but can still easily access many different providers on a virtual basis. To address states' concerns and facilitate states using the most effective and accurate standards for their programs, we proposed to revise § 438.68(b)(1) and (2) by deleting the requirements for states to set time and distance standards and adding a more flexible requirement that states set a quantitative network adequacy standard for specified provider types. We explained in the proposed rule that quantitative standards that states may elect to use include, but are not limited to, minimum provider-to-enrollee ratios; maximum travel time or distance to providers; a minimum percentage of contracted providers that are accepting new patients; maximum wait times for an appointment; hours of operation requirements (for example, extended evening or weekend hours); and combinations of these quantitative measures. We encouraged states to use the quantitative standards in combination—not separately—to ensure that there are not gaps in access to, and availability of, services for enrollees.

We stated that this proposed change would enable states to choose from a variety of quantitative network adequacy standards that meet the needs of their respective Medicaid programs in more meaningful and effective ways, particularly for LTSS programs given the often very limited supply of providers and the potential functional limitations of the LTSS population. We proposed to remove § 438.68(b)(2)(i) and (ii) and reflect all LTSS network adequacy requirements in § 438.68(b)(2). Currently, § 438.68(b)(1) specifies the provider types for which states are required to establish network adequacy standards and § 438.68(b)(1)(iv) requires states to establish time and distance standards for ''specialist, adult and pediatric.'' As noted in the 2016 final rule, we believed that states should set network adequacy standards that are appropriate at the state level and are best suited to define the number and types of providers that fall into the ''specialist'' category based on differences under managed care contracts, as well as state Medicaid programs. Therefore, we believed it was inappropriate for us to define ''specialist'' at the Federal level (81 FR 27661). Since the publication of the 2016 final rule, we have received numerous questions from states and other stakeholders about who should define the types of providers to be included as specialists. We clarified that our proposal would give states the authority under the final rule to define ''specialist'' in whatever way they deem most appropriate for their programs. To make this authority clear, we proposed to revise § 438.68(b)(1)(iv) to add ''(as designated by the state)'' after ''specialist.'' This proposed change would eliminate potential uncertainty regarding who has responsibility to select the provider types included in this category for the purposes of network adequacy.

Currently, § 438.68(b)(1)(viii) requires states to establish time and distance standards for ''additional provider types when it promotes the objectives of the Medicaid program, as determined by CMS, for the provider type to be subject to time and distance access standards.'' In the 2016 final rule, we finalized the language in § 438.68(b)(1)(viii) because it provided the flexibility to address future national provider workforce shortages and future network adequacy standards (81 FR 27660). Since the 2016 final rule was published, states have expressed concern that if we rely on this authority and its flexibility of identifying ''additional provider types,'' managed care plans may have to assess network adequacy and possibly build network capacity without sufficient time. Based on this state input, we proposed to remove § 438.68(b)(1)(viii) to eliminate any uncertainty states may have regarding this requirement.

The following summarizes the public comments received on our proposal to amend § 438.68 and our responses to those comments.

Comment: Many commenters supported the proposal to delete the requirement for states to establish time and distance standards and instead require any quantitative standard. Commenters stated that not requiring the use of time and distance increases flexibility to states and will have a positive impact on more accurately assessing access to telemedicine. Many commenters offered recommendations including requiring states to use a combination of data-driven quantitative

and qualitative standards for capacity, availability, and accessibility that have been cooperatively developed with stakeholders to ensure appropriate network access and patient satisfaction that is reasonable and achievable. A few commenters recommended requiring states to establish separate standards for rural and urban areas that align with the Medicare Advantage managed care program. One commenter recommended setting a maximum number of measures that can be implemented by states.

Response: While we agree that states should use a combination of data-driven quantitative and qualitative standards that have been developed with stakeholder input to comprehensively assess network adequacy, we do not believe that it is appropriate to include that as a requirement in the regulation. As we noted in the proposed rule, we encourage states to use the quantitative standards in combination—not separately—to ensure that there are not gaps in access to and availability of services for enrollees. We decline to require states to establish separate standards for rural and urban areas or to align their standards with those used in the Medicare Advantage program, but note that § 438.68(b)(3) permits states to vary network adequacy standards for the same provider type based on geographic areas. We also decline to limit the number of measures a state can implement to assess network adequacy. We believe states are in the best position to determine the most appropriate number and type of quantitative measures to provide them with the information needed to effectively manage their programs, as well as fulfill their obligations under §§ 438.206 and 438.207.

Comment: Commenters recommended requiring states and health plans to routinely monitor their standards and network performance for alignment with needs of the enrolled population and that states enforce these standards through corrective action when necessary. Additionally, commenters recommended requiring states to measure network access at the subnetwork level, that is, when a managed care plan restricts its enrollees to using only a portion of the plan's larger network, if managed care plans impose subnetwork access requirements on enrollees. Some commenters recommended requiring adequacy standards for specific specialties and provider types. A few commenters suggested that CMS encourage states to acknowledge differences in provider types, particularly for pharmacies, as patients have multiple options outside of brick-and-mortar establishments to fill prescriptions such as mail order and home delivery, which do not lend themselves easily to inclusion under typical network adequacy standards. Commenters stated CMS should give states the flexibility to set different standards for pharmacies due to their unique features.

Response: We expect states and health plans to routinely monitor their network performance against the standards established by the state under § 438.68 as amended in this final rule; we believe that states will set these standards in alignment with, and taking into account, the needs of the covered population. We also expect that states will take corrective action when necessary. The timeframes for submission of network adequacy documentation required by § 438.207(c) is a minimum, and states and managed care plans should use network adequacy measurement as a tool that can be utilized at any time to proactively identify trends and address issues. Under § 438.68, network adequacy standards can be set at whatever level a state deems appropriate; thus, states that have plans utilizing subnetworks, could establish and measure network adequacy at that level. We decline to specify additional provider types as suggested by commenters in § 438.68(b)(1) nor to add more categories or types of ''pharmacies'' in § 438.68(b)(1)(vi), but clarify here that the provider types listed are a minimum. States are free to apply network adequacy standards to additional provider types as they deem appropriate for their programs.

Comment: One commenter recommended stipulating that telehealth providers may only be counted toward a managed care plan's network adequacy when that provider is actively providing services to CHIP/Medicaid beneficiaries in that community and the managed care plan has demonstrated that its telehealth coverage policies and practices offer parity to telehealth providers.

Response: We defer to each state to determine the criteria to be applied to telehealth providers and how such providers would be taken into account when evaluating network adequacy of the state's Medicaid managed care plans. Section 438.68(b) does not set criteria of this nature that states must use. Under § 438.68(c)(1)(ix), states must consider the availability and use of telemedicine when developing their network adequacy standards. If states elect to include telehealth providers in their network adequacy analysis, we believe that the states will establish criteria that appropriately reflect the unique nature of telehealth, as well as the availability and practical usage of telehealth in their state.

Comment: Several commenters stated that CMS should, at minimum, encourage states to consider the following when establishing standards and measuring network adequacy: Regionalization of specialty care; co-located service offerings; enrollee ratios by specialty; geographic accessibility including proximity to state lines; foreseeable road closures; wait times by specialty based on provider hours and availability; volume of technological and specialty services available to serve the needs of covered persons requiring technologically advanced or specialty care; diagnostics or ancillary services; patient experience survey data, and minimum appropriate providers available to meet the needs of children and adults with special health care needs.

Response: We believe these factors could be valuable additions to states' network adequacy review process, and therefore, encourage states to consider them, although we decline to mandate their use in § 438.68. We also remind states to be cognizant of the mental health parity provisions applicable to MCOs, PIHPs, and PAHPs in § 438.910(d) when selecting measures of network adequacy. Plans also need to be mindful of their responsibilities for mental health parity under part 438, subpart K, in network development and evaluation. We believe that states are in the best position to determine the most appropriate measures for use in their programs to address the local needs of their populations.

Comment: A few commenters recommended baseline or minimum provider time and distance, patient-provider ratios, and timely access standards which could be used to inform state-developed network adequacy standards. A few commenters suggested specific minutes and miles standards while another suggested specific appointment wait time standards. One commenter stated that giving states too much flexibility could result in significant variability across states thereby increasing administrative burden for plans which operate in multiple states.

Response: As we stated in the 2016 final rule (81 FR 27661), we decline ''to adopt quantitative standards for time and distance.'' Underlying that 2016 final rule with regard to § 438.68(b) and our 2018 proposed rule is a belief that states should be allowed to set appropriate and meaningful quantitative standards for their respective programs. States are in the best position to set specific quantitative standards that

reflect the scope of their programs, the populations served, and the unique demographics and characteristics of each state.'' We reiterated this position in the proposed rule and continue to believe that we should defer to states and not set Federal standards as prescriptive as the commenters suggest. We understand that providing states this level of flexibility could result in widely varied standards but given the diversity and complexity of Medicaid managed care programs, such variation may be warranted. We encourage states and managed care plans to collaborate on the development of network adequacy standards and for plans that participate in Medicaid in multiple states, to share information with states so that best practices and lessons learned can be leveraged to improve network adequacy measurement in all states. States should consider using technical expert panels and multiple sources of stakeholder input to ensure that they develop robust and appropriate network adequacy measures for their programs.

Comment: A few commenters suggested that CMS provide additional clarification and detail regarding ''quantitative network adequacy standards,'' specifically asking if CMS recommends weighing variables a certain way, whether variables will be adjusted for different provider types that might have varying data based on their demands and location, what will be the reporting sources for network adequacy data and if they are self-reported, how will states ensure minimal subjectivity in the data, and how will standards such as ''minimum percentage of contracted providers that are accepting new patients'' be implemented.

Response: We decline to include additional specificity in § 438.68 addressing considerations for state development or implementation of network adequacy standards. We believe the list in § 438.68(c) reflects an appropriate level of detail. The commenters' suggestions may be useful to states and we encourage states to consider them as appropriate.

Comment: A few commenters recommended that CMS outline possible quantifiable standards that could supplement time and distance standards or provide additional guidance regarding the types of quantitative network adequacy standards that could be adopted by a state. A few commenters suggested that CMS convene a group of stakeholders or experts to address issues regarding network adequacy standards such as clear definition and suggested guidelines of what constitutes network adequacy, including as they relate to populations that access LTSS provided in the home.

Response: We decline to adopt or implement these recommendations as we believe that providing states with the flexibility to identify the type of quantitative standard, as well as the standard itself for purposes of establishing and measuring network adequacy in Medicaid managed care programs, is appropriate in light of the traditional role of states in administering Medicaid. We continue to believe that we should defer to states and not set overly prescriptive Federal standards. We note here that we convened a group of states to gather information on their best practices and lessons learned about network adequacy. The resulting document was published in April 2017: *Promoting Access in Medicaid and CHIP Managed Care: A Toolkit for Ensuring Provider Network Adequacy and Service Availability* and is available at *https://www.medicaid.gov/medicaid/managed-care/downloads/guidance/adequacy-and-access-toolkit.pdf.* This toolkit, designed as a resource guide for state Medicaid and CHIP agency staff, is intended to: Assist state Medicaid and CHIP agencies with implementing the requirements of the new Federal rule related to network adequacy and service availability standards; provide an overall framework and suggest metrics for monitoring provider network adequacy and service availability, as well as Medicaid and CHIP managed care enrollees' access to care overall; and highlight effective or promising practices that states currently use to develop and monitor provider network and access standards, and promote access to care. We encourage states and managed care plans to review the Toolkit as they establish standards under § 438.68.

Comment: One commenter noted that states should be required to consult with American Indian/Alaskan Native (AI/AN) tribes to determine quantitative network adequacy standards and specialists to which the standards would apply, such that gaps in coverage and limitations in access to care for AI/ANs in tribal communities are minimized.

Response: We agree that states should engage in robust stakeholder engagement when developing their network adequacy standards to ensure inclusion of appropriate provider types based on the needs of the covered populations. We remind states of their obligations for tribal consultation as specified in Section 1902(a)(73) of the Act as well as additional guidance issued in State Medicaid Director Letter 10–001 (*https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD10001.PDF*).

Comment: Many commenters disagreed with the proposal to delete the requirement for states to set time and distance standards and instead require a quantitative minimum access standard. Commenters stated that current requirements already provide states with adequate flexibility in establishing network adequacy standards and are necessary to avoid narrowing of existing networks to ensure plans make every effort to safeguard patient access. Several commenters expressed that not enough time has passed since the associated provisions in the 2016 final rule became effective to form an evidentiary basis from which to determine whether the proposed changes are necessary.

Response: We believe that, while useful and appropriate for many plans and areas, time and distance analysis may not always produce results that accurately reflect provider availability within a network. We believe that deleting the requirement to use a time and distance standard for all of the required provider types will enable states to choose from a variety of quantitative network adequacy standards that meet the needs of their respective Medicaid managed care programs in more meaningful and effective ways. We clarify that the proposed change to § 438.68(b)(1) does not require states currently using a time and distance standard to cease using, or make changes to, their standard. The proposed change merely offers states an option to use a different adequacy standard if they believe that time and distance is not the most appropriate standard for their program.

Comment: Many commenters noted that removal of current measures may result in additional burden to providers, as well as enrollees residing in rural areas and would increase risk and negatively impact health outcomes for children and underserved populations.

Response: We do not believe that providing states with the option to use a different quantitative standard than time and distance will add provider burden or negatively impact health outcomes for children and underserved populations. Our expectation is that if states use a variety of quantitative measures designed to produce the most accurate and comprehensive assessment possible of network adequacy of providers needed for services covered under the contract, providers and enrollees should benefit from that because adequate access to necessary providers will have been ensured.

Comment: One commenter stated that the proposed rule fails to meet the statutory requirement that the Medicaid managed care plans provide assurances that it ''maintains a sufficient number, mix, and geographic distribution of providers of services'' as directed in section 1932(b)(5) of the Act and that time and distance standards are the only standards described in the proposed rule which can make these assurances. This commenter further stated that CMS lacks the legal authority to eliminate the statutory requirement that Medicaid managed care plans assure the state and the Secretary that it maintains a sufficient ''geographic distribution of providers of services.''

Response: We disagree that time and distance is the only standard that can produce information sufficient to enable a managed care plan to attest that it maintains a sufficient number, mix, and geographic distribution of providers of services. Time and distance standards are one of many quantitative measures that states and managed care plans can use, alone or in combination, to assess provider networks and ensure a sufficient number, mix, and distribution of providers. Quantitative standards that states may elect to use include, but are not limited to, minimum provider-to-enrollee ratios; maximum travel time or distance to providers; a minimum percentage of contracted providers that are accepting new patients; maximum wait times for an appointment; hours of operation requirements (for example, extended evening or weekend hours). We clarify that our proposal in no way eliminates the statutory requirement that managed care plans assure the state and the Secretary that it maintains a sufficient geographic distribution of providers of services. That requirement is unaffected by this change and implemented by § 438.207.

Comment: Many commenters expressed concern with CMS' rationale for the proposal regarding the impact of telemedicine on the efficacy of time and distance standards (83 FR 57278). Commenters noted that telehealth and telemedicine cannot offer the full array of services that are otherwise available to a patient who is physically present in a provider's office. Commenters stated that states should be required to develop separate network adequacy standards for telemedicine, but maintain standards for traditional service delivery, and noted that in-person access should remain a priority when measuring network access as many situations are not applicable for the use of technology-enabled care.

Response: We understand the commenters' concerns but clarify that it was not our intent to imply that telehealth offers the full array of services that are otherwise available to a patient who is physically present in a provider's office. We used telehealth as an example of a situation where measuring access using a time and distance standard may not be optimally effective to evaluate the adequacy of a provider network and the ability of the plan to ensure access to services. We agree that states need to balance the use of telehealth with the availability of providers that can provide in-person care and enrollees' preferences for receiving care to ensure that they establish network adequacy standards under § 438.68 that accurately reflect the practical use of both types of care in their state. Under § 438.68(c)(1)(ix), states must consider the availability and use of telemedicine when developing their network adequacy standards.

Comment: Some commenters recommended requiring states to establish standards that align with other regulatory provisions (such as those applicable to Qualified Health Plans (QHPs) or Medicare Advantage plans), and the Medicaid statute at section 1932(c) of the Act (cited by the commenter as 42 U.S.C. 1396u–2(c)), which requires states to establish standards for access to care so that covered services are available within reasonable timeframes and in a manner that ensures continuity of care and adequate primary care and specialized services capacity. The commenters stated that alignment with these provisions would ensure reasonable timelines for access to care and continuity of care. A few commenters recommended requiring states, contracted managed care plans, and pharmacy benefit managers to follow Medicare Part D regulatory guidance on access to specialty medications.

Response: We decline to require states to align their network adequacy standards with the standards applicable to other programs (such as standards for QHPs, Medicare Advantage or Medicare Part D). We believe that the states establishing and assessing their managed care plans' networks using the standards required in § 438.68 will ensure compliance with the statute. However, we clarify that § 438.68 is consistent with section 1932(c)(1)(A)(i) of the Act, which requires states to develop and implement a quality strategy that includes standards for access to care so that covered services are available within reasonable timeframes and that ensure continuity of care. We believe that the managed care regulations at § 438.206, which requires that states ensure that all services covered under the contract are available and accessible to enrollees, and § 438.68, which requires states to develop network adequacy standards, work together to ensure that states meet their obligations under the Act. We acknowledge that states may find some of those standards to be appropriate for their Medicaid managed care programs and that adopting existing measures may reduce the amount of time states have to spend developing standards, as well as reduce operational burden on managed care plans that also participate in other programs. States should review standards used by other programs and evaluate their potential usefulness in their Medicaid managed care programs. However, we believe that state flexibility on this point is paramount and will not impose alignment as a requirement.

Comment: Several commenters supported the proposal to give states the authority to define ''specialist'' in whatever way they deem appropriate for their programs. Some commenters offered suggestions for specific types of specialists that we should require states to include in their definition of ''specialist.'' A few commenters recommended that CMS provide guidance to states on specialties that should be considered or included in each category listed in § 438.68(b)(1) and prioritize provider types to help avoid undue administrative burden on plans due to variability across states.

Response: We appreciate the comments in support of our proposal to clarify that states have the authority to designate ''specialists'' to which network adequacy standards will apply under § 438.68(b)(1). We decline to identify additional specific specialties or provider types for states to include in this category. We believe states are best suited to identify the provider types for which specific access standards should be developed in order to reflect the needs of their populations and programs. We note that States' network adequacy standards are included in their quality strategies and are subject to publication and public comment consistent with existing transparency provisions in § 438.340(c)(1).

Comment: Many commenters disagreed with the proposal to allow states to define ''specialist'' in whatever way they deem appropriate and recommended that CMS identify specific provider types as specialists. One commenter stated that CMS should define specialists to include providers who focus on a specific area of health and include sub-specialists who have additional training beyond that of a specialist. Some commenters

recommended requiring states to include specific specialists including hematologists, adult and pediatric oncologists, surgical specialists, pulmonologists, allergists, and emergency physicians. One commenter recommended that CMS revise its proposed language to state ''(as designated by the state in a manner that ensures access to all covered services),'' which would reiterate the need for states to ensure that managed care plan's provider networks guarantee full access to all benefits covered under the state plan and are representative of the types of providers that frequently provide services to consumers within their corresponding service areas.

Response: We understand commenters' concerns but do not agree CMS should define ''specialist'' in § 438.68(b)(1)(iv). As noted in the 2016 final rule on this topic, we believe that states should set network adequacy standards that are appropriate at the state level and are best suited to designate the number and types of providers that fall into the ''specialist'' category based on differences under managed care contracts, as well as state Medicaid programs; therefore, we believe it would be inappropriate for us to identify at the Federal level specific specialists for which each state must establish an access standard (81 FR 27661). We expect states to apply network adequacy standards to all provider types and specialties necessary to ensure that all services covered under the contract are available and accessible to all enrollees in a timely manner as required by § 438.206.

Comment: Commenters noted that allowing states to define ''specialist'' may inadvertently limit access for enrollees to covered services, result in higher costs if certain categories of specialists are no longer in-network, lead to inconsistent application of the policy when patients see physicians in another state that defines specialists in different ways, and decrease quality of care in states that create standards which allow less qualified providers (for example, nurse practitioners in lieu of doctors) to meet ''specialist'' criteria. One commenter expressed concern that allowing states to define ''specialist'' could negatively affect national quality measures that rely heavily on certain provider types rendering care to count towards numerator compliance.

Response: We do not agree that allowing states to designate which specialists are subject to the required network adequacy standards is likely to limit access, increase costs, lead to lower quality of care, promote inconsistent application due to differing designations among states, or affect the accuracy of national quality measures. Network adequacy standards are utilized by managed care plans and states to assess network adequacy at an aggregate level on a periodic basis. Meaning, network adequacy standards are not used to determine the availability of, or authorize care by, a particular type of provider for an individual enrollee. We believe that § 438.206 is sufficiently clear on states' and managed care plans' responsibilities for ensuring that all covered services are available and accessible to enrollees in a timely manner, including specifically addressing situations when an enrollee's managed care plan's network is unable to provide necessary services in § 438.206(b)(4). Managed care plans must necessarily develop their networks in ways that enable them to comply with all of their obligations under §§ 438.206 and 438.207. Lastly, although we do not see a correlation between the specialists a state chooses to include for network adequacy purposes and provider types necessary for calculating quality measures, states can include specialists that are implicated in quality measure calculations if they so choose.

Comment: Several commenters suggested that the final rule should instruct states that their designations of specialists for purposes of § 438.68(b), and any network adequacy standards, must be consistent with existing state laws regarding licensure and certification, as well as the Medicaid managed care nondiscrimination regulation which prohibits managed care plans from discriminating against providers based on their licensure or certification.

Response: States and managed care plans must comply with all applicable Federal and state laws as specified in §§ 438.3(f) and 438.100(d) and provider discrimination is specifically prohibited in §§ 438.12 and 438.214. Specifically, § 438.12 prohibits managed care plans from discrimination in the participation, reimbursement, or indemnification of any provider who is acting within the scope of his or her license or certification under applicable state law, solely on the basis of that license or certification and § 438.214(c) specifies that managed care plans are prohibited from discriminating against providers that serve high-risk populations or specialize in conditions that require costly treatment. We do not believe that the requirement on states to establish network adequacy standards in § 438.68(b) contravenes or limits these other provisions, or that an amendment to § 438.68 to incorporate similar requirements about non-discrimination is necessary or appropriate.

Comment: A few commenters agreed with the proposal to eliminate the requirement for states to establish time and distance standards for ''additional provider types'' identified by CMS because it will foster experimentation and innovation to improve care delivery as well as streamline assessment of network adequacy.

Response: We believe removing the requirement for states to establish time and distance standards for ''additional provider types'' identified by CMS will enable states to recognize and react more quickly to local needs and developing trends in care.

Comment: Several commenters disagreed with the proposal to no longer require states to establish time and distance standards for ''additional provider types when it promotes the objectives of the Medicaid program.'' Commenters stated that the current requirement gives CMS an efficient way to address changes in Medicaid benefits, workforce shortages, or concerns regarding access to care without going through the rulemaking process, which impairs CMS' ability to respond to emergent concerns. Several commenters suggested that rather than eliminating the provision, it could be amended to provide states with advanced notice (specifically one year) before including a new provider type. A few commenters stated that any concerns regarding implementation timelines could be addressed in informal guidance or by allowing states to create implementation standards within certain parameters established through agency instruction.

Response: We believe that deleting § 438.68(b)(1)(viii) removes an unnecessary level of administrative burden and makes it clear that designating additional provider types that are subject to network adequacy analysis is a state responsibility. This revision is consistent with the other revisions proposed at § 438.68(b) introductory text and (b)(1)(iv). We considered proposing a specific timeline for advance notice instead of deleting § 438.68(b)(1)(viii) completely, but ultimately concluded that that approach was not consistent with the overall goal and purpose of § 438.68(b).

Comment: Several commenters supported the proposed network adequacy requirements allowing states to use any quantitative standard when developing network adequacy standards for long term services and supports programs, specifically noting appreciation for flexibility in determining how networks are developed and stated that CMS'

emphasis on states developing standards that ensure beneficiary access and provider availability rather than just time and distance is appropriate.

Response: We appreciate the comments in support of our revisions to reorganize § 438.68(b)(2) to reflect consistency with the requirement in § 438.68(b)(1) for states to develop network adequacy standards for specified provider types.

Comment: Commenters suggested that CMS develop meaningful and appropriate network adequacy standards (including national standards) for LTSS providers that recognize the realities of various settings and locations in which these services are delivered as well different provider types (agency employees versus independent personal care workers). One commenter also stated that any national standards developed by CMS should be subject to a stakeholder notice and comment period and ensure that standards support consumer choice of providers and community living. One commenter encouraged CMS to provide states with increased guidance rather than less, including, network adequacy metrics based on choice standards, service fulfillment standards, and provider ratios. The commenter continued that guidance should ensure that networks for LTSS services in which the provider travels to the enrollee are just as robust as those in which the enrollee travels to the provider.

Response: We decline to set national network adequacy standards. We believe it is particularly important that states have flexibility to set network adequacy standards customized for their LTSS programs given the wide variation in program design, the often very limited supply of providers, the provision of services outside of an office setting, and the potential functional limitations of the LTSS population. We encourage states to solicit stakeholder input in the development of their LTSS network standards to ensure that they adequately address situations when enrollees travel to the provider as well as when the provider travels to the enrollee. CMS issued guidance on setting network adequacy standards in April 2017: *Promoting Access in Medicaid and CHIP Managed Care: A Toolkit for Ensuring Provider Network Adequacy and Service Availability* and is available at *https://www.medicaid.gov/medicaid/managed-care/downloads/guidance/adequacy-and-access-toolkit.pdf.* This toolkit, designed as a resource guide for state Medicaid and CHIP agency staff, includes a specific chapter on LTSS. See Chapter V ''Network and Access Standards and Monitoring for Special Provider and Service Types.''

Comment: Several commenters disagreed with the proposal to delete the requirement for states to set time and distance standards for LTSS providers and stated that such standards are highly beneficial to guiding how LTSS network adequacy standards are developed and judged, and that these standards are particularly relevant for LTSS given the provider shortages for direct-care staff in many areas. Commenters further stated that time and distance standards help ensure that there are providers available in a given area and provide home care agencies, managed care plans, and state agencies with a standard that is easy to use and understand to assess whether provider shortages are due to long travel times that require additional compensation. Another commenter stated that for nursing facility and other institutional-type LTSS providers, time and distance standards also ensure that enrollees are able to maintain their relationships with their community and family during their time in a facility and that if an enrollee has to enter a facility far way (either in time or distance), the enrollee is less likely to be able to maintain the support networks they will ultimately need to successfully transition back into the community.

Response: We agree that time and distance may be useful network adequacy standards for certain provider types and we clarify that our proposed revisions do not prohibit nor discourage the use of time and distance as a network adequacy standard. Our proposed revisions merely remove the requirement that time and distance standards be used as the standard for all provider types. States and managed care plans can continue using time and distance—alone or in conjunction with other standards such as enrollee-to-provider ratios—for any provider types that they deem appropriate. Nursing facilities and other institutional-type facilities that provide LTSS are not specifically included in § 438.68(b)(1); as such, the development and application of network adequacy standards to these provider types is at state discretion because we do not designate the LTSS provider types for which specific evaluation standards must be developed and used in paragraph (b)(2); identifying specific provider types at the Federal level is unnecessary as states have the requisite knowledge and expertise about the services covered under their managed care plans to know which provider types should be individually evaluated for access. We agree that facilitating the maintenance of the support networks that will help enrollees transition back to and stay in the community after an institutional stay is important and we urge states and managed care plans to consider this in the development of their network adequacy standards.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.68 as proposed.

11. Adoption of Practice Guidelines (§ 438.236)

In the 2016 final rule, we attempted to remove the terminology ''contracting health care professionals'' throughout the rule because it is not defined in any regulation or statute and we believed that use of ''network provider'' as defined in § 438.2 was more accurate. We inadvertently missed removing the term at § 438.236(b)(3). To correct this, we proposed to remove the words ''contracting health care professionals'' and insert ''network providers'' in § 438.236(b)(3).

The following summarizes the public comments received on our proposal to amend § 438.236 and our responses to those comments.

Comment: One commenter supported the proposed language change to remove the words ''contracting health care professionals'' and insert ''network providers'' in § 438.236(b)(3).

Response: We thank the commenter for the support. Consistent Use of ''network provider,'' which is a defined term in § 438.2 promotes clarity in the regulations.

After consideration of public comments and for the reasons articulated in the proposed rule and our responses to comments, we will finalize § 438.236(b)(3) as proposed.

12. Enrollee Encounter Data (§ 438.242(c))

In § 438.242(b)(3) of the final rule, we required that all contracts between a state and an MCO, PIHP, or PAHP provide for the submission by the managed care plan of all enrollee encounter data that the state is required to submit to us under § 438.818. Since the final rule, some states and managed care plans have expressed concern about, and been hesitant to submit, certain financial data—namely, the allowed amount and the paid amount. Some managed care plans consider this information to be proprietary and inappropriate for public disclosure. We explained in the proposed rule that we understand their concern but emphasize the importance of these data for proper

monitoring and administration of the Medicaid program, particularly for capitation rate setting and review, financial management, and encounter data analysis. Additionally, the allowed and paid amounts of claims are routinely included on explanation of benefits provided to enrollees; thus making this information already publicly available. To clarify the existing requirement and reflect the importance of this data, we proposed to revise § 438.242(c)(3) to explicitly include ''allowed amount and paid amount.'' We explained in the proposed rule that the proposed change to § 438.242(c)(3) would in no way change the rights of Federal or state entities using encounter data for program integrity purposes to access needed data. Nor would it change the disclosure requirements for explanation of benefits notices (EOBs) or other disclosures to enrollees about their coverage.

In the proposed rule, we noted that the health insurance industry has consistently stated that the contractual payment terms between managed care plans and providers are confidential and trade secret information and that the disclosure of this information could cause harm to the competitive position of the managed care plan or provider. We also stated that we would treat data as trade secret when the requirements for such a classification are met. We stated that we recognize the significance of the volume of data collected in the T–MSIS and take our obligations seriously to protect from disclosure information that is protected under Federal law. Our goal in proposing to explicitly name allowed and paid amount in § 438.242(b)(3) is to ensure that the scope of the collection of encounter data is clear. We affirmed our commitment to safeguarding data protected by Federal law from inappropriate use and disclosure.

The following summarizes the public comments received on our proposal to amend § 438.242(c) and our responses to those comments.

Comment: Many commenters supported the proposed revision to § 438.242(c)(3) and agreed that more accurate and complete Medicaid data and transparency are needed and that data on allowed and paid amounts are critical to monitoring and administering the Medicaid program. Commenters noted that this clarification will strengthen the ability of state and Federal officials to monitor managed care plan payments to network providers for their effect on access to care, is consistent with statutory provisions regarding reporting of encounter data established in the Patient Protection and Affordable Care Act of 2010 (PPACA) (Pub. L. 111–148, enacted March 23, 2010 as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted March 30, 2010)) (''Affordable Care Act''),[25] and will help to identify potential fraud, waste, and abuse. A few commenters supported this proposal because they believe that managed care plans erroneously state that this information is trade secret. Several commenters stated that the proposed revision to § 438.242(c) will improve the accuracy, transparency, and accountability of encounter data.

Response: We agree that it is important for states and us to have complete and accurate encounter data for proper program administration. We appreciate the support and recognition of this important program policy from commenters.

Comment: Several commenters requested clarifications about the proposed changes to § 438.242(c). A few commenters requested more guidance on the definitions of ''allowed amount'' and ''paid amount'', and one commenter recommended that CMS seek input from managed care plans and other stakeholders on the proposed definitions. A few commenters requested clarification on how the requirement to report allowed and paid amounts will apply to subcapitated arrangements with providers that do not have clear payments for individual services and do not use a per service payment structure. Specifically, a few commenters requested clarification regarding whether the allowed and paid amounts that the state is required to report to CMS are the amounts the MCO, PIHP, or PAHP or subcontractor allowed and paid to the direct healthcare provider.

Response: We understand the request for additional clarification on how the allowed and paid amount fields should be populated in T–MSIS submissions. For provider claims paid by the managed care plan or subcontractor on a FFS basis, ''allowed amount'' and ''paid amount'' have the same meaning as used for completing EOBs sent to enrollees; that is, the allowed amount reflects the amount the managed care plan or subcontractor expects to pay for a service based on its contract with the provider and the paid amount reflects the amount the managed care plan or subcontractor actually sends to the provider after adjudicating the claim. This would be the same for claims paid by the state Medicaid agency or a managed care plan.

We acknowledge that there are many types of payment arrangements including other than a per service payment arrangement, used in Medicaid managed care and that data fields in T–MSIS may need to be populated in different ways to accurately capture the data associated with the different arrangements. It is critical that Transformed Medicaid Statistical Information System (T–MSIS) data reflect all data associated to services provided to managed care enrollees, including services provided by subcontractors. For example, comprehensive data on pharmacy services subcontracted to a pharmacy benefit manager must be submitted to T–MSIS with the same level of accuracy and completeness as data for claims paid by the managed care plan directly. The requirements for populating fields in T–MSIS are documented in a data dictionary and accompanying guidance issued by CMS. We also have technical assistance available for states that have questions about submitting T–MSIS data. For more information, visit: *https://www.medicaid.gov/medicaid/data-and-systems/macbis/tmsis/index.html.* The dynamic nature of health care payment arrangements necessitates that we use flexible and rapid methods for distributing T–MSIS information to states in the most efficient and effective manner. As such, including overly specific details to address every type of payment arrangement in a regulation is not prudent nor feasible. States should consult T–MSIS requirements and guidance documents and request technical assistance as needed to ensure that their T–MSIS submissions meet current standards.

Comment: One commenter stated that the allowed amount is not needed for administering the Medicaid program because it is not necessary for invoicing Federal rebates or capturing Federal reimbursement for Medicaid expenditures. Another commenter stated that the capitation rates should be set based on the paid amount, not the allowed amount, and that if CMS has concerns about amounts paid, it should look towards addressing policies that drive up costs, such as state-mandated formularies or any willing provider provisions, and adopt proven benefit design tools used in the commercial market to keep costs down.

Response: We disagree with the commenter that the information about

[25] Sections 6402(c)(3) and 6504(b)(1) of the Affordable Care Act reorganize, amend, and add to sections 1903(i)(25) and 1903(m)(2)(A)(xi) of the Act by adding provisions related to routine reporting of encounter data as a condition for receiving Federal matching payments for medical assistance.

the allowed amount should not be collected. While allowed amount data submitted by managed care plans to states may not be utilized as routinely as paid amount data in setting capitation rates or oversight activities, it nonetheless provides states and CMS insight into important aspects of a managed care plan's network, namely, its fee schedule and contractually negotiated rates. Analyzing allowed amount data can facilitate plan comparisons that are not possible with paid amounts as well as provide insight into possible causes for access issues within a plan's network. We clarify here that we did not intend to convey in our proposal that we had ''concerns with paid amounts,'' but rather to clarify the meaning of ''all enrollee encounter data'' in § 438.242(c)(3) as finalized in the 2016 final rule by explicitly stating the mandatory submission of encounter data includes allowed amount and paid amount data. Under § 438.818, states must submit all enrollee encounter data to CMS; § 438.242(c) requires states to require Medicaid managed care plans to submit to the state the same encounter data that must be submitted in their T–MSIS submissions to us. As explained in the 2016 final rule, Sections 6402(c)(3) and 6504(b)(1) of the Affordable Care Act reorganize, amend, and add to the provisions of sections 1903(i)(25) and 1903(m)(2)(A)(xi) of the Act by adding provisions related to routine reporting of encounter data as a condition for receiving Federal matching payments for medical assistance. Section 1903(i)(25) of the Act mandates that, effective March 23, 2010, Federal matching payments to the states must not be made for individuals for whom the state does not report enrollee encounter data to us. The PPACA amendment to section 1903(m)(2)(A)(xi) of the Act specifies that the obligation for an MCO to report ''patient encounter data'' was, for contract years after January 1, 2010, to the state in a timeframe and level of detail specified by the Secretary. The data that must be collected and reported under these provisions is the same, but the population covered by section 1903(i)(25) of the Act, compared to the population covered by section 1903(m)(2)(A)(xi) of the Act, included enrollees of PIHPs and PAHP. (81 FR 27737). These statutory changes or the data required from Medicaid managed care plans were reflected in §§ 438.242 and 438.818 of the 2016 final rule.

Comment: Several commenters appreciated CMS' commitment to safeguarding data protected by Federal law from inappropriate use and disclosure but recommended that CMS reinforce this assurance in regulatory language by including an affirmative statement in § 438.242(c) that would make the submissions subject to applicable Federal and state confidentiality laws and regulations. A few commenters stated that they appreciate CMS' recognition that contractual payment terms between managed care plans and providers may be confidential and trade secret information, the disclosure of which could potentially harm competition among managed care plans and providers.

Response: We decline to include additional regulatory text indicating the applicability of Federal and state laws and regulations to the collection of enrollee encounter data that states are required to submit to T–MSIS. We exercise due diligence to comply with all applicable laws and regulations with respect to all data in T–MSIS. We do not believe that this final rule is the appropriate place to discuss fully the scope and applicability of various confidentiality and data protection laws to encounter data that must be submitted under sections 1903(i)(25) and 1903(m)(2)(A)(xi) of the Act. If, and when, there is a request for disclosure of this data (or if we seek to disclose without a request), we will evaluate the applicable law and whether encounter data submissions are protected from release or disclosure under Federal law. The facts of each situation, including the age and scope of the data, are necessarily key components in any such analysis.

Comment: A few commenters disagreed that the allowed amount is already in the public domain in the form of EOBs because EOBs are not public documents. Several commenters stated that the allowed amount is considered proprietary information by most plans and is not appropriate for public disclosure.

Response: We understand commenters' concern; however, there are no restrictions on an enrollee's use or disclosure of their EOBs. We recognize the significance of managed care plans' concerns and commit to treating these data as confidential under applicable law *when the requirements for such treatment are met.* We also acknowledge the significance of the large volume of data collected in T–MSIS as opposed to the very limited amount of data available from individual EOBs, and the potential uses the quantity would enable. We take our obligations seriously to safeguard information that is protected under Federal law from inappropriate use and disclosure.

Comment: One commenter urged CMS to not only ensure that contractual payment terms are safeguarded from disclosure, but also stated that aggregated data that could be used to reverse engineer contractual payment terms is safeguarded. Another commenter requested additional information about the measures CMS uses or proposes to use to safeguard the allowed and paid amount data and recommended that CMS apply stringent safeguards in how this information is used to ensure that this data is only used for its intended purposes and not in manners that have the potential to adversely impact competition for plans and providers. One commenter requested that the final rule clarify that any additional disclosure of allowed and paid amounts, beyond that made to the state and CMS, is at the discretion of the managed care plan. One commenter stated that they discourage requiring submission of allowed and paid amounts, and that at a minimum, managed care plans need to better understand the purpose of this data collection and CMS' intended use for this data.

Response: We understand the concern that the large quantity of data maintained in T–MSIS could be used to reverse engineer payment terms and fee schedules. Safeguarding information that is protected under Federal law from inappropriate use and disclosure is a priority for us. However, there are adequate protections in other Federal law (for example, exemption 4 in the Freedom of Information Act, 5 U.S.C. 552(b)(4), the Trade Secrets Act, 18 U.S.C. 1905) so adding a new regulatory protection here is not appropriate. Further, we decline to include regulatory text giving plans discretion over the use and distribution of T–MSIS data. CMS will comply with all applicable Federal requirements associated with use and disclosure of data. As we stated in the proposed rule, we consider encounter data invaluable for proper monitoring and administration of the Medicaid program, particularly for capitation rate setting and review, financial management, program integrity, and utilization analysis. As we explained in SMD 13–004 (*https://www.medicaid.gov/federal-policy-guidance/downloads/smd-13-004.pdf*), our goal is for T–MSIS data to be used for initiatives such as to study encounters, claims, and enrollment data by claim and beneficiary attributes; analyze expenditures by medical assistance and administration categories; monitor expenditures within

delivery systems and assess the impact of different types of delivery system models on beneficiary outcomes; examine the enrollment, service provision, and expenditure experience of providers who participate in our programs; and observe trends or patterns indicating potential fraud, waste, and abuse in the programs so we can prevent or mitigate the impact of these activities. We are committed to collecting accurate and comprehensive data, meeting our obligations to safeguard that data, and using it to reach our goals to improve the Medicaid program and the health outcomes of its beneficiaries.

Comment: A few commenters expressed concerns about the impact of reporting the allowed amount on costs associated with modifying encounter data collection and IT systems for states and health plans. One commenter stated that the allowed amount is not currently an available field in either the National Council for Prescription Drug Programs (NCPDP) standard reporting layouts frequently used by states as the basis for capturing their pharmacy encounters, or in the 837 ASC[26] X12 standards used to report professional claims. One commenter recommended that instead of requiring the allowed amount to be reported with enrollee encounter data, CMS should use the approach taken by the 837 ASC X12 workgroup that permits calculation of the allowed amount from the fields needed to calculate it in the data already captured in the current layout. Commenter stated that calculating allowed amount in this manner would promote greater consistency in reporting and allow CMS to achieve its goal of more accurately identifying administrative costs.

Response: We believe the commenter is referring to the pre-adjudicated allowed amount field. If so, we understand that the allowed amount is no longer a required field in 837 ASC X12 for pre-adjudicated claims. However, Loop 2400 HCP02 (Priced/Repriced Allowed Amount) data element does still exist in the 5010 format and is applicable to post-adjudicated claims. The allowed amount added by the managed care plan or subcontractor during adjudication is the data that should be submitted to T–MSIS. We clarify here that we are not requiring the creation of new fields in any of the standardized transaction formats referenced in § 438.242(c)(4); existing fields should be populated consistent with the T–MSIS data dictionary. As such, we do not believe states nor managed care plans will need to invest significant, if any, IT resources to comply. We decline to adopt a requirement for a calculated allowed amount over one populated when the claim is adjudicated.

Comment: A few commenters recommended ways to implement the proposed change to § 438.242. Commenters stated that, given the variety of contracting and subcontracting arrangements, consultation should occur between Medicaid plans, states, and CMS on how best to define and implement this provision to ensure that all appropriate costs are captured for rate development. A few commenters recommended that there be sufficient time for implementation because the use of new fields in the encounter system will require considerable programming for point of service claims, and one commenter requested a future effective date for these changes.

One commenter recommended making reporting the allowed amount optional. One commenter recommended that CMS work with healthcare stakeholders to create industry standard formats for encounter file submissions and seek public input through future formal rulemaking. Commenters also recommended that CMS finalize any such industry standard formats with sufficient time and definitive guidance in advance of required use.

Response: The size and scope of today's Medicaid programs need robust, timely, and accurate data to ensure the highest financial and program performance, support policy analyses, and maintain ongoing improvement that enables data-driven decision making. Encounter data are the basis for any number of required or voluntary activities, including rate setting, risk adjustment, quality measurement, value-based purchasing, program integrity, and policy development. Since 1999, states have been required to electronically submit data files to MSIS, including eligibility and paid claims files. The paid claims files have always required the same fields of data that are present on a claim form or standardized electronic format. Submitting allowed and paid amounts for encounter data to CMS is not a new requirement for states, although their compliance rates of completeness and accuracy have varied widely. Congress enacted sections 6402(c)(3) and 6504(b)(1) of the PPACA which reorganized, amended, and added to the provisions of sections 1903(i)(25) and 1903(m)(2)(A)(xi) of the Act by adding provisions related to routine reporting of encounter data as a condition for receiving Federal matching payments for medical assistance. Section 1903(i)(25) of the Act mandates that, effective March 23, 2010, Federal matching payments to the states must not be made for individuals for whom the state does not report enrollee encounter data to us. Further, section 1903(m)(2)(A)(xi) of the Act specifies that an MCO must report ''patient encounter data'' for contract years after January 1, 2010, to the state in a timeframe and level of detail specified by the Secretary. We do not believe that the clarification we are adding to the regulation (by incorporating explicit wording that the allowed amount and paid amount are part of the required encounter data reporting) for the purpose of emphasizing the importance of accurate and complete submission by Medicaid managed care plans necessitates additional consultation or significant implementation efforts. We do not believe there is a need for one industry standard reporting format solely for encounter data submissions. We addressed data standardization and file formats for submission of encounter data in the 2016 final rule in § 438.242(c)(4), which specifies submission of encounter data to the state in standardized ASC X12N 837 and NCPDP formats, and the ASC X12N 835 format as appropriate. As noted previously in our responses to comment on the proposal to amend § 438.242(c)(3), we believe that populating the existing field in the X12N 837 and NCPDP formats, and the ASC X12N 835 format will not entail significant burden.

Generally, all regulations have future effective dates, and we do not believe we need to set an additionally delayed or unique compliance date for § 438.242(c)(3) as revised in this final rule given the lengthy history of this requirement.

After consideration of the public comments and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing § 438.242(c) as proposed.

13. Medicaid Managed Care Quality Rating System (MAC QRS) (§ 438.334)

In the 2016 final rule (81 FR 27686), we established at § 438.334 the authority to require states to operate a Medicaid managed care quality rating system (QRS) and incorporated this provision in its entirety into CHIP at § 457.1240(d). That regulation provides that we, in consultation with states and other stakeholders, and after providing public notice and opportunity to comment, will identify performance measures and a methodology for a Medicaid and CHIP managed care quality rating system. That regulation

[26] Accredited Standards Committee.

also provides that states will have the option to use the CMS-developed QRS or establish an alternative state-specific QRS (''state alternative QRS''), provided that the state alternative QRS produces substantially comparable information about plan performance. Under the regulation, any state alternative QRS is subject to CMS approval.

In the 2016 final rule, we used the acronym Medicaid Managed Care Quality Rating System QRS (MMC QRS). In this final rule, we refer to the Medicaid and CHIP Managed Care Quality Rating System (''MAC QRS''), as both Medicaid and CHIP are subject to the QRS regulations.

In the November 14, 2018 proposed rule, we proposed to make several revisions to the QRS regulations at § 438.334. These proposed revisions were intended to better balance the goal of facilitating inter-state comparisons of plan performance and reducing plan burden through standardization with the need for state flexibility and the practical challenges inherent in producing comparable ratings across heterogeneous states. We proposed no changes to § 457.1240(d), therefore all proposed changes to § 438.334 would be incorporated by § 457.1240(d)'s cross-reference and apply equally to both a state's Medicaid and CHIP programs.

Specifically, we proposed to revise the requirement in § 438.334(c)(1)(i) (redesignated at paragraph (c)(1)(ii) in this final rule) to make explicit our intention to take feasibility into account when requiring that the information yielded by a state alternative QRS be substantially comparable to the information yielded by the CMS-developed QRS, by taking into account differences in state programs that may complicate comparability. We also proposed to add a new paragraph (c)(4) to explicitly provide that we would engage with states and other stakeholders in developing sub regulatory guidance on what it means for an alternative QRS to yield substantially comparable information, and how a state would demonstrate it meets that standard.

Current § 438.334(b) provides that CMS ''will identify performance measures and a methodology'' for the MAC QRS. We proposed to revise paragraph (b) to provide that CMS will develop a MAC QRS framework, including the identification of a set of mandatory performance measures and a methodology.

We proposed to redesignate § 438.334(c)(1)(i) and (ii) as paragraphs (c)(1)(ii) and (iii), respectively, and proposed to add new paragraph (c)(1)(i) to require a state alternative QRS to include the mandatory measures identified in the framework. We noted that states will retain flexibility to include additional measures important to serving their quality goals and meeting the needs of their beneficiaries and stakeholder communities. The purpose of the proposed change is to facilitate comparable ratings while continuing to provide flexibility for states to include additional measures important to serving their beneficiaries and achieving their quality goals. We also noted that, as the MAC QRS and our recently launched Medicaid and CHIP Scorecard serve related goals, we expect to coordinate the measures selected for the Scorecard and those selected for the CMS-developed QRS. The Scorecard includes measures from the Child and Adult Core Sets that CMS identifies and publishes pursuant to sections 1139A and 1139B of the Act and that are voluntarily reported by states, as well as federally-reported measures in three areas: State health system performance, state administrative accountability, and Federal administrative accountability. Both the Child and Adult Core Sets and the Scorecard are reviewed annually and are expected to continue to evolve. More information about the Scorecard is available at *https://www.medicaid.gov/state-overviews/scorecard/index.html.*

We proposed to revise § 438.334(b) to provide that the CMS-developed QRS will align where appropriate with the Qualified Health Plan (QHP) quality rating system developed in accordance with 45 CFR 156.1120, the Medicare Advantage 5-Star Rating System, and other related CMS quality rating approaches. We noted that alignment would be determined as part of the ongoing development of the proposed measures and methodologies and would be addressed in the MAC QRS-specific rulemaking.

Finally, we proposed to revise the current introductory language in § 438.334(c)(1) introductory text and (c)(1)(ii) to eliminate the requirement that states obtain prior approval from CMS before implementing a state alternative QRS to reduce the upfront administrative burden on states and speed time to implementation. Instead of prior CMS approval, we proposed at § 438.334(c)(3) that states would, upon CMS request, submit the following information to CMS to demonstrate compliance with § 438.334(c): The state's alternative QRS framework, including the performance measures and methodology to be used in generating plan ratings; documentation of the public comment process described in § 438.334(c)(2)(i) and (ii), including issues raised by the Medical Care Advisory Committee and the public, any policy revisions or modifications made in response to the comments, and the rationale for comments not accepted; and other information specified by CMS. We noted that as part of our general oversight responsibilities, we would still review states' alternative QRS and work with states on any identified deficiencies. We described the proposed approach as similar to the oversight process we use for states' Medicaid eligibility verification plans (§ 435.945(j)), and CHIP eligibility verification plans (§ 457.380(i)), which require states to submit eligibility verification plans to CMS upon request, in a manner and format prescribed by CMS. However, our proposal for the state alternative QRS would not have required prior approval.

The following summarizes the public comments received on our proposal to amend § 438.334 and our responses to those comments.

Comment: We received many comments supporting the establishment of a minimum mandatory measure set that would be applicable across both the CMS-developed QRS and state alternative QRS. A number of commenters stated that this proposal will reduce administrative burden on plans and providers and allow for more easily comparable data across states. Several commenters supported the proposal to apply the minimum mandatory measure set across the CMS-developed QRS and state alternative QRS, noting this will establish a level of consistency across states but continue to give states additional flexibility to add measures important to the state. One commenter supported coordinating the minimum set with Scorecard and offered to work with CMS on exploring how the QRS and Scorecard can support one another.

Response: We thank commenters for their support and are finalizing the proposed policies for (1) adoption by CMS of a minimum mandatory measure set within the full MAC QRS measure set and of a methodology developed in accordance with § 438.334(b) with some modifications as discussed in this section of this final rule; and (2) application of the minimum mandatory measure set to state alternative QRS in § 438.334(c)(1)(i).

Comment: A number of commenters recommended that the minimum set of mandatory measures should include measures that are focused on outcomes; are clinically credible; address potentially avoidable outcomes; are comprehensive in scope; have

quantifiable financial impact; use standard data; and are comparable across states.

Response: We will take commenters' suggestions under advisement as we continue the stakeholder engagement and MAC QRS development process leading to a future MAC QRS-specific rulemaking.

Comment: One commenter sought confirmation that health plans will not be responsible for reporting measures that are specific to types of services not included in their benefit packages, in situations where states have provided carve-outs for those services such as pharmacy, behavioral health or dental.

Response: While the reporting requirements for plans associated with the MAC QRS are beyond the scope of this rule, we agree that it would not be reasonable to hold plans accountable for services that are not included in their contracts and which they do not provide. We intend to take this and other considerations related to service carve-outs and limited benefit plans into account as part of the stakeholder engagement process, in development of the proposed MAC QRS-specific rulemaking.

Comment: Many commenters expressed concern with aligning the MAC QRS with other CMS quality rating approaches and/or with the proposals to develop the minimum set of mandatory measures and to coordinate that minimum set with the Scorecard initiative. Several commenters noted deficiencies or gaps in the current QHP and Medicare Advantage 5-Star Quality Rating System methodologies, and pointed out that the Medicaid/CHIP programs serve different populations than Medicare and QHP programs and cover different services. As such, these commenters believed that alignment with the Medicare Advantage 5-Star Quality Rating System may not provide an accurate picture of the care being provided. A few commenters expressed concern with the proposed alignment because Medicaid and CHIP serve a significant number of children and recommended that CMS ensure pediatric specific ratings are available and that the measure set include measures relevant to children and their caregivers.

Some commenters noted that the current version of Scorecard contains only 16 quality measures and expressed concern that a measure set comprised only of Scorecard measures would leave large measurement gaps for key Medicaid populations, such as adults and children with disabilities, pregnant women and newborns, persons receiving long term services and supports, and aging populations. A few commenters noted that a mandatory measure set may not be applicable across disparate managed care programs within a state that serves unique populations. One commenter did not support the proposal to require mandatory measures, because the mandatory measures may be in clinical domains in which their state already excels. The commenter also noted that a mandatory measure set would not consider the resources states with an existing QRS may have already spent to gain support for the measures already contained in such an existing QRS.

Response: We are finalizing the authority and requirements for (1) a framework for the MAC QRS, including the identification of the performance measures, a minimum mandatory measure set within the full MAC QRS measure set, methodology, and (2) an alignment where appropriate with the qualified health plan (QHP) quality rating system developed in accordance with 45 CFR 156.1120, the Medicare Advantage 5-Star Rating System, and other related CMS quality rating approaches in the amendment to § 438.334(b), which we are redesignating as paragraph (b)(1). We use the term framework to encompass all of the critical components of a QRS, which include, but are not necessarily limited to, the selected performance measures and methodology. Although alignment, where appropriate, with other CMS quality rating systems and approaches is required under the rule we are finalizing, the regulation, as proposed and finalized, does not limit MAC QRS measures only to those included in the Scorecard, the listed rating systems, or other CMS quality rating systems. For example, measures not currently included in Scorecard but important to beneficiaries and pertinent to specialty services and specific populations (for example, MLTSS measures) will also be considered for the full MAC QRS measure set. Moreover, states will continue to have the flexibility to add measures for services, programs and populations that are important to each state, should the full MAC QRS measure set (including the minimum mandatory subset) not include specific measures important to a particular state for its quality improvement goals. Therefore, we are finalizing the amendments to § 438.334(b), redesignated as paragraph (b)(1), with modification to clarify that the MAC QRS framework includes the identification of the performance measures, as well as a subset of mandatory performance measures, and a methodology. Per § 438.334(b)(1), we will consult with states and other stakeholders in developing the framework including the MAC QRS measure set and subset of minimum mandatory measures, which then will be subject to formal public notice and comment so we expect that stakeholders and the public will have ample opportunity to provide comment on the measures identified by us, including the mandatory measures.

Further, while the proposed and final rule call for the MAC QRS to be aligned with the QHP QRS, the Medicare Advantage 5-Star rating system and other related CMS quality rating approaches (such as Scorecard) where appropriate, this does not mean alignment in all aspects. Differences would be appropriate, for example, to address the different populations and services covered in the Medicaid and CHIP programs.

Comment: Many commenters supported our proposal to align the CMS-developed MAC QRS with other CMS rating approaches where appropriate. Several commenters agreed that alignment across programs will reduce administrative burden and promote high-quality care.

Response: As we noted in the proposed rule, we proposed to expand the requirement to align the MAC QRS, where appropriate, with other CMS-developed quality rating approaches, based on feedback gathered through early stages of the stakeholder engagement process that a more expansive approach to alignment would reduce reporting burden on plans that operate across multiple markets, such as Medicare Advantage and the Marketplace. We are finalizing the amendment to include alignment with the Medicare Advantage 5-Star rating system and other CMS quality rating approaches in addition to the QHP QRS at § 438.334(b)(1). In the final regulation text, we are making a technical modification to the citation of the Medicare Advantage 5-Star rating system to indicate that it is described in 42 CFR part 422, subpart D.

Comment: A few commenters requested clarification on the process CMS will use to develop the MAC QRS framework including measures and methodology and requested that CMS provide a timeline for development of the MAC QRS framework.

Response: As we noted in the proposed rule, we have begun the early stages of a stakeholder engagement process needed for the MAC QRS framework. We have conducted interactive listening sessions with various stakeholders, including state

and health plan stakeholder groups' directors, and interviewed several beneficiaries. We also have convened a diverse technical expert panel (TEP) to meet periodically to advise us on the framework, objectives, measures, and methodologies for the MAC QRS. The TEP includes representatives from state Medicaid and CHIP agencies, plans, beneficiary advocates, and quality measurement experts. We intend to continue this type of stakeholder engagement to develop the MAC QRS, culminating in the publication of a MAC QRS-specific proposed rule in the **Federal Register**, consistent with at the requirements in § 438.334(b), which we are redesignating as paragraph (b)(1). We also intend to provide technical assistance and guidance to states to assist them with implementation of the MAC QRS.

As we explained in both the 2015 Medicaid managed care proposed rule (80 FR 31153) and the 2016 final rule response to comments (81 FR 27688), after finalizing the initial CMS-developed QRS, we may periodically review it to determine the need for modifications, such as refining the methodology and updating the measures to ensure continuing alignment. However, we realize that the current regulations do not clearly reflect the policy described in the preambles; therefore, we are adding a new paragraph at § 438.334(b)(2) to make clear that CMS would follow the same stakeholder engagement and rulemaking process prior to updating the CMS-developed QRS, including consulting with States and other stakeholders and then providing public notice and opportunity to comment, in accordance with paragraph (b)(1) of § 438.334.

Comment: Several commenters supported the proposed language change that clarified and reinforced our intention to include stakeholders in developing the MAC QRS framework, including a set of performance measures, a subset of mandatory measures, and methodology for determining a rating based on reported measures. A few commenters recommended working with the Core Measures Quality Collaborative. A few commenters recommended including beneficiaries, providers and researchers in the process. One commenter recommended that Medicaid MCOs have an opportunity to participate in the development of the QRS framework. A few commenters supported CMS' proposal to work with stakeholders to develop sub regulatory guidance on what it means for an alternative QRS to yield substantially comparable information. A few commenters requested that health plans be included in the process. One commenter suggested that CMS should seek input from The Partnership for Medicaid.

Response: We appreciate commenters' interest and willingness to participate in the development of the MAC QRS. We are committed to a stakeholder engagement process that captures the diverse viewpoints of the Medicaid and CHIP community. Our current regulation at § 438.334(b), redesignated as § 438.334(b)(1) in this final rule, provides for CMS consultation with states and other stakeholders in the development of the CMS-developed QRS. Our proposal at § 438.334(c)(4) (for the Secretary to issue guidance in consultation with states and other stakeholders) was intended to codify our intention similarly to actively engage with states and other stakeholders in the development of the ''substantially comparable'' guidance for state alternative QRSs as well. We are retaining the policy to require consultation in development of the CMS-developed QRS in § 438.334(b)(1) of the final rule and finalizing proposed paragraph (c)(4), with a technical modification in both paragraphs to clarify that issuance of the MAC QRS-specific rulemaking and the subregulatory guidance on substantial comparability will be ''after consulting,'' rather than ''in consultation,'' with states and other stakeholders. We believe this technical change eliminates potential confusion about the timing of stakeholder consultation and clarifies that it is a distinct engagement process that will happen before the rulemaking used to adopt or revise the framework for the CMS-developed QRS. We recognize the broad range of stakeholders interested in the development of the MAC QRS and are committed to working with them in the development of both the MAC QRS and subregulatory guidance related to alternative QRS.

Comment: Several commenters supported our proposal, in § 438.334(c)(1)(ii), to take feasibility into account when applying the substantial comparability requirements to a state alternative QRS. A few commenters appreciated CMS's effort to clarify the considerations that will be taken into account in applying the standard and providing additional flexibility to states, but continued to question how the substantially comparable standard will be implemented. Many other commenters expressed concerns that this proposal would create too much flexibility, limiting comparability and allowing states to implement inadequate rating systems with measures that are not useful for Medicaid populations, especially vulnerable populations within their state.

Response: We agree that comparability is an important goal and that utilization of meaningful measures is key, but we also believe feasibility is an important consideration because states' covered populations and program design, as well as their information technology, data collection and reporting capacity, differ. We are finalizing paragraph (c)(1)(ii) as proposed. We will engage with states and other stakeholders in developing the sub regulatory guidance specifying the criteria and process for determining the substantially comparability standard, as required under § 438.334(c)(4). We look forward to working with states and other stakeholders to strike the right balance between comparability and flexibility under the standard for state alternative QRSs, set forth in § 438.334(c)(1)(ii) of the final rule, while producing ratings that are meaningful and useful for beneficiaries, plans, and states. As § 438.334(c)(4) requires that we consult with states and other stakeholders before issuing the guidance on the substantial comparability standard, it would be premature to provide specific guidance on that point here. We also expect that the MAC QRS will evolve, and with continued CMS support and technical assistance to states, what may not be initially feasible may become more feasible over time.

Comment: Many commenters recommended additional measures and measure sets for alignment with and inclusion in the MAC QRS. Several commenters recommended including the Medicaid and CHIP Core Measure Sets. Several commenters recommended aligning the MAC QRS measures with the ''Meaningful Measures'' initiative by CMS for use across CMS programs. A few commenters encouraged CMS to utilize standard, nationally developed and consensus-based measures. A few commenters encouraged CMS to use reliable and valid measures that reflect quality of care and plan performance. A few commenters recommended that any mandatory measures should be relevant to long-term care and LTSS programs and one commenter recommended that the CMS-developed QRS and any state alternative QRS be required to include at least the domains listed in § 438.330(c)(1)(ii) on quality of life, rebalancing, and community integration. Several commenters requested that the mandatory measure set include sufficient measures for pharmacy, cancer care, screenings and preventive care. One commenter urged

CMS to recognize the importance of access to care as a summary indicator when developing a standardized Medicaid QRS.

A few commenters suggested including Healthcare Effectiveness Data and Information Set (HEDIS) measures. A few commenters also encouraged the use of medication use-related metrics and aligning with the Pharmacy Quality Alliance (PQA) measures. A few commenters requested that CMS define pharmacy quality within the QRS and urged that measures related to pharmacy performance be standardized, achievable, and have proven criteria that measure individual pharmacy performance. One commenter recommended including the Consumer Assessment of Healthcare Providers and Systems (CAHPS) survey. Another commenter recommended aligning with the Medicare Part D star rating program. One commenter encouraged aligning with the Dental Quality Alliance for oral health. A few commenters encouraged CMS to ensure that states have a dental-specific QRS domain rather than a single measure within a broader set. One commenter suggested that measures related to cancer care should be included and that these measures should focus on the specifics of cancer treatment, be meaningful to patients and relevant to all oncology specialties. One commenter suggested using existing summary indicators for the qualified health plans (QHPs).

Response: We did not propose specific measures or measure sets in this rule, which is focused on the overarching authority for the MAC QRS. Consideration of specific measures and measure sets is being addressed in the ongoing engagement CMS is having with stakeholders in developing the MAC QRS framework. The regulation we are finalizing at § 438.334(b)(1) requires the MAC QRS that CMS develops to align where appropriate with CMS quality rating approaches, but does not preclude our consideration of other quality rating systems. We will consider them as we continue the stakeholder engagement and development of the MAC QRS within the authority of § 438.334.

We provide here for readers some information about some of the CMS initiatives noted by the commenters. Section 1139A of the Act requires HHS to identify and publish a core measure set of children's health care quality measures for voluntary use by state Medicaid and CHIP programs. In addition, section 1139B of the Act similarly requires HHS to identify and publish a core set of health care quality measures for adult Medicaid enrollees. For more information on the Medicaid and CHIP Core Measure Sets see *https://www.medicaid.gov/medicaid/quality-of-care/performance-measurement/index.html.* CMS's comprehensive initiative ''Meaningful Measures'' was launched in 2017 and identifies high priority areas for quality measurement and improvement across our programs. Its purpose is to improve outcomes for patients, their families and providers while also reducing burden on clinicians and providers. More information about this initiative may be found at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/CMS-Quality-Strategy.html.*

Comment: A few commenters supported the proposal to eliminate the prior-approval requirement in § 438.334(c)(1) of the current regulations for states opting to develop a state alternative QRS, noting this will reduce delays in implementing a state alternative QRS and will allow for greater state flexibility. One commenter supported the proposal but expressed concern that too much flexibility for states could create too much variation among QRS requirements across states. Many other commenters opposed removing the prior-approval requirement. Some commenters perceived this change could undermine CMS's oversight authority, or reduce plan accountability by allowing states to choose only those measures on which the state and/or their contracted health plans already perform well and for which there is little room for improvement. Some commenters perceived this change could reduce the ability to share and collect meaningful data, and create additional reporting requirements and burdens on physicians. A few commenters were concerned that states could receive feedback from CMS requiring a change in their state alternative QRS late in its implementation, after states had already expended significant time and resources in developing and building their alternative QRS. These commenters requested that CMS allow states the option to submit their alternative QRS for some level of CMS review and approval prior to implementation.

Response: The proposal was intended to provide states with upfront administrative flexibility and avoid potential delay in implementation. However, we also understand the concerns of commenters regarding this risk to states in expending time and resources on an alternative QRS which CMS might subsequently determine does not meet the substantial comparability standard. We also agree with commenters' concerns about the risks to ensuring that all state alternative QRS's meet the substantial comparability standard. Therefore, we are not finalizing our proposal to remove the requirement that states submit alternative QRS to CMS for approval prior to implementation. As discussed in this rule, the prior approval requirement currently codified at § 438.334(c)(1)(ii) is being redesignated as paragraph (c)(1)(iii) in this final rule with one grammatical correction as to the word ''receives''. In addition, our proposal to amend § 438.334(c)(2), which was to revise the introductory text solely to be consistent with the proposal to eliminate the prior approval requirement, is not being finalized.

Comment: One commenter requested clarification whether updates to a state's alternative QRS would trigger a CMS review or additional stakeholder outreach. One commenter suggested that CMS review states' alternative QRS on at least an annual basis to address any deficiencies.

Response: As explained in this rule, we are not finalizing the change to the current requirement that states receive prior-approval from CMS of an alternative QRS prior to its implementation. For the same reasons, we agree with the commenters that prior approval of modifications is necessary to ensure that the standards for use of an alternative QRS continue to be met and that states do not make significant investment in modifications that CMS then determines do not comply with the substantially comparable standard. Prior approval from CMS of a state alternative QRS, including modifications to a state alternative QRS, is required under the current regulations at § 438.334(c)(1)(ii), and we are not substantively modifying this requirement in light of our decision not to finalize the proposal to eliminate the prior approval requirement. This requirement is redesignated as § 438.334(c)(1)(iii), in this final rule. Further, we note that § 438.334(c)(2), which we are not amending, requires that both implementation of a state alternative QRS and modification of an approved state alternative QRS require Medical Care Advisory Committee input and a state public notice and comment process prior to submission to us for approval. These stakeholder engagement requirements, which apply whether a state is implementing an initial state alternative QRS or making modifications to an existing state alternative QRS, continue to apply. We believe that CMS review and approval of the state alternative QRS prior to

implementation and prior to a modification would be substantively similar in terms of the standards applied and the information considered. We do not believe adding a specific requirement for annual CMS review of an approved alternative QRS is necessary given that CMS approval of the initial state alternative QRS and any modifications are already addressed in the regulation text. As noted in this rule, we are codifying at § 438.334(b)(2) the authority to periodically update and modify the MAC QRS framework including a continued process for stakeholder engagement and public notice and opportunity for comment. When we make changes, we will explain in those future rulemakings and guidance what it means for states implementing the CMS-developed MAC QRS, as well as how the changes affect the substantial comparability analysis of any state alternative QRS. We expect to work with all states to implement future MAC QRS modifications.

Comment: Several commenters expressed concern that the removal of CMS prior-approval of alternative QRS also changed the timing of the state-level public stakeholder process from prior to submitting an alternative QRS proposal to CMS to prior to a state implementing an alternative QRS. Commenters expressed concern that this could limit the impact stakeholders have with states developing an alternative QRS. One commenter suggested that CMS should reinforce the importance of the public comment process in developing an alternative QRS and several recommended that CMS model the state-level public comment process on the section 1115(a) demonstration public engagement requirements.

Response: As noted, we are not finalizing the proposed removal of CMS prior-approval. In addition, we remind readers that § 438.334(c)(2), which we did not propose to amend, requires states to obtain input from their Medical Care Advisory Committee and to provide an opportunity for public comment of at least 30-days prior to the state submitting to CMS a request for or modification of a state alternative QRS. Also, current § 438.334(c)(3), as amended and redesignated at paragraph (c)(3)(ii), requires states to include documentation of the public comment process in the request to CMS, including discussion of the issues raised by the MCAC and the public as well as documentation of any policy revisions or modifications made in response to the comments and rationale for comments accepted.

Comment: One commenter requested that CMS clarify the proposal to redesignate § 438.334(c)(1)(ii) of the current text (that requires states to receive CMS prior approval) to § 438.334(c)(1)(iii) because it conflicts with CMS's proposal to eliminate the prior approval requirement.

Response: While we agree this was a technical error in the amendatory instructions for the proposed changes (see 83 FR 57296), we are not finalizing the removal of the prior-approval requirement. We are redesignating revised paragraph (c)(1)(i) (relating to the substantial comparability standard for alternative QRS) as paragraph (c)(1)(ii); adding a new paragraph (c)(1)(i) (applying the minimum mandatory measure set to alternative QRS); and redesignating paragraph (c)(1)(ii) (requiring CMS prior-approval of alternative QRS) as paragraph (c)(1)(iii). We are also finalizing the proposed amendment to paragraph (c)(1) so that it provides that ''a state may implement'' a state alternative QRS. The proposed text eliminates a redundancy in the current regulation text, paragraph (c)(1), which provides that a state ''may submit a request to CMS for approval''. This language is redundant with the requirement in redesignated paragraph (c)(1)(iii) requiring that states receive CMS approval prior to implementing an alternative QRS.

After consideration of all the comments received and for the reasons outlined in the proposed rule and our responses to the comments, we are finalizing the changes to the MAC QRS regulations at § 438.334 as proposed with some modifications for clarity and with the exception of the proposal to eliminate the requirement for CMS prior approval of a state's use of an alternative QRS. We are finalizing amendments to § 438.334 as follows:

- We are finalizing amendments to proposed paragraph (b), redesignated it as paragraph (b)(1), with minor modifications. As finalized, paragraph (b)(1) includes clarifications about the MAC QRS framework, including performance measures, a subset of minimum mandatory measures, and methodology; timing of CMS's consultation with states and other stakeholders; clarifications to the listed examples of the content of the MAC QRS; and a technical correction to the citation to the Medicare Advantage 5-Star Quality Rating System.
- We are finalizing a new paragraph at § 438.334(b)(2) to make clear that CMS, after consulting with States and other stakeholders and providing public notice and opportunity to comment, may periodically update the MAC QRS framework developed in accordance with paragraph (b)(1).
- We are finalizing proposed revisions to eliminate duplicative language in the introductory language in paragraph (c)(1).
- We are finalizing, as proposed, revisions to current paragraph (c)(1)(i) (relating to feasibility factors for the substantial comparability standard for a state alternative QRS) and redesignating this as paragraph (c)(1)(ii); finalizing a new paragraph (c)(1)(i) (applying the minimum mandatory measure set to state alternative QRS); and redesignating current paragraph (c)(1)(ii) (requiring CMS prior-approval of state alternative QRS) as paragraph (c)(1)(iii)).
- We received no comments on the several proposed changes to § 438.334(c)(3), regarding the information about their alternative QRS that states would need to provide to CMS. We proposed that states would provide, in addition to the information about stakeholder engagement already required by § 438.334(c)(3), a copy of the alternative QRS framework, including the performance measures and methodology to be used in generating plan ratings, and other information specified by CMS to demonstrate compliance with the substantial comparability standard. We are finalizing these proposed changes with modification to correct several grammatical errors, to enumerate the additional information to be provided in separate paragraphs (c)(3)(i) through (iii) and to more clearly identify the scope of the information we may request by using a cross-reference to paragraph (c)(1).
- We are finalizing the proposed addition of paragraph (c)(4) related to a stakeholder engagement requirement and issuance of guidance on the substantial comparability of alternative QRS, with one modification to change the phrase ''in consultation'' to ''after consultation.''

14. Managed Care State Quality Strategy (§ 438.340)

In the November 2018 proposed rule, we proposed to make some technical changes to § 438.340 to clarify the inclusion of PCCM entities, as described in § 438.310(c)(2), as one of the managed care entities to be included in the state managed care quality strategy. Specifically, because § 438.340(b)(8) did not make clear how PCCM entities should be incorporated into the other elements of the quality strategy, we proposed to delete § 438.340(b)(8) and to add PCCM entities to the list of managed care plans identified in the

quality strategy elements described at § 438.340(b)(2), (b)(3)(i), (b)(6), and (c)(1)(ii). We then proposed to redesignate paragraphs (b)(9), (10), and (11) as paragraphs (b)(8), (9), and (10), respectively, and to make a conforming revision to the cross reference in § 438.340(c)(3)(ii) to refer to redesignated paragraph (b)(10). We explained in the 2018 proposed rule why additional revision to add references to PCCM entities to other paragraphs in § 438.340(b) was not necessary.

Additionally, we proposed to amend § 438.340(b)(6) which, for the purposes of the states' plan to reduce health disparities within the quality strategy, defines ''disability status'' based on whether the individual qualified for Medicaid on the basis of a disability. Specifically, we proposed to remove this definition of disability status because we were concerned that it may be unintentionally narrow, leading to under-recognition of individuals with disabilities. Because disability status can change over the course of an individual's lifetime, qualifying for Medicaid on the basis of disability will only be one source of information to determine a beneficiary's disability status, and not necessarily the only source or the most accurate source of this information. In addition, there is no consensus definition of ''disability status,'' and the definition applied for purposes of Medicaid eligibility is not necessarily the only definition appropriate for evaluating health disparities. We also noted that providing this demographic information for each Medicaid enrollee to the managed care plan at the time of enrollment is a minimum standard under the current regulation and encouraged states to send updated demographic information to an enrollee's managed care plan whenever updated demographic information is available to the state.

As we considered the comments on these proposed changes, discussed in this rule, we realized that the regulation on the state managed care quality strategy is not the most appropriate place for the requirement to transmit certain information to managed care plans to be located. Since the requirement to transmit this information is tied to the enrollment of the individual beneficiary in the managed care plan, we believe it would be best to include this requirement as part of the standards for enrollment. Therefore, we are moving this requirement from § 438.340(b)(6) to § 438.54(b) (relating to state managed care enrollment systems) by adding a new paragraph (b)(3) in § 438.54, requiring states to provide the demographic information listed in § 438.340(b)(6) for each Medicaid enrollee to the individual's managed care plan at the time of enrollment. The movement of this requirement from § 438.340(b)(6) to § 438.54(b) is a non-substantive, technical change.

The following summarizes the public comments received on our proposal to amend § 438.340 and our responses to those comments.

Comment: A few commenters supported the technical correction related to PCCM entities to delete § 438.340(b)(8) and to add references to PCCM entities in each regulatory paragraph regarding the applicable quality strategy elements.

Response: We are finalizing the proposed changes to delete paragraph (b)(8) and to add reference to PCCM entities to paragraphs (b)(2), (b)(3)(i), and (c)(1)(ii) as proposed. We also had proposed to add reference to PCCM entities in paragraph (b)(6) and are finalizing the substance of that change. In conjunction with moving the sentence in § 438.340(b)(6) (requiring the State to provide its plans with certain demographic information), to which that change was proposed, to § 438.54(b)(3), we are including reference to PCCM entities in § 438.54(b)(3) as revised in this final rule. With the deletion of paragraph (b)(8) in § 438.340, we also are finalizing the proposed redesignation of paragraphs (b)(9), (10), and (11) as paragraphs (b)(8), (9), and (10), respectively. We note that we are finalizing a conforming technical change to paragraph (c)(3)(ii) to change the internal reference from paragraph (b)(11) to its new designation of paragraph (b)(10).

Comment: Several commenters supported the proposal to remove the definition of disability status from § 438.340(b)(6). Several commenters agreed that the current definition of disability status in this regulation is too narrow but expressed concern that removing the definition would make it difficult to compare health disparity data across states without a common definition. A few commenters recommended that there should be a common or standard approach to defining disability status, noting the variation in how it is defined across HHS, as well as other Federal agencies. The commenters stated that the lack of a standardized, routine approach for defining and identifying the population with disabilities impedes efforts to monitor the population, target care appropriately, or develop quality measures that could be used to improve understanding of gaps and how effective interventions are in closing those gaps. One commenter suggested using the HHS definition of disability status currently used in population health surveys. One commenter suggested including voluntary disability status questions in the Medicaid eligibility application. One commenter recommended that CMS issue guidance on how best to collect and share data on disability status. One commenter recommended that states adopt a definition of disability status that will allow plans to identify individuals who may need LTSS or individuals with disabilities that may need reasonable accommodations.

Response: While we agree that standardization and comparability are important considerations, we are not able to define disability status for the purposes of other programs. We also recognize that not all states have the same data systems or access to all of the same sources of data on disability status. The only uniform definition of disability status for purposes of these regulations would be to limit designation of disability status to beneficiaries who are eligible for Medicaid on the basis of disability, which we agree with commenters is too narrow. Thus, we have determined it best not to establish a uniform definition of disability. At the same time, we agree with commenters who are concerned that having no definition will impede identification of individuals with disabling conditions, provision of appropriate services and utilization of robust quality measurement to drive improvements in care. Therefore, we are neither finalizing the proposal to remove the definition of disability status from § 438.340(b)(6) entirely nor adopting a single definition at the Federal level for this regulation. Instead, we are revising § 438.340(b)(6) to provide states with flexibility to define in their quality strategy ''disability status.'' Further, we are requiring in § 438.340(b)(6) that the state's quality strategy include how the state will make the determination that a Medicaid enrollee meets the state's definition, including a description of the data source(s) that the state will use to identify disability status. To assure some uniformity, we are adopting a requirement that, at a minimum, states' definition of ''disability status'' include individuals who qualify for Medicaid on the basis of disability. We appreciate commenters' requests for guidance on how best to collect and share data on disability status and will consider developing such guidance in the future.

With regard to states' efforts to identify enrollees who may need LTSS or reasonable accommodations, we note that the standards for coordination and continuity of care located at § 438.208(c) already require states to implement mechanisms to identify persons who need LTSS or have special health care needs, as defined by the state, to MCOs, PIHPs and PAHPs. Additionally, § 438.208(c)(1) requires states to specify this plan in the state's managed care quality strategy. The mandatory elements of the managed care quality strategy are identified in § 438.340(b), and the requirement to describe the state's plan for identifying persons who need LTSS or who have special health care needs is codified at redesignated § 438.340(b)(9) in this final rule). We also note that qualified individuals with a disability, including those who do not need LTSS may be entitled to reasonable accommodation under Federal disability rights law. The provisions we are finalizing here do not change or limit application and obligations arising under Federal disability rights law so we remind states and managed care plans to ensure that their obligations are met.

Comment: Several commenters recommended that if CMS finalizes this proposal, CMS should require states to include in their quality strategy how they define disability and the sources of information they used to make the determination. Commenters stated that doing so would foster greater transparency and aid in comparability.

Response: We agree that transparency and comparability of health data are important considerations. We are finalizing § 438.340(b)(6) with a modification to address the definition of ''disability status.'' We are retaining the requirement in the current regulation that disability status means whether the individual qualified for Medicaid on the basis of disability, but that is a minimum standard for identifying disability status rather than the only permitted definition. We are also finalizing regulation text to require that states include in their quality strategy how the state is defining ''disability status'' and how the state will make the determination that a Medicaid enrollee meets the standard, including which data sources the state is using to identify these individuals.

Comment: A few commenters did not support the proposed change to the definition of disability status, claiming that states do not have access to other data sources to determine disability status and requiring them to use other data sources would create confusion in the eligibility system and add undue reporting burden.

Response: We disagree that states do not have other data sources to determine disability status. In fact, several state Medicaid agencies supported our proposal because they would prefer to use other and more accurate data sources than to rely solely on the information used to establish eligibility. For example, states may use Title II data, which would indicate whether the Social Security Administration has found that the person has a disability. Further, we did not propose and are not finalizing a requirement that states are required to use other data sources to ascertain beneficiaries' disability status for purposes of meeting the requirements in § 438.340(b)(6). However, if states have other, more accurate sources of information of disability status or any other demographic factors, we believe it is appropriate that states be permitted to use such information as part of their plan to identify, evaluate, and reduce, to the extent practicable, health disparities. As finalized, § 438.340(b)(6) enables states to do so.

Comment: One commenter expressed concern about states obtaining demographic information from additional sources and whether the methods of gathering and using the information would respect patient health information privacy.

Response: We appreciate the commenter's concern. However, the ability to use information obtained from other available sources of information on disability status does not create new authority for states to obtain such information. Rather, § 438.340(b)(6) of the final rule simply provides states with flexibility to use other third party information which the state already is permitted to access for a purpose directly connected to administration of the state plan, that is, to improve the health outcomes of individuals living with disabilities or falling into demographic groups associated with poorer health outcomes. Such use is consistent with the privacy and confidentiality protections afforded beneficiaries under section 1902(a)(7) of the Act and the HIPAA Privacy Rule, 45 CFR part 160 and subparts A and E of part 164. If a data source is not available to the state or the state is not authorized to use a particular data source, our regulation at § 438.340(b)(6) does not change that or create authorization for access by the state.

Comment: Several commenters agreed with CMS' encouragement that states should send updated demographic information to managed care plans whenever available.

Response: We appreciate commenters' support.

After consideration of all comments received, and for the reasons outlined in the proposed rule and our responses to the comments received, we are finalizing the technical changes related to references to PCCM entities, as proposed, in § 438.340(b)(2), (b)(3)(i), and (c)(1)(ii). In paragraph (b)(3)(i), we are also finalizing a minor grammatical correction to use ''will'' in place of ''would'' in the last sentence. We are not finalizing the proposed addition of the term ''PCCM entity'' to paragraph (b)(6) as proposed, but are finalizing the requirement that the state provide the demographic information listed in § 438.340(b)(6) for each Medicaid enrollee to the individual's MCO, PIHP, PAHP, or PCCM entity at the time of enrollment at § 438.54(b)(3). We are finalizing the deletion of paragraph (b)(8) and the redesignation of paragraphs (b)(9), (10), and (11) as paragraphs (b)(8), (9), and (10), respectively. We are finalizing a conforming technical change to paragraph (c)(3)(ii) to change the internal reference from paragraph (b)(11) to its new designation of paragraph (b)(10).

Further, we are not finalizing the deletion of the definition of disability status in § 438.340(b)(6), but instead are modifying the current regulation to indicate that ''disability status'' means, at a minimum, whether the individual qualified for Medicaid on the basis of a disability and to require that states include in their quality strategy how the state defines disability status and how the state determines whether a Medicaid enrollee meets the standard, including any data sources the state will use to identify disability status.

15. Activities Related to External Quality Review (§ 438.358)

In the 2018 proposed rule, we proposed a technical correction to amend the cross references listed in § 438.358(b)(1)(iii), which requires that a review be conducted within the previous 3-year period to determine MCO, PIHP, and PAHP compliance with certain managed care standards. Specifically, we proposed a technical correction to § 438.358(b)(1)(iii) to insert cross-references to several standards which this review must address but which had been inadvertently omitted from the 2016 final rule, including §§ 438.56 (Disenrollment requirements and limitations), 438.100 (Enrollee rights) and 438.114 (Emergency and post-stabilization services). The

requirements in these regulations have been included in the EQR protocol for the compliance review activity since the initial release of the protocols in 2003 and in all subsequent revisions of the protocols. It was not our intent to change the scope of EQR or to delete these cross-references in the 2016 rule. Indeed, we noted in both the 2015 proposed rule (80 FR 31156) and the 2016 final rule (81 FR 27706) that we did not intend to make substantive changes to eliminate any elements of the compliance review EQR activity.

The following summarizes the public comments received on our proposal to amend § 438.358 and our responses to those comments.

Comment: All the commenters on this topic supported the technical correction to add the references to § 438.358(b)(1)(iii) to match the scope of the regulation and the EQR protocols prior to the 2016 final rule.

Response: We thank the commenters for their support. Adding these references to certain requirements for access standards, structure and operations, and quality measurement and performance ensures that § 438.358(b)(1)(iii) provides for the same scope of EQR as it required prior to amendment by the 2016 final rule.

After consideration of all comments received and for the reasons outlined in the proposed rule and our responses to those comments, we are finalizing the amendments to § 438.358(b)(1)(iii) as proposed.

16. Exemption From External Quality Review (§ 438.362)

Section 438.362 implements section 1932(c)(2)(C) of the Act, which provides that a state may exempt an MCO from undergoing an EQR when certain conditions are met. First, the MCO must have a current Medicare contract under Part C of Title XVIII or under section 1876 of the Act, as well as the current Medicaid contract under section 1903(m) of the Act. Second, the two contracts must cover all or part of the same geographic area within the state. Third, the Medicaid contract must have been in effect for at least 2 consecutive years before the effective date of the exemption and during those 2 years, the MCO must have been subject to the Medicaid EQR during those 2 years and been found to have performed acceptably with respect to the quality, timeliness, and access to health care services it provides to Medicaid beneficiaries. Neither the statute nor § 438.362 requires states to exempt plans from EQR; however, this is explicitly provided as an option for states. States have discretion to require all their managed care plans to undergo EQR, even those MCOs that could be exempted under § 438.362. To increase transparency regarding state use of the exemption from the Medicaid EQR for certain MCOs, we proposed to add a new § 438.362(c) to require that states annually identify on their website, in the same location as where EQR technical reports are posted, the names of the MCOs it has exempted from EQR, and when the current exemption period began.

We sought comment on whether instead to revise § 438.364(a) to require that states identify the exempted plans and the beginning date of the plan's current exemption period in their annual EQR technical reports, either in addition, or as an alternative, to posting this information directly on the state's website. We also solicited comments on how states are currently using the exemption provision and how states currently make that information publicly available.

The following summarizes the public comments received on our proposal to amend § 438.362 and our responses to those comments.

Comment: Several commenters supported the proposal to require states to publicly identify any exempted plans along with the beginning date of their current exemption period on their website or in the annual EQR technical support. Commenters stated that this proposal represents little burden to plans or states but improves transparency and accountability. Other commenters noted that without this exemption information posted on the website, the annual EQR technical report may be misinterpreted as a comprehensive account of the quality of all managed care plans in a state, when in actuality there may be plans omitted from the report.

Response: We thank commenters for their support and agree that acknowledging the exemptions provided to certain MCOs from the EQR provides greater transparency with minimal burden on states. We are finalizing with modification the proposed revision to § 438.362 to make minor grammatical changes and to add a new paragraph (c) to require identification of MCOs exempt from Medicaid EQR, or that no MCOs are exempt, as appropriate, on the state agency website required under § 438.10(c)(3).

Comment: Several commenters supported the alternative suggestion that states identify MCOs exempt from Medicaid EQR activities in the EQR technical report, noting that this would allow for historical trending of exemption information whereas the information states post on their website may only include current exemption information. Several commenters stated that CMS should require the information to be both included in the EQR technical report as well as displayed on the website. These commenters noted that posting this information in more than one place will not present a burden to the states since they already make exemption determinations, inform their EQRO of which plans are exempted from EQR, and maintain EQR information on their websites. Finally, several commenters noted that if CMS does not require both methods, CMS should prioritize sharing the information on the state's website, as this is more accessible to beneficiaries, providers, and other stakeholders.

Response: We agree with commenters that both alternatives are useful. Because they are not mutually exclusive, we are also finalizing new regulation text at § 438.364(a)(7) that states also include in their EQR technical reports the names of the MCOs exempt from EQR by the state, including the beginning date of the current exemption period or that no MCOs are exempt, as appropriate.

Comment: Some commenters sought clarification with regard to what would be required of states that do not exempt managed care plans from EQR due to a Medicare review.

Response: We had intended that if no MCOs are exempt from the Medicaid EQR, the state would indicate this fact on the state's website consistent with the new transparency requirement. Requiring an explicit statement that no MCOs have been exempted from the requirement ensures that this information is clearly communicated on the state's website. To make this clear, we are finalizing the proposed revisions to § 438.362 and the additional revision to § 438.364(a)(7) with additional text to make this requirement explicit.

Comment: A few commenters recommended that CMS require states to provide direct links to the most current Medicare performance review for the MCOs they have exempted from EQR to allow consumers and advocates to easily find relevant performance data on exempted plans. They stated this would improve transparency without adding any burden to plans or states in terms of redundant reporting.

Response: We do not currently publish all information about Medicare performance reviews for every plan. At this time, we annually provide summary information on Medicare Parts C and D plan performance, compliance, audits

and enforcement actions on *CMS.gov*. Moreover, we did not propose to require states to make public the most current Medicare performance review. Therefore, we are not adopting the recommendation made by these commenters. We agree that directing consumers to information about Medicare performance reviews would support our transparency goals, and encourage states to provide links to any publicly available information, but we do not think a requirement for that is necessary or appropriate to finalize here.

After consideration of all comments received on this topic and for the reasons outlined in the proposed rule and our responses to those comments, we are finalizing the revision to § 438.362 with an additional requirement for states to indicate that no MCOs are exempt from EQR if that is the case and technical modifications to improve the clarity of the text. We are also finalizing a new paragraph (a)(7) in § 438.364 of the final rule to require that information on state exemption of MCOs be included as an element of the annual EQR technical reports or that no MCOs are exempt, as appropriate.

17. External Quality Review Results (§ 438.364)

In the 2018 proposed rule, we explained how in § 438.364(d), we had inadvertently referenced paragraph (b) instead of referencing paragraph (c). We proposed to revise § 438.364(d) to amend the incorrect reference.

We did not receive comments on this technical correction to § 438.364(d) and, for the reasons noted here and in the proposed rule, are finalizing it as proposed.

18. Grievance and Appeal System: Statutory Basis and Definitions (§ 438.400)

We proposed to revise the definition of ''adverse benefit determination'' in § 438.400(b) to clarify treatment of denials of claims on the basis that they are not clean claims. In the 2016 final rule at § 438.400(b)(3), we finalized the definition of an ''adverse benefit determination'' including denials in whole or in part of payment for service. The term adverse benefit determination was proposed and finalized in the 2016 final rule as a replacement for the term ''action,'' which had been defined with the same definition in the 2002 rule. Under § 438.404(a), managed care plans are required to give enrollees timely notice of an adverse benefit determination in writing and consistent with the requirements in § 438.10 generally. Given the broad meaning of the term ''denial of a payment,'' some managed care plans may be generating a notice to each enrollee for every denied claim, even those that are denied for purely administrative reasons (such as missing the National Provider Identifier, missing the enrollee's sex, or because the claim is a duplicate) and which generate no financial liability for the enrollee. Issuing notices of such adverse benefit determinations for which the enrollee has no financial liability nor interest in appealing simply to comply with § 438.404(a) may create administrative and economic burdens for plans, and unnecessary confusion and anxiety for enrollees who frequently misunderstand the notices as statements of financial liability.

To alleviate unnecessary burden on the managed care plans and enrollees, we proposed to revise § 438.400(b)(3), to specify that a denial, in whole or in part, of a payment for a service because the claim does not meet the definition of a clean claim at § 447.45(b) is not an adverse benefit determination. Under the proposal, the notice requirements in § 438.404 would not be triggered if the denial is solely because the claim is not a clean claim as defined at § 447.45(b). Section 447.45(b) defines ''clean claim'' as one that can be processed without obtaining additional information from the provider of the service or from a third party, and includes a claim with errors originating in a State's claims system; it does not include a claim from a provider who is under investigation for fraud or abuse, or a claim under review for medical necessity. We explained that this amendment would eliminate burden on plans to send unnecessary notices and avoid anxiety for enrollees receiving such notices and that the proposed change was not expected to expose enrollees to financial liability without notice, or jeopardize their access to care or rights to appeal.

We also provided guidance on how we would interpret the proposed change to the definition of adverse benefit determination. While notices to enrollees for claims that do not comply with the clean claim definition in § 447.45(b) would not be required under our proposed amendment to § 438.400(b)(3), the notice requirements for all future claims (including resubmission of the same claim) would have to be independently determined. For example, if a provider resubmits a clean claim after the initial one was not processed because it did not comply with the requirements in § 447.45(b), and the managed care plan subsequently issues an adverse benefit determination, the managed care plan would still be required to issue a timely notice under § 438.404(a) for the second claim. Whether an adverse benefit determination notice is required must be determined for each claim individually, regardless of whether notices were required for previously submitted claims.

The following summarizes the public comments received on our proposal to amend § 438.400 and our responses to those comments.

Comment: Many commenters supported the proposed change to eliminate the enrollee notice requirement for claims denied for not meeting the definition of a clean claim. Commenters noted that Medicaid enrollees are inundated with communications from providers and insurers, adding to the stress and confusion they experience when navigating the health care system. Accordingly, they should not be notified when a denial is based on a technical error that providers and managed care plans can resolve without enrollee input. Commenters noted that this proposed change would reduce beneficiary anxiety and confusion.

Response: We appreciate the supportive comments and believe enrollees and managed care plans will benefit from the reduction in unnecessary notices.

Comment: Commenters recommended that the proposed clean claim language could cause confusion among managed care plans and states as they attempt to determine how to apply notice requirements in cases where a claim falls under the technical definition a clean claim, but the claim denial does not impact the enrollee.

Response: In cases where a claim meets the technical definition of a clean claim and payment is denied in whole or in part, that denial does meet the definition of adverse benefit determination and the managed care plan must send the notice required in § 438.404. The revision to § 438.400(b)(3), as proposed and as finalized, only addresses claims that do not meet the definition of clean claim in § 447.45(b). Whether a claim denial ''impacts the enrollee'' is not part of the definition of an adverse benefit determination and does not affect a managed care plan's responsibility for sending the notice required in § 438.404. To make our intent clear, we will add ''solely'' in the final text of § 438.400(b)(3) to clarify that the only claim denials for all or part of the payment that do not trigger the notification requirements are those denials that result solely from the claim not meeting the definition of clean claim in § 447.45(b).

Comment: Several commenters requested that CMS not finalize the proposed clean claim language and instead specify more directly that notice requirements are not triggered in situations where a member will be held harmless or is not financially responsible despite a full or partial denial of a payment for service. Alternatively, commenters noted that CMS could provide additional context for the definition of ''clean claim'' by including guidance and a range of practical examples. The examples should make clear that the notices are not triggered in the denial cases mentioned in the preamble such as missing data or duplicate submissions, nor are they triggered in other similar cases such as clear billing errors or practices involving waste or abuse. Commenters stated that either change would still provide for independent determinations on the need for notices at a later point, for example, after a resubmitted claim, if an enrollee could then be subject to financial liability.

Response: We decline to adopt the commenters' suggestion to exempt all claims that do not result in enrollee liability from the definition of adverse benefit determination. While this may seem a minor expansion of the types of claims our revision targets, it actually would, in some states, increase the number of eliminated notices exponentially. These notices are an important beneficiary protection as they may be the only notification an enrollee receives alerting them that a claim has been submitted on their behalf. If the enrollee then begins to receive bills from the provider, they are already aware of the situation and have the information needed to appeal or obtain information from the managed care plan about their cost sharing rights and responsibilities. Further, the provision of these notices when there is a denial of coverage (or payment), is consistent with the principle that enrollees are entitled to be active participants in their health care; without full understanding of what is covered, enrollees are not able to make knowledgeable decisions about their health care coverage and their use of health care.

From a program integrity perspective, another benefit of these notices is the opportunity it provides the enrollee to detect potential fraudulent claims. For example, if a provider is billing for services that were never rendered, the adverse benefit determination notice is likely the enrollee's first alert to the situation. Enrollees can play an important role in the detection and reporting of potential fraud, waste, and abuse, and it was not our intent in this provision to undermine that. By limiting the carve out from the definition of adverse benefits determination to situations where the denial is because the claim does not meet the definition of clean claim, we believe we struck the appropriate balance between reducing burden and confusion for enrollees and maintaining an important enrollee protection.

With regard to the request for additional context, we do not believe we can, or should, develop a list of examples for the regulation text. The potential number of reasons for denying a claim because it does not meet the definition of clean claim is unlimited and any attempt to create an exhaustive list of examples would likely cause ambiguity and confusion. The obligation to determine if a claim meets the definition in § 447.45(b), that is, is a claim that can be processed without obtaining additional information from the provider of the service or from a third party rests with the managed care plan and must be determined for each claim, regardless of whether notices were required for previously submitted claims. Plans must apply the definition in § 447.45(b) consistently and reasonably and have an obligation to comply with their responsibilities in connection with adverse benefit determinations, as that term is defined in § 438.400 as finalized here. The concept of a ''clean claim,'' including as defined in § 447.45(b), is ubiquitous in the health care system and we do not believe that this is a difficult standard to apply.

Comment: Several commenters opposed the proposed change and stated that these types of denials should continue to be treated as adverse benefit determinations that trigger notice requirements. Commenters stated that it is important to err on the side of providing more transparency and information to enrollees so they can be as fully engaged in their care as possible. One commenter noted that if a consumer is not aware of a denied claim, the provider may send a bill if Medicaid is secondary to private insurance. Another commenter recommended the continuation of the requirement to send notices for these types of denials but allow for a process for enrollees to opt out of receiving the notices about these specific types of denials if they so choose.

Response: We agree that adverse benefit determination notices do improve transparency and provide claim information to enrollees that they may find useful. However, we do not generally believe receiving a notice on claim denials that are related solely to whether the claim was submitted with all necessary information, and therefore, generate no financial liability or reason to appeal for the enrollee, is advantageous to enrollees nor facilitates engagement in their care. A claim denied solely for not being a clean claim does not impact any future adjudication of that same claim based on program benefit level and medical necessity, which would be subject to the adverse benefit determination notice provision in § 438.400(b)(3). As we stated in the 2018 proposed rule, whether an adverse benefit determination notice is required must be determined for each claim, regardless of whether notices were required for previously submitted claims. Adverse benefit determination notices are a valuable and important beneficiary protection and we believe that finalizing this provision strikes a reasonable balance. We appreciate the commenter's suggestion to retain the current definition and allow enrollees to opt-out, but we decline to implement that suggestion.

After consideration of the public comments received and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the revision to the definition of adverse benefit determination in § 438.400(b) substantially as proposed with the addition of ''solely'' for clarity.

19. Grievance and Appeal System: General Requirements (§§ 438.402 and 438.406)

We proposed changes to §§ 438.402(c)(3)(ii) and 438.406(b)(3) to eliminate the requirements that an oral appeal be submitted in writing to be effective. In the 2016 final rule, we adopted the requirement that an oral appeal must be followed by a written, signed appeal at § 438.402(c)(3)(ii). This requirement was also included at § 438.406(b)(3), regarding handling of grievances and appeals, where managed care plans must treat oral inquiries seeking to appeal an adverse benefit determination as appeals and that such oral inquiries must be confirmed in writing. We stated in the 2018 proposed rule that managed care plans have found that some enrollees may take too long to submit the written, signed appeal, while others fail to submit the written appeal at all. This creates problems for enrollees who wait for extended periods of time for a resolution and for managed care plans who must invest resources to encourage enrollees to submit the documentation, as well as uncertainty for managed care plans as to how to comply with § 438.406 (Handling Grievances and Appeals) when the

enrollee never submits the written, signed appeal.

We proposed to eliminate the requirement for enrollees to submit a written, signed appeal after an oral appeal is submitted in §§ 438.402(c)(3)(ii) and 438.406(b)(3). We explained our belief that the removal of the requirement would reduce barriers for enrollees who would not have to write, sign, and submit the appeal, would enable plans to resolve appeals more quickly, and would decrease the economic and administrative burden on plans. This proposed change would also harmonize the managed care appeal process with the state fair hearing process because § 431.221(a)(1)(i) requires state Medicaid agencies to permit an individual or authorized representative of the individual to submit state hearing requests via different modalities—including telephone—without requiring a subsequent written, signed appeal. Although we proposed to eliminate the requirement in § 438.406(b)(3) that an oral appeal must be followed by a written, signed appeal, we did not propose to change the current regulatory language there that specifies that oral inquiries seeking to appeal an adverse benefit determination are treated as appeals.

The following summarizes the public comments received on our proposal to revise §§ 438.402(c)(3)(ii) and 438.406(b)(3) and our responses to those comments.

Comment: Many commenters supported the elimination of the requirement for a written, signed appeal after an oral appeal is submitted. Commenters stated an oral appeal should be sufficient to begin the appeals process alone, and subsequent written, signed requirements add an unnecessary barrier to enrollees filing an appeal with the managed care plan. Commenters stated that the elimination of the written requirement benefits all parties involved, as it reduces the additional administrative burdens for both the enrollee and the plan.

Response: We continue to believe eliminating the requirement for enrollees to submit a written appeal after filing an oral appeal will facilitate enrollees receiving resolutions to their appeals much more quickly.

Comment: Several commenters expressed concern that no longer requiring a written request will harm enrollees by removing the evidence of an appeal request. Commenters stated that this type of change may inadvertently cause states to no longer be able to hold plans accountable for the overall grievance and appeal system, including following up on appeal requests in a timely manner, processing requests and initiating the appeals process. The filing of the written appeal helps to ensure that data are available on appeals filed and processed, as well as data on the disposition of appeals. Commenters urged CMS to create a way to incorporate a written record that is less burdensome on the enrollee, perhaps assigning a confirmation number to the oral transaction, to ensure that the appeal is received and documented for the appeals process.

Response: We clarify that finalizing this provision does not eliminate the option for enrollees to submit appeals in writing; any enrollee that is not comfortable filing their appeal orally due to concerns that the appeal may not be documented or tracked appropriately, can file it in writing. Further, the regulation change we are finalizing in §§ 438.402(c)(3)(ii) and 438.406(b)(3) does not change any reporting, tracking, documentation or other requirements on the managed care plan. To the extent that the managed care plan needs to assign a tracking number, make written (or electronic) records summarizing the oral request made by the enrollee, or take other steps to comply with the requirements for the appeal and grievance system, those have not changed. All that this final rule changes is whether the enrollee must follow up in writing after making an oral request for an appeal. We believe there are adequate regulatory requirements supporting the appeal process; specifically, § 438.228 requires states' contracts with MCOs, PIHPs, and PAHPs to have a grievance and appeal system that meets the requirements of subpart F and § 438.416 specifies the recordkeeping requirements for grievances and appeals. We believe that data collected on appeals may actually improve because excluding oral appeals that were not followed up in writing or not followed up in a timely fashion based on review of a plan's performance, would have inappropriately skewed the resolution timeframes. Without these delays, appeal resolution data should more accurately reflect a managed care plan's performance. Managed care plans may find a method such as a confirmation number useful and we encourage them to consider it along with any other method that they find efficient and effective to accurately track oral appeals and to ensure that the plan is compliant with the appeal and grievance system requirements in part 438, Subpart F.

Comment: A few commenters stated that requiring a written request may make it easier for certain populations to file an appeal, such as individuals with disabilities, individuals who are incapacitated, individuals with limited English proficiency and individuals with health aids, health care proxies, powers of attorney and translators, because they would be able to request an appeal in a manner and at a time that is most convenient for them.

Response: Finalizing the elimination of the requirement for a written appeal to be submitted in follow up to an oral appeal in §§ 438.402(c)(3) and 438.406(b)(3), does not eliminate the option for enrollees to submit appeals in writing. Enrollees can submit an appeal orally or in writing; the choice of method is a decision left to the enrollee. We expect that enrollees (or their representatives) who believe that a written request is better suited to their own needs will file written appeals.

Comment: Several commenters supported the elimination of the requirement for a written, signed appeal but recommended that CMS require states to create redundancy protection to ensure that oral requests for appeals are fully and accurately recorded. Commenters stated that managed care entities may fail to acknowledge and document oral requests, raising concern that the lack of a written record would create a ''he said, she said'' situation between the appealing enrollee and the managed care plan.

Response: We agree that oral appeals need to be accurately documented but we decline to require a specific method or impose specific requirements along those lines. Managed care plans should use whatever means they deem most appropriate and that comply with § 438.416, which requires that each grievance or appeal record must contain, at a minimum: A general description of the reason for the appeal or grievance; the date received; the date of each review or, if applicable, review meeting; resolution at each level of the appeal or grievance, if applicable; date of resolution at each level, if applicable; and the name of the covered person for whom the appeal or grievance was filed. Additionally, the record must be accurately maintained in a manner accessible to the state and available upon request to CMS. Given that managed care plans may have to defend their appeal decisions at a state fair hearing if one is requested by the enrollee, we believe managed care plans will select an appropriate documentation method that accurately captures the appeal in sufficient detail. Finally, states have the ability to specify a specific documentation method in a managed care plan's contract if they

wish to do so and this final rule does not change that.

Comment: One commenter recommended CMS clarify in the regulation language how a state or managed care plan can make a determination that a verbal contact from a member constitutes an oral appeal. Commenter requested that CMS include the language that a member would need to specifically use or questions that the managed care plan needs to ask to ensure that there is understanding that an appeal is being requested orally. Commenter noted that for the purposes of tracking of appeals and response times, a date of when the appeal process officially starts is necessary, as any lack of clarity as to what constitutes an oral appeal will negatively impact the setting of an official appeal start date.

Response: We do not believe it is necessary for us to provide a script for either enrollees or managed care plans. Section 431.221(a) has allowed states to permit oral filings for state hearing requests since 1979. As such, we believe enrollees have a sufficient level of understanding of, and experience in, using an oral appeal filing process and will benefit from the consistency between the process described in § 431.221(a)(1)(i) and the amendment being finalized in this rule. As noted in this rule, enrollees retain the right to file a written appeal if they prefer that method. We note that states have the flexibility to mandate specific processes for their managed care plans to follow for handling oral appeals if they elect to do so.

After consideration of the public comments received and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing §§ 438.402(c)(3)(ii) and 438.406(b)(3) as proposed.

20. Resolution and Notification: Grievances and Appeals (§ 438.408)

We proposed a revision to § 438.408(f)(2) to require the timeframe for an enrollee to request a state fair hearing after receiving an adverse decision from a managed care plan would be no less than 90 calendar days and no more than 120 calendar days from the date of the MCO's, PIHP's, or PAHP's notice of resolution; under this proposal, the state would set the specific deadline within these limits. Previously, in the 2016 final rule, we revised the timeframe for managed care enrollees to request a state fair hearing to 120 calendar days from a plan's decision; this was codified at § 438.408(f)(2). We adopted this timeframe because we believed it would give enrollees more time to gather the necessary information, seek assistance for the state fair hearing process, and make the request for a state fair hearing (81 FR 27516). However, we have heard from stakeholders that the 120-calendar day requirement has created an inconsistency in filing timeframes between Medicaid FFS and managed care, creating administrative burdens for states and confusion for enrollees. The FFS rule limits the timeframe beneficiaries have to request a hearing to no more than 90 days (§ 431.221(d)).[27] It was not our intent to burden states with additional tracking of the fair hearing process in multiple systems, on multiple timeframes. Nor do we want to confuse enrollees in states where some services are provided through FFS and others through managed care.

Therefore, we proposed to revise § 438.408(f)(2) to stipulate that the timeframe for enrollees to request a state fair hearing will be no less than 90 calendar days and no greater than 120 calendar days from the date of the MCO's, PIHP's, or PAHP's notice of resolution. We stated the proposed revision would allow states that wished to align managed care with the FFS filing timeframe to do so without jeopardizing the enrollee's ability to gather information and prepare for a state hearing. This proposal would also allow states that have already implemented the 120-calendar day timeframe to maintain that timeframe without the need for additional changes.

The following summarizes the public comments received on our proposal to amend § 438.408(f)(2) and our responses to those comments.

Comment: Many commenters supported the proposal to move from a fixed 120 calendar days to a more flexible range of 90–120 calendar days. Commenters noted that this would improve consistency and reduce member confusion by avoiding two different timelines depending on the service delivery model (that is, managed care or FFS), as well as provide consistency for stakeholders. Commenters noted that benefits of such alignment, including minimizing confusion and administrative costs, and encouraging more timely resolution of cases.

Response: We agree that finalizing this provision as proposed can benefit enrollees and states.

Comment: Several commenters opposed the proposed 90–120 day range. These commenters stated providing enrollees with as much time as possible to prepare for a hearing is substantially more important than providing states with the ability to align their managed care and FFS delivery system timeframes for filing requests for a state fair hearing. Commenters noted that it takes time to collect evidence, gather proper documentation and seek legal help, and noted that it is essential that beneficiaries have every opportunity to make their case.

Response: We understand the commenters' concerns but do not believe that enrollees will be disadvantaged in states that elect to limit their managed care enrollees to the minimum 90 calendar days to file for a state fair hearing. We believe 90 calendar days is sufficient time for enrollees to gather documentation and seek legal assistance if desired. We remind commenters that the compliance date for § 438.408(f)(2) was the rating period for contracts starting on or after July 1, 2017, and therefore, states should already be in compliance with the 120 calendar day filing limit. Finalizing this change does not require states to change their filing limit, it simply provides states with an option if they elect to exercise it.

Comment: Commenters expressed concern that many beneficiaries are medically fragile, frail, or actively ill or injured and that CMS should be proposing steps to ensure state Medicaid programs fully educate their beneficiaries about the steps required and timing of internal appeals and Medicaid state fair hearings.

Response: We do not believe that a change in the managed care regulations is necessary for this purpose. Managed care plans are required to provide information on appeal and state fair hearing rights and processes under §§ 438.10(g)(2)(xi) and 438.408(e)(2)(i). Section 438.10(g)(2)(xi) requires enrollee handbooks to contain grievance, appeal, and state fair hearing procedures and timeframes, in a state-developed or state-approved description and § 438.408(e)(2)(i) requires a notice of appeal resolution to include the right to request a state fair hearing and how to do so. We believe this provides sufficient and appropriate means of conveying this information to enrollees.

Comment: One commenter recommended that CMS reduce the timeframe to 60 days because the longer timeline exposes enrollees and plans to increased financial risk since the beneficiary can be held financially responsible for the services rendered during the time the appeal is proceeding as specified in § 438.420(d).

[27] 42 CFR 431.221(d) states that the agency must allow the applicant or beneficiary a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing.

Response: We understand the commenter's concern about enrollee exposure to financial liability but decline to adopt a 60-day filing timeframe. As we stated in the 2016 final rule, because the continuation of benefits option includes the active participation of the enrollee (that is, the enrollee can elect the extent and duration of the services that they wish to continue receiving), the enrollee has some ability to control the amount of liability they are willing to assume in certain situations. (81 FR 27637). We also clarify that regardless of the upper limit on the filing timeframe, enrollees are free to request a state fair hearing immediately upon receiving the managed care plan's notice of adverse appeal resolution. There is no required ''wait time'' between receiving a plan's notice of adverse appeal resolution and making the request for a state fair hearing. We believe that this ability for an enrollee to promptly file for a state fair hearing, plus the protection available in the context of continuation of benefits under § 438.420, provides ample protection against this particular harm and are therefore not revising the appeal timeframe for requesting a state fair hearing for this reason.

After consideration of the public comments received and for the reasons articulated in the proposed rule and our responses to comments, we are finalizing the amendment to § 438.408(f)(2) as proposed.

II. Children's Health Insurance Program (CHIP) Managed Care

A. Background

The American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5, enacted February 17, 2009), the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (Pub. L. 111–3, enacted on February 4, 2009), and the PPACA made applicable to CHIP several Medicaid managed care provisions in section 1932 of the Act, including section 1932(a)(4), Process for Enrollment and Termination and Change of Enrollment; section 1932(a)(5), Provision of Information; section 1932(b), Beneficiary Protections; 1932(c), Quality Assurance Standards; section 1932(d), Protections Against Fraud and Abuse; and section 1932(e), Sanctions for Noncompliance. In addition, the PPACA applied to CHIP sections 1902(a)(77) and 1902(kk) of the Act related to provider and supplier screening, oversight, and reporting. Our 2016 final rule implemented these statutory provisions and built on initial guidance provided in State Health Official (SHO) letters 09–008 and 09–013, issued on August 31, 2009 and October 21, 2009, respectively. The provisions in the 2016 final rule both reflected and superseded this earlier guidance.

Since the publication of the 2016 final rule, and subsequent technical corrections to the rule in a correction notice published on January 3, 2017 (82 FR 37) (the 2017 correction notice), we have observed the need for additional minor technical or clarifying changes to the CHIP managed care provisions, primarily to clarify that certain Medicaid managed care requirements do not apply to CHIP. These changes were included in the November 14, 2018 proposed rule. The public comments received on the proposed CHIP provisions in the 2018 proposed rule and our responses are described in this final rule.

B. CHIP Managed Care Provisions of the Rule and Analysis of and Responses to Public Comments

The following sections, arranged by subject area, are a summary of the comments we received regarding specific CHIP proposals. Some of the comments raise issues that are beyond the scope of the proposed rule. We are not summarizing or responding to those comments.

1. Compliance Dates for Part 457 Managed Care Provisions

The 2016 final rule provides that unless otherwise noted, states will not be held out of compliance with new requirements in part 457 adopted in the 2016 final rule until CHIP managed care contracts as of the state fiscal year beginning on or after July 1, 2018, so long as the states (and applicable CHIP managed care contracts) complied with the previously applicable regulations (that is, the regulations in place before the 2016 final rule) (81 FR 27499). Since the 2016 final rule was published, some stakeholders expressed that they believed that the preamble was not clear about when states need to comply with the CHIP managed care regulations. We clarified in the 2018 proposed rule that, except as otherwise noted, compliance with the revisions to the CHIP managed care regulations in part 457 of the 2016 final rule is required as of the first day of the state fiscal year beginning on or after July 1, 2018, regardless of whether or not the managed care contract in effect is a multi-year contract entered into a previous fiscal year or is a new contract effective for the first state fiscal year beginning on or after that date.

Comment: Several commenters supported the clarification provided regarding CHIP's compliance date.

Response: We thank commenters for their support.

2. Information Requirements (§ 457.1207)

Section 457.1207 sets forth the CHIP requirements for providing enrollment notices, informational materials, and instructional materials for enrollees and potential enrollees of managed care entities by adopting, by cross-reference, the Medicaid requirements in § 438.10. We addressed in the 2018 proposed rule three cross references that should not apply to CHIP and that we inadvertently included in the CHIP regulatory text.

Section 438.10(c)(2) requires state Medicaid agencies to use the state's beneficiary support system as specified in § 438.71. We did not intend to adopt the Medicaid beneficiary support system requirements for CHIP in the 2016 final rule; therefore, we proposed to modify the language in § 457.1207 to exclude § 438.10(c)(2) from the cross-reference used to incorporate the Medicaid requirements into the CHIP regulations.

Section 438.10(g)(2)(xi)(E) requires that the enrollee handbook of Medicaid managed care entities notify Medicaid enrollees that, when requested, benefits will continue when the enrollee files an appeal or state fair hearing (also known as ''aid paid pending''). Because CHIP enrollees are not entitled to continuation of benefits pending an appeal, we intended to exclude the requirement to notify CHIP enrollees of this requirement from the handbook of CHIP plans. Because § 457.1207 of the 2016 final rule inadvertently included a cross reference applying this handbook requirement in CHIP, we proposed to modify the language in § 457.1207 to exclude § 438.10(g)(2)(xi)(E) from the cross-reference used to incorporate the Medicaid requirements into the CHIP regulations.

Additionally, § 438.10(g)(2)(xii) requires that the enrollee handbooks for Medicaid MCOs, PIHPs, PAHPs, and PCCM entities must provide information on how to exercise an advance directive, as set forth in § 438.3(j). CHIP regulations do not include advanced directive requirements, and therefore, we did not intend that managed care plans be required to notify CHIP enrollees on how to exercise advanced directives. As a result, we proposed to modify the language in § 457.1207 to eliminate an erroneous reference applying the Medicaid information requirement regarding advance directives to CHIP.

The following is a summary of the public comments we received on our

proposal to amend § 457.1207 and our responses to them.

Comment: Several commenters supported the proposed clarifications and technical corrections.

Response: We are finalizing our proposal to amend § 457.1207 as proposed.

Comment: One commenter recommended CMS provide an explanation of its position regarding ''aid paid pending''.

Response: As we explain in this final rule and as we noted in our response to comments received in the 2016 final rule (81 FR 27768), the right to benefits pending the outcome of a grievance or appeal does not derive from section 1932(b)(4) of the Act, but from the constitutional due process protections afforded to beneficiaries of an entitlement program under *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) and its progeny, including provision of benefits to beneficiaries who are being terminated from or denied coverage pending appeal. Unlike Medicaid, CHIP is not an entitlement program, and therefore the right to benefits pending appeal is not available to CHIP beneficiaries.

Comment: One commenter recommended affording states the discretion to apply beneficiary support provisions to CHIP enrollees and to make FFP available for states doing so.

Response: The Medicaid provision to provide beneficiary support in § 438.71 and cross-referenced under the beneficiary information requirements in § 438.10(c)(2) requires states to provide counseling to Medicaid enrollees regarding choice of managed care plans and assistance with LTSS, among other requirements. While CHIP does not adopt Medicaid's requirements to ensure beneficiary choice of managed care plans at enrollment in § 438.52 and states are not required to cover LTSS under CHIP, states are required by § 457.110 to provide information to all CHIP applicants and enrollees in order for these families to make informed decisions about their choice of health plans and providers. Under § 457.110, states must provide information to CHIP applicants and enrollees about covered benefits, cost sharing requirements, names and locations of participating providers, and other information related to CHIP. A state is permitted to use its Medicaid beneficiary support system to fulfill the CHIP enrollment assistance and information requirements; states simply are not required to do so. We note also that our revisions to § 457.1207 do not remove application to CHIP of any of the numerous other requirements in § 438.10 that require managed care entities to provide important information to enrollees and potential enrollees about the entity's provision of services through, for example, enrollee handbooks and provider directories. Section 2105(a)(1)(D)(v) allows for claiming of ''other reasonable costs incurred by the state to administer the plan'' as a CHIP administrative expense, subject to the state's 10 percent cap on administrative expenditures under section 2105(a)(2) of the Act. If the state chooses to provide the information to CHIP enrollees through the beneficiary support system established for Medicaid enrollees, the state may claim that expenditure as a CHIP administrative expense.

For the requirements in § 438.71 (relating to LTSS), as we discussed in our response to comments received in the 2016 rule (81 FR 27757), states are not required to cover home and community-based services (that is, LTSS) in their separate CHIPs. Therefore, LTSS beneficiary support is not usually applicable to states with a separate CHIP. States that choose to cover LTSS have flexibility to determine the role the MCOs and other entities have in authorizing LTSS.

Comment: One commenter recommended that CMS allow states to provide information regarding advance directives to CHIP enrollees and that FFP be available to states that do so.

Response: As we noted in our response to comments received in the 2016 final rule (81 FR 27760), the mandatory Medicaid standards regarding advance directives described in §§ 438.3(j) and 422.128 do not apply to CHIP and we do not believe that they should. We believe that the Medicaid advance directives provisions would create a significant burden on states and MCOs, PIHPs, and PAHPs in the CHIP context, with correspondingly little benefit for beneficiaries, as there are very few adult beneficiaries in CHIP and very few children need an advance directive. States may choose to require a managed care entity to provide information about advance directives to managed care enrollees since the requirements in § 457.1207 (cross-referencing § 438.10, including § 438.10(g)) represent the minimum amount of information that must be provided to enrollees in an enrollee handbook. A state could also choose to require its CHIP managed care entities to provide certain CHIP enrollees (for example, pregnant women) with information about how to execute an advance directive, similar to the requirement for Medicaid set out at § 438.3(j), and may receive FFP as a CHIP administrative expenditure for doing so, subject to the state's 10 percent cap on administrative expenditures under section 2105(a)(2) of the Act. However, because the underlying Medicaid advance directive requirement does not apply in the context of CHIP, we decline to adopt a requirement for states to require their CHIP managed care entities make this information available.

After consideration of the public comments and for the reasons outlined in the proposed rule and our responses to comments, we are finalizing as proposed the amendment to § 457.1207 to exclude paragraphs (c)(2), (g)(2)(xi)(E), and (g)(2)(xii) of § 438.10 the cross-reference used to incorporate the Medicaid requirements into the CHIP regulations.

3. Structure and Operations Standards (§ 457.1233)

In the 2016 final rule, at § 457.1233(b), we adopted the provisions in § 438.230 related to MCO, PIHP, PAHP and PCCM entity requirements for contracting with subcontractors. However, in § 457.1233(b) we inadvertently included PCCMs instead of PCCM entities. We proposed to revise § 457.1233(b) to conform to the requirement that § 438.230 applies to PCCM entities.

Also, at § 457.1233(d), we adopted the provisions in § 438.242 that require states operating a separate CHIP to collect enrollee encounter data from managed care plans. In finalizing § 438.242, we also intended to apply to CHIP the requirements of § 438.818, which is cross-referenced in § 438.242 and requires the submission of enrollee encounter data to CMS. We proposed to revise § 457.1233 to make explicit our intention to apply the terms of § 438.818 to CHIP.

Finally, in the 2016 final rule at § 457.1233(d) we made a technical error regarding the CHIP applicability date. Our cross-reference to § 438.242 inadvertently applied the Medicaid applicability date of July 1, 2017 for the health information system requirements instead of the later compliance date generally applicable to CHIP (which is as of the first day of the state fiscal year beginning on or after July 1, 2018) that was specified in the 2016 final rule and discussed in section II.B.1 of this final rule. Therefore, we also proposed to revise § 457.1233(d) to make this technical correction.

The following is a summary of the public comments we received on our proposals to amend § 457.1233.

Comment: Several commenters supported the technical corrections and clarification about collection of enrollee

encounter data in the CHIP structure and operations standards regulatory sections.

Response: We thank the commenters for their support.

After consideration of the comments and for the reasons outlined in the proposed rule and our responses to the comments, we are finalizing as proposed the amendments to paragraphs (b) and (d) of § 457.1233.

4. Quality Measurement and Improvement (§ 457.1240)

In the 2016 final rule, we aligned the quality assessment and performance improvement program standards for CHIP MCOs, PIHPs and PAHPs (with minor exceptions) with the Medicaid standards at § 438.330 by adopting references to § 438.330 in § 457.1240(b). Where appropriate, § 457.1240, as finalized in the 2016 final rule, also applied these Medicaid standards to PCCM entities. However, we inadvertently failed to include a cross-reference to one of the Medicaid standards at § 438.330(b)(2), relating to the collection and submission of quality performance measurement data, which we intended to apply to PCCM entities in CHIP. We proposed revisions to § 457.1240(b) to correct this omission and reflect application of § 438.330(b)(2) to PCCM entities in CHIP.

Additionally, we inadvertently failed to exclude references to consultation with the State's Medical Care Advisory Committee as a state requirement when the state drafts or revises the state's quality strategy in § 438.340(c)(1)(i) (which we incorrectly identified as § 438.330(c)(1)(i) in the 2018 proposed rule) and when the state requests, or modifies the use of an alternative managed care QRS under § 438.334(c)(2)(i) and (c)(3). Establishment of a Medical Care Advisory Committee (MCAC) is required for Medicaid programs under § 431.12. Regulations at §§ 438.334(c)(2)(i) and (c)(3) and 438.340(c)(1)(i) require that the state seek input from the MCAC in developing a state alternative QRS and managed care quality strategy. However, there is no requirement that states establish a MCAC for CHIP similar to that in § 431.12, and therefore, the consultation requirements with the state's MCAC in §§ 438.340(c)(1)(i) and 438.334(c)(2)(i) and (c)(3) are not applicable to CHIP. We proposed to revise § 457.1240 to eliminate the MCAC consultation requirements from the incorporation of the Medicaid requirements relating to adoption of a QRS and managed care quality strategy for CHIP.

We noted in the November 2018 proposed rule how changes proposed to § 438.340 (regarding the managed care state quality strategy) were addressed as technical, conforming changes to the CHIP regulation (§ 457.1240(e)) that incorporates § 438.340. Comments on the proposed changes in § 438.340 (relating to the managed care state quality strategy), are discussed in the preamble at section I.B.14 of this final rule while comments received specific to CHIP, which adopts the Medicaid requirements for the state quality strategy, are addressed in section II.B.8 of this final rule.

The following is a summary of the public comments we received on our proposal to amend § 457.1240 and our responses.

Comment: Several commenters supported the clarifications and technical corrections of the requirements to collect and submit quality performance measurement data to PCCM entities.

Response: We thank commenters for their support and are finalizing the proposed correction.

Comment: One commenter noted that proposed § 457.1240 included a reference to ''§ 438.330(c)(1)(i)'' even though this reference does not address consultation with the Medical Care Advisory Committee, which is the requirement that we proposed to remove for CHIP.

Response: We appreciate the commenter bringing this error to our attention. We agree that the correct reference should be to § 438.340(c)(1)(i). We are making the proposed correction in the final rule by finalizing an amendment to § 457.1240(e), which cross-references § 438.340 to incorporate requirements for a written quality strategy for assessing and improving the quality of health care and services furnished to CHIP enrollees. As finalized in this rule, § 457.1240(e) excludes the reference to consultation with the MCAC (described in § 438.340(c)(1)(i)) from the incorporation of Medicaid managed care requirements into CHIP. In addition, we have noted that § 457.1240(d), which cross-references § 438.334 and incorporates the requirement for a managed care quality rating system, also fails to exclude from the CHIP regulation the requirement that the state consult with the MCAC. We are also finalizing an amendment to § 457.1240(d) to exclude § 438.334(c)(2)(i) and (c)(3) from application to CHIP. These items were proposed in § 457.1240(b) of the proposed rule but we have determined that they would be more appropriately placed in §§ 457.1240(d) and (e).

Comment: Several commenters opposed the proposal to remove consultation with the MCACs regarding the state's quality strategy as a requirement for CHIP and suggested that states be required, or encouraged, by CMS to seek and respond to MCACs, other advocacy groups, and key stakeholder groups involved in CHIP quality measurement and improvement activities to provide their perspective and expertise.

Response: We appreciate the commenters' recognition of the important role stakeholder groups play in advising states on CHIP quality strategies and agree with the commenters about the importance of this involvement. Because we agree that stakeholder input is important, § 457.1240(e) generally incorporates those components from the Medicaid managed care rule at § 438.340 by cross-referencing § 438.340 with, as finalized here, only an exclusion for the MCAC consultation in § 438.340(c)(1)(i). Thus, CHIP adopts the Medicaid requirement to make the quality strategy available for public comment before submitting the strategy to CMS (at § 438.340(c)(1)) and to make the review of the effectiveness of the quality strategy conducted by the state at least every 3 years available to the public (at § 438.340(c)(2)). Further, states must ensure ongoing public involvement in the state's CHIP state plan under § 457.120(b). However, the regulations at § 431.12, which require each state to establish an MCAC, specify that the MCAC advise the *Medicaid* agency about health and medical care services (emphasis added). While states have the flexibility to consult their MCAC for purposes of their CHIP quality strategy, and we encourage them to do so, the CHIP regulations do not require establishment of a similar advisory committee for CHIP. Consultation with the MCAC has never been a regulatory requirement for CHIP agencies, and we did not intend to create a mandate for them to do so implicitly through a cross reference in the 2016 managed care regulation. In addition, to require consultation with the Medicaid MCAC would require that the MCAC exceed its regulatory mandate. Therefore, we decline to adopt a requirement for consultation with the MCAC in connection with CHIP managed care programs and the comprehensive quality assessment and performance improvement programs that managed care entities must be required to establish and implement under § 457.1240(d) and (e).

After consideration of the public comments and for the reasons outlined in the proposed rule and our responses to comments, we are finalizing our proposal to reflect application of § 438.330(b)(2) to PCCM entities in CHIP with some minor non-substantive revisions to § 457.1240(b). We are reformatting and revising the text in two ways. First, we are redesignating most of the current regulation text in § 457.1240(b) as § 457.1240(b)(1) and designating a separate paragraph (b)(2) for the regulation text providing that, in the case of a CHIP contract with a PCCM entity, the requirements of § 438.330(b)(2) and (3), (c), and (e) apply. Second, we are revising the text to improve the readability of the regulation.

We inadvertently proposed to codify exceptions to the applicability of §§ 438.334 and 438.340 (regarding consultation with the MCAC) in § 457.1240(b). In the final rule, we are finalizing these exceptions in the appropriate paragraphs of § 457.1240. In § 457.1240(d), we state that § 438.334(c)(2)(i) and (c)(3) related to consultation with the MCAC do not apply to the requirements related to the managed care quality rating system for CHIP. In § 457.1240(e) we state that § 438.340(c)(1)(i) related to the MCAC does not apply to the requirements related to the managed care quality strategy for CHIP. This is substantively consistent with our proposal to exclude references to consultation with the MCAC from the CHIP requirements.

5. Grievance System (§ 457.1260)

In the 2016 final rule, we aligned CHIP with the Medicaid grievance and appeals provisions in subpart F of part 438, by incorporating them into § 457.1260, with two substantive exceptions. First, § 457.1260 provides that references to ''state fair hearings'' in part 438 should be read as referring to part 457, subpart K (which imposes certain CHIP applicant and enrollee protections). Second, § 457.1260 excludes the applicability date in § 438.400(c) from applying in the CHIP context. Following publication of the 2016 final rule, we became aware of a number of concerns related to how § 457.1260 currently incorporates the requirements applicable to Medicaid managed care plans, including the following:

• *Definition of adverse benefit determination (§ 438.400):* We inadvertently failed to exclude a reference to paragraph (6) of the definition of ''adverse benefit determination'' in § 438.400; this paragraph includes in the definition of adverse benefit determination the denial of enrollee's request to exercise his or her choice to obtain services outside the network under § 438.52. We did not adopt § 438.52 in CHIP, and therefore, this should not have been included in the definition of adverse benefit determination for CHIP. Our proposed regulation text at § 457.1260(a)(2) would incorporate the definitions adopted in § 438.400, other than this one provision from the definition of adverse benefit determination.

• *General requirements for appeals and grievances (§ 438.402):* In the 2016 final rule, in § 457.1260 we adopted all of § 438.402 into CHIP. This included an optional external medical review at § 438.402(c)(1)(i)(B). However, at § 457.1120(a), CHIP already provides states with two options to conduct an external review of a health services matter. The additional optional external medical review was superfluous. We proposed to effectively eliminate this additional, optional external medical review from the CHIP managed care appeal process by excluding the language of § 438.402(c)(1)(i)(B) in the list of appeal and grievance provisions that were incorporated from the Medicaid managed care appeals requirements in proposed § 457.1260(b).

In addition, we proposed provisions in § 457.1260(b)(2) through (4) that would apply in place of the provisions in § 438.402(c)(1)(i)(A), (c)(1)(ii), and (c)(2), respectively, by substituting references to ''state fair hearings'' from the Medicaid rules with references to part 457, subpart K (which provides for certain CHIP applicant and enrollee protections, including external review) in proposed regulation text that otherwise generally mirrored text in § 438.402. This approach is substantively consistent with the current rule. Our proposed regulation text, at § 457.1260(b), would continue to incorporate Medicaid grievance and appeals system establishment and operation rules in § 438.402(a), (b), and (c)(2) and (3).

• *Timing of notice of adverse benefit determinations (§ 438.404):* We realized that there may have been some confusion about whether states should follow the timing of notice of adverse benefit determination requirements described in § 438.404(c)(1) or in § 457.1180. We proposed to clarify that we did not intend to incorporate the requirements of part 431, subpart E into CHIP from § 438.404(c)(1). We proposed, at § 457.1260(c)(1), that states must ensure that the CHIP managed care entities comply with the provisions in §§ 438.404(a), (b)(1), (2), and (4) through (6) and (c)(2) through (6). In addition, we proposed at § 457.1260(c)(2) language that would effectively replicate the requirements in § 438.404(b)(3) but substitute the reference to ''state fair hearings'' with the reference to part 457, subpart K. We also proposed, at § 457.1260(c)(3), that states provide timely written notice for termination, suspension, or reduction of previously authorized CHIP-covered services, which mirrors the timing of notice requirements in § 457.1180.

• *Handling of grievances and appeals (§ 438.406):* We proposed at § 457.1260(d) that the state must ensure that the CHIP managed care entities comply with the provisions in § 438.406.

• *Resolution and notification (§ 438.408):* We proposed revisions in § 457.1260(e) to address the concerns about references to state fair hearings and external medical reviews discussed in this rule. Proposed § 457.1260(e)(2) mirrored the language of § 438.408(a) but we proposed to restate the text (rather than cross-reference Medicaid managed care regulation) so that the use of ''this section'' in the text referred to the language in § 457.1260 instead of § 438.408. In addition, proposed § 457.1260(e)(3) through (7) effectively restated the requirements imposed § 438.408(b)(3), (e)(2), (f)(1) introductory text, (f)(1)(i), and (f)(2), respectively, with references to part 457, subpart K, instead of referring to ''state fair hearings'' as the Medicaid managed care regulation does. We did not include the Medicaid external medical review provisions (§ 438.408(f)(1)(ii)) from the list of appeal and grievance provisions that we proposed to incorporate in proposed § 457.1260. However, our proposed regulation text at § 457.1260(e) incorporated the resolution and notification requirements of Medicaid grievance and appeals rules as set out at § 438.408(b), (c)(1) and (2), (d), (e)(1), and (f)(3).

• *Services not furnished (§ 438.424):* The current regulation inadvertently incorporated and applied the Medicaid standard at § 438.424(b), which requires a state to pay for disputed services furnished while an appeal is pending—which we did not intend to apply to CHIP. The Medicaid rule at § 438.420, regarding the continuation of benefits while an appeal is pending does not apply to CHIP. Therefore, the CHIP regulation at § 457.1260 should not include either § 438.420 or § 438.424(b), which provides that a state must pay for disputed services furnished while the appeal is pending if the decision to deny authorization of the services is reversed. Therefore, we did not propose to incorporate § 438.420 or § 438.424(b)

in proposed § 457.1260. Proposed § 457.1260(i) mirrored § 438.424(a), except for substituting the reference to ''state fair hearings'' with the reference to part 457, subpart K. in requiring CHIP managed care entities to provide denied services as expeditiously as the enrollee's health requires, but no later than 72 hours, from the date the managed care entity receives notice reversing its denial.

In sum, we proposed revisions to the regulation text in § 457.1260 that adopted some provisions of the Medicaid appeals and grievances requirements in total (such as in §§ 438.406, 438.410, 438.414 or 438.416) and some only in part (such as in §§ 438.400, 438.402, 438.404, 438.408, and 438.424). We solicited comments on whether our more detailed regulation text, which incorporates specific provisions of subpart F of part 438, was sufficiently clear and detailed for the appropriate administration of grievances and appeals in the CHIP context.

The following is a summary of the public comments we received on our proposal to amend § 457.1260 and our responses to those comments.

Comment: A few commenters supported the proposed changes to the CHIP grievance system to require the state to require MCOs, PIHPs and PAHPs to comply with incorporated provisions (in §§ 438.402, 438.404, 438.406, 438.408, and 438.414) and noted that these changes would expedite the grievance process.

Response: We appreciate the support for our proposal at § 457.1260 regarding the grievance system.

Comment: One commenter requests that states be able to use the Medicaid definition of ''adverse benefit determination'' in § 438.400(b) and receive FFP for doing so, even though CHIP is not adopting § 438.400(b)(6). That section includes in the definition of ''adverse benefit determination'' any denial of an enrollee's request to exercise his or her choice to obtain services outside the network under § 438.52 as a result of Medicaid choice at enrollment requirements and certain exceptions to this rule for rural areas.

Response: We previously did not adopt § 438.52 in CHIP in the 2016 final rule because CHIP does not require choice of plans at enrollment, and therefore, this should not have been included in the definition of adverse benefit determination for CHIP. However, if a state optionally provided for choice of plan at enrollment, created a rural exception that, like § 438.52(b)(2)(ii), allowed for an enrollee to obtain services outside the network and established that a denial of that rural exception would constitute an adverse benefit determination, FFP would be available. We do not believe that additional regulation text is necessary for § 457.1260 to address the ability of a state to expand the definition of ''adverse benefit determination'' to include denials of optional benefits that the state may adopt for its CHIP. We are finalizing § 457.1260(a)(2) as proposed.

Comment: One commenter requested that states be able to adopt the Medicaid state fair hearing process for CHIP and receive FFP for using the Medicaid state hearing process.

Response: States are already permitted to use the Medicaid fair hearing process for CHIP pursuant to § 457.1120. Section 457.1120(a) provides that a state must have one of two review processes: (1) A process that meets the requirements of §§ 457.1130 through 457.1180, which set forth specific standards about the matters subject to review, core elements of the review process, impartiality, time frames, continuation of enrollment, and notices; or (2) a process that complies with State review requirements currently in effect for all health insurance issuers (as defined in section 2791 of the Public Health Service Act) in the State. The Medicaid state fair hearing process is compliant with the standards outlined in §§ 457.1130 through 457.1180 (66 FR 2635–2640). Many states already use the Medicaid fair hearing process for this purpose.

The proposed clarifying amendments to § 457.1260 to remove references to the Medicaid state fair hearing process would not eliminate states' option to utilize the Medicaid state fair hearing process to satisfy the CHIP requirements in § 457.1120(a)(1). The proposed revisions, which we are finalizing with modifications in this final rule, simply clarify how the appeals and grievances process under part 438, subpart F relate to the state CHIP review requirements in § 457.1120.

Comment: One commenter requested clarification regarding the applicable timelines for adverse benefit notifications for CHIP in proposed § 457.1260(c). The commenter suggested that we had proposed conflicting requirements in proposed § 457.1260(c)(3) and proposed § 457.1260(c)(1), which cross-references § 438.404(c)(3). Further, the commenter suggested that § 438.404(c)(3) addressed the timing of appeals and grievances but not the timing of notices for denials and limitations of services.

Response: We agree with the commenter that the timelines as proposed were confusing. The CHIP standard in § 457.1180 simply requires that states provide enrollees and applicants of ''timely written notice'' of any adverse determination. Rather than aligning the standard for CHIP plans to provide notice to enrollees with the standards for Medicaid plans, we agree that alignment with the timeliness standards for states to notify CHIP beneficiaries of other adverse benefit determinations is appropriate. Therefore, in the final rule we state in § 457.1260(c)(3) that CHIP plans must provide the enrollee with timely written notice of adverse benefit determinations, which is consistent with the timeliness standard in 457.1180, except for expedited service authorization decisions. This makes the timeframes for notice consistent across §§ 457.1260 and 457.1180. CHIP does not address expedited service authorization decisions in § 457.1180. Therefore, for these types of decisions, we are finalizing at § 457.1260(c)(3) the use of the Medicaid notice timing requirement in § 438.404(c)(6) (which cross references § 438.210(d)(2)).

Comment: Several commenters sought clarification on the continued inclusion (in § 457.1260) of references to continuation of benefits despite the fact that CHIP beneficiaries are not entitled to continued benefits pending appeal. One commenter specifically suggested that we remove the reference to § 438.404(b)(6) in proposed § 457.1260(c)(1) and the proposed language at § 457.1260(e)(4)(ii) and (iii) because each of these relate to the continuation of benefits during an appeal even though CHIP does not adopt the Medicaid continuation of benefits requirements in § 438.420. In addition, several commenters suggested that we include the right to continue to receive benefits pending an appeal in § 438.420 and the related requirement for payment for reversed adverse benefit determinations when benefits were provided pending appeal § 438.424(b) because preservation of enrollee health and due process require that enrollees retain access to services during the resolution of any dispute regarding their entitlement to them. Alternatively, several commenters suggested that CMS at least permit states to continue benefits while pending appeal and require states to notify enrollees of this option.

Response: First, we thank commenters for pointing out where our proposed regulation text for § 457.1260 included cross-references to requirements from part 438 that are relevant to the aid pending appeal policy. As there is no continuation of benefits/aid pending appeal requirement in CHIP, we are not

finalizing any of the related references in § 457.1260.

Second, we are not finalizing references to any right or policy regarding the continuation of benefits pending appeal in § 457.1260(c)(2) or (3), (e)(4)(ii) and (iii), or (i). As we have previously explained (83 FR 57284), the right to benefits pending the outcome of a CHIP review does not derive from section 1932(b)(4) of the Act, but from the constitutional due process protections afforded to beneficiaries of an entitlement program under *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) and its progeny, including provision of benefits to beneficiaries who are being terminated from or denied coverage pending appeal. Unlike Medicaid, CHIP is not an entitlement program and therefore the right to benefits pending appeal is not available to CHIP beneficiaries. Therefore, in summary, to address these clarifications and respond to these comments, we are:

- Finalizing § 457.1260(c)(2) and (3), with revisions;
- Not finalizing § 457.1260(e)(4)(ii) and (iii); and
- Finalizing § 457.1260(i) with revisions to eliminate references to aid pending appeal.

Comment: One commenter suggested that the language proposed at § 457.1260(e)(3) and (6) was duplicative, as both deemed exhaustion of the plan's appeal process and permitted an enrollee to seek State external review in accordance with part 457, subpart K, if an MCO, PIHP or PAHP failed to comply with the notice and timing requirements for an adverse decision outlined in § 457.1260.

Response: We agree, and therefore, are not finalizing the regulation text at proposed § 457.1260(e)(6). We are finalizing the deemed exhaustion provision at § 457.1260(e)(3) and including there a statement that the enrollee may initiate a state external review in accordance with part 457, subpart K, in such cases. We also note an additional duplication of this deemed exhaustion requirement in the proposed language at § 457.1260(b)(3) so we are not finalizing that duplicative provision either. Proposed § 457.1260(b)(4) is redesignated as paragraph (b)(3) in the final rule.

Comment: Several commenters stated that they appreciated Medicaid aligning in § 438.408(f)(2) the timeframes for enrollees to request a state fair hearing across the managed care and fee for service delivery systems by giving states the flexibility to choose a time period between 90 and 120 days. The CHIP proposal at § 457.1260(e)(6) maintained the requirement that enrollees have 120 days to request a state review, which is out of alignment with Medicaid.

Response: We agree that timeframes should be aligned across delivery systems and programs and appreciate commenters bringing to our attention our inadvertent failure to align the timeframe in proposed § 457.1260(e)(7) with the revisions for Medicaid in proposed § 438.408(f)(2). We are modifying the regulation text in proposed § 457.1260(e)(7), redesignated as paragraph (e)(5), to achieve the intended alignment. Under § 457.1260(e)(5) of the final rule, states have the same flexibility they have in Medicaid to provide enrollees with between 90 and 120 calendar days to request a state external review of a plan's adverse benefit determination.

Comment: One commenter questioned why CHIP MCOs have to comply with § 438.408(f)(3) (proposed at § 457.1260(e)(1)) when there is no state fair hearing requirement for CHIP.

Response: Although we proposed that the substance of the Medicaid regulations at § 438.408(f)(3) (regarding the parties to be included in a fair hearing) apply to CHIP, we agree that the proposed application of all of § 438.408(f)(3) to CHIP was an error, because § 438.408(f)(3) is explicitly about the parties to be at the State fair hearing. CHIP has separate regulations, found in subpart K of part 457 of the regulations, governing the review process for CHIP beneficiaries. Therefore, we are not finalizing at § 457.1260(e)(1) the proposal that CHIP managed care entities comply with § 438.408(f)(3)).

After consideration of the public comments and for the reasons outlined in the proposed rule and our responses to comments, we are finalizing, with several modifications, the regulation text proposed at § 457.1260 regarding the appeal and grievance systems. A summary of the changes is as follows:

- Throughout § 457.1260, we are finalizing parenthetical text to identify the scope and nature of the requirements from part 438 that we are incorporating to apply to CHIP MCOs, PIHPs, and PAHPs. In addition, we have corrected cross-references throughout § 457.1260 as needed to refer to the sections within § 457.1260 in lieu of the Medicaid cross-references.
- *Statutory basis and definitions.* We are finalizing § 457.1260(a)(1) and (2) as proposed. Paragraph (a)(1) identifies the applicable statutory provisions regarding CHIP managed care entities having an appeals and grievance system. Paragraph (a)(2) incorporates the definitions of the following terms from § 438.400(b): ''adverse benefit determination,'' except for paragraph (6); ''appeal,'' ''grievance,'' and ''grievance and appeal system.''
- *General requirements.* We are finalizing as proposed § 457.1260(b)(1). We are finalizing paragraph (b)(2) with a minor modification to cite to § 457.1260(e) instead of § 438.408. We are not finalizing the proposal at § 457.1260(b)(3) because it is duplicative of what we are finalizing at paragraph (e)(3). We are finalizing what was proposed at paragraph (b)(4) as § 457.1260(b)(3) regarding the ability of a provider or authorized representative to file a grievance, request an appeal, or request state external review for an enrollee.
- *Notice of Adverse Benefit Determination.* We are finalizing § 457.1260(c) to address the content and timing requirements for notices of adverse benefit determinations, with substantial revisions to the timeframes for these notices. We are finalizing § 457.1260(c)(1) to require that the state ensure that its CHIP managed care entities comply with the provisions at § 438.404(a) and (b)(1), (2), and (5) regarding the content of the notice of an adverse benefit determination. We are also finalizing additional content requirements for these notices in paragraph (c)(2). Taken together, § 457.1260(c)(1) and (2) mean that the following information must be provided to an enrollee as part of a notice of adverse benefit determinations:

++ The adverse benefit determination the MCO, PIHP, or PAHP has made or intends to make.

++ The reasons for the adverse benefit determination, including the right of the enrollee to be provided upon request and free of charge, reasonable access to and copies of all documents, records, and other information relevant to the enrollee's adverse benefit determination. Such information includes medical necessity criteria, and any processes, strategies, or evidentiary standards used in setting coverage limits.

++ The circumstances under which an appeal process can be expedited and how to request it.

++ The enrollee's right to request an appeal of the MCO's, PIHP's, or PAHP's adverse benefit determination, including information on exhausting the MCO's, PIHP's, or PAHP's one level of appeal and the right to request a State external review in accordance with the terms of subpart K of part 457;

++ The procedures for the enrollee to exercise his or her rights to an appeal.

We are finalizing provisions regarding the timing of the notice at § 457.1260(c)(3). As explained in our

response to comments about the timing of notices of adverse benefit determinations, CHIP managed care entities will have to comply with a standard that notices be ''timely,'' consistent with the requirement in § 457.1180, rather than within a specific timeframe for notices of adverse benefit determination, except in cases of expedited service authorizations. In the circumstances of expedited service authorization decisions, the terms of § 438.404(c)(6) (incorporating § 438.210(d)(2) by cross reference) apply. Section 438.210(d)(2) sets out timeframes for expedited authorization determinations.

• *Handling of grievances and appeals.* We are finalizing § 457.1260(d) as proposed, to require states to ensure that CHIP managed care entities comply with the provisions at § 438.406 with regard to the handling of grievances and appeals.

• *Resolution and notification.* We are finalizing § 457.1260(e) with revisions.

++ In paragraph (e)(1), we are finalizing as proposed the requirement that states ensure CHIP managed care entities comply with the provisions at § 438.408(b) (relating to the timeframe for resolution of grievances and appeals), (c)(1) and (2) (relating to the extension of timeframes for resolution of grievances and appeals), (d) (relating to the format of the notice of resolution for grievances and appeals), and (e)(1) (relating to the content of the notice of resolution for grievances and appeals). However, we are not finalizing the proposal to require compliance with § 438.408(f)(3) because the parties to an appeal in the CHIP managed care contexts are set forth at part 457, subpart K.

++ We are finalizing paragraph (e)(2) as proposed with a clarification that the state-established timeframes for resolution of each grievance and appeal must not exceed the timeframes identified in paragraph (e)(1) of § 457.1260, which incorporates the timeframes in § 438.408(b) and (c)(1) and (2).

++ We are finalizing § 457.1260(e)(3) with additional text specifying that an enrollee may seek state external review in accordance with part 457, subpart K, after the plan's appeal process is exhausted.

++ We are finalizing paragraph (e)(4) regarding the content of the notice of appeal resolution with only the proposal that such notice include the enrollee's right to seek state external review in accordance with the terms of part 457, subpart K, and how to do so. We are not finalizing the proposal to require that the notice include the right to request and receive benefits while the review is pending and that the enrollee may be held liable for the costs of those benefits if the adverse benefit determination was upheld.

++ We are finalizing paragraph (e)(5) with modifications. We are finalizing as proposed in paragraph (e)(5) that an enrollee may request a state external review only upon exhausting the CHIP managed care entity's appeal process. We are adding to paragraph (e)(5) the timeframe for requesting a state external review, which was proposed in paragraph (e)(7).

++ We are modifying that proposal to align with § 438.408(f)(2), by requiring that enrollees must have no less than 90 days and no more than 120 days after the plan's date of resolution to request a review.

6. Sanctions (§ 457.1270)

In the 2016 final rule, CHIP adopted, at § 457.1270, the Medicaid requirements related to sanctions in the managed care context in part 438, subpart I. We inadvertently did not include a provision in § 457.1270 that states may choose to establish sanctions for PCCMs and PCCM entities as specified in § 438.700(a). In addition, we did not indicate that references in § 438.706(a)(1) and (b) should be read to refer to the requirements of subpart L of part 457, rather than references to sections 1903(m) and 1932 of the Act. We proposed to revise the language of § 457.1270 to reflect these technical changes.

The following is a summary of the public comments we received on our proposals to amend § 457.1270.

Comment: A few commenters supported the clarifications and technical corrections to the regulatory sanctions applicable in § 457.1270.

Response: We are finalizing the amendments to § 438.1270.

After consideration of the public comments and for the reasons outlined in the proposed rule and our responses to comments, we are finalizing the amendments to § 457.1270 as proposed with slight modification. We are adding parentheticals in the regulation text to help readers understand what general subject is addressed in the Medicaid cross-references in § 457.1270(b) and (c).

7. Program Integrity Safeguards (§ 457.1285)

Section 457.1285 sets forth the CHIP requirements for program integrity safeguards for managed care entities by adopting the Medicaid requirements in subpart H of part 438, except for the terms of § 438.604(a)(2), by cross-reference. These cross-referenced standards include, among other things, requirements related to provider enrollment, auditing, implementation and maintenance of arrangements or procedures that are designed to detect and prevent fraud, waste, and abuse. In the 2016 final rule, we inadvertently failed to exclude from our cross-reference to the Medicaid managed care program integrity provisions a regulation that should not apply to CHIP. Specifically, CHIP does not adopt the Medicaid actuarial soundness requirements, therefore, states do not need to use the specified plan information collected in § 438.608(d)(1) and (3) for setting actuarially sound capitation rates as required in Medicaid; we proposed to modify the language of § 457.1285 to reflect this technical correction.

The following is a summary of the public comments we received on our proposal to amend § 457.1285.

Comment: A few commenters supported the proposed clarifications and technical corrections to program integrity safeguards.

Response: We thank commenters for their support.

Comment: One commenter noted that the proposed regulatory text at § 457.1285 included a typographical error in failing to include a reference to § 438.608(d)(4) as proposed. The rule text states, ''except that the terms of § 438.604(a)(2) and (d)(4) of this chapter do not apply;'' however, the text should read ''except that the terms of §§ 438.604(a)(2) and 438.608(d)(4) of this chapter do not apply.''

Response: Section 438.608(d)(4) is the correct cross-reference as we explained in the preamble of the 2018 proposed rule, and we make that correction in the final rule.

Comment: One commenter requested that CHIP adopt the Medicaid state monitoring requirements in § 438.66.

Response: This comment is outside the scope of this rule. We did not propose to incorporate § 438.66 into the CHIP regulations and therefore cannot do so in the final rule as such a substantive change in the responsibilities of a state with regard to its CHIP and the managed care entities with which the state contracts should be subject to public notice and comment. We also refer the commenter to § 457.204, which authorizes CMS compliance actions when a state fails to comply with its oversight responsibilities under these regulations for a managed care contract.

After consideration of the public comments and for the reasons outlined in the proposed rule and our responses to comments, we are finalizing the

regulation text at § 457.1285 as proposed with one modification. We are modifying the regulatory text at § 457.1285 to exclude §§ 438.604(a)(2) and 438.608(d)(4), rather than § 438.604(a)(2) and (d)(4), from being applied in CHIP.

8. CHIP Conforming Changes To Reflect Medicaid Managed Care Proposals

In the 2016 final rule, CHIP adopted many of the Medicaid regulations via cross-reference. We proposed to revise some of these Medicaid regulations. The cross-references to these revised regulations are unchanged in this final rule. We explained in the proposed rule that the changes made to the following Medicaid regulations in this final rule would also apply, by existing cross-reference, to CHIP. We welcomed comments on the proposed changes specifically as they apply to CHIP:

- *MLR standards (§ 438.8(k)):* As discussed in section I.B.6. of this final rule, we proposed revisions to § 438.8(k)(1)(iii) and (e)(4). Section 438.8(k) is incorporated into the CHIP regulations in § 457.1203(e) and (f).
- *Information requirements (§ 438.10):* As discussed in section I.B.8 of this final rule, we proposed several revisions to § 438.10. Section 438.10 is incorporated into the CHIP regulations at §§ 457.1206(b)(2) (via cross-reference to § 457.1207), 457.1207, and 457.1210(c)(5) (via cross-reference to § 457.1207).
- *Disenrollment: Requirements and limitations (§ 438.56):* As discussed in section I.B.9. of this final rule, we proposed revisions to § 438.56(d)(5) by deleting ''PCCMs or PCCM entities.'' Section 438.56 is adopted in CHIP at § 457.1212.
- *Network adequacy standards (§ 438.68):* As discussed in section I.B.10. of this final rule, we proposed revisions to the provider-specific network adequacy standards in § 438.68(b). The Medicaid network adequacy standards are applied to CHIP per § 457.1218.
- *Practice guideline (§ 438.236):* As discussed in the preamble at section I.B.11. of this final rule, we proposed revisions to § 438.236(b)(3) by deleting contracting health care professionals and replacing it with network providers. Section 438.236 is incorporated into the CHIP regulations at § 457.1233(c).
- *Health information systems (§ 438.242):* As discussed in section I.B.12. of this final rule, we proposed revisions to the health information systems requirements in § 438.242. Section 438.242 is adopted in CHIP at § 457.1233(d).
- *Medicaid managed care QRS (§ 438.334):* As discussed in the section I.B.13. of this final rule, we proposed revisions to § 438.334(b), (c)(1) introductory text, and (c)(1)(ii), redesignating current paragraphs (c)(1)(i) and (ii) as paragraphs (c)(1)(ii) and (iii), respectively, and adding new paragraph (c)(1)(i). We also proposed revisions to redesignated paragraph (c)(1)(ii) and adding new paragraph (c)(4). Section 438.334 is adopted in CHIP at § 457.1240(d).
- *Managed care state quality strategy (§ 438.340):* As discussed in the preamble at section I.B.14. of this final rule, we proposed revisions to § 438.340(b)(2), (b)(3)(i), (b)(6), and (c)(1)(ii). We also proposed removing § 438.340(b)(8), and redesignating paragraphs (b)(9), (10), and (11) as paragraphs (b)(8), (9), and (10), respectively. Section 438.340 is incorporated into the CHIP regulations at § 457.1240(e).
- *Activities related to EQR (§ 438.358):* As discussed in section I.B.15. of this final rule, we proposed revisions to § 438.358(b)(1)(iii). Section 438.358 is incorporated into the CHIP regulations at § 457.1250(a).
- *EQR Results (§ 438.364(d)):* As discussed in section I.B.17 of this final rule, we proposed revisions to § 438.364(d). Section 438.364 is incorporated into CHIP regulations at § 457.1250(a).
- *Statutory basis, definitions, and applicability (§ 438.400):* As discussed in section I.B.18. of this final rule, we proposed revisions to § 438.400(b)(3). Section 438.400 is incorporated into the CHIP regulations at § 457.1260.
- *General requirements (§§ 438.402 and 438.406):* As discussed in section I.B.19. of this final rule, we proposed revisions to §§ 438.402(c)(3)(ii) and 438.406(b)(3). Sections 438.402 and 438.406 are incorporated in CHIP in § 457.1260.

The following is a summary of the public comments we received on our proposal to CHIP conforming changes to reflect Medicaid managed care proposals.

Comment: We received several comments supporting CHIP's proposals to align with the Medicaid requirements where appropriate.

Response: We thank commenters for their support.

Comment: We received several comments that did not include specific comments on the CHIP proposal to incorporate these Medicaid proposals but referred us to their comments on the Medicaid proposals.

Response: Because CHIP proposed to adopt, by cross-reference, the proposed changes to §§ 438.8(k), 438.10, 438.56, 438.68, 438.236, 438.242, 438.334, 438.340, 438.358, 438.364(d), 438.400, 438.402, and 438.406, we direct commenters to the responses to their comments on the Medicaid proposals adopted by CHIP.

Comment: Several commenters disagreed with the proposal revisions in § 438.68(b), adopted by cross-reference to CHIP through § 457.1218, to eliminate the requirement for states to establish time and distance standards for the list of specified provider types and to eliminate the requirement for standards to be developed for ''additional provider types'' identified by CMS. Alternatively, these commenters requested that CMS establish specific minimum quantitative standards for the specified provider types, including for pediatricians, pediatric specialists, and pediatric dentists, and to also identify additional types of pediatric provider types to be included in network adequacy standards, including pediatric medical subspecialties, providers at FQHCs and pediatric dental specialties.

Response: We refer commenters to section I.B.10 of the preamble and the responses provided therein to address comments received for these proposed revisions to § 438.68. As we stated there, we believe removing the requirement for states to establish time and distance standards for specified providers and removing authority for CMS to add additional provider types will enable states to recognize and react more quickly to local needs and developing trends in care. The list of providers for which states must develop quantitative network adequacy standards includes pediatric primary care, pediatric specialists, pediatric behavioral health, and pediatric dental. We believe this list provides the appropriate balance between assuring that states maintain appropriate networks for the child population, and providing flexibility to states to react to the specific needs of their population and provider landscape in their state. States already have the authority to add additional provider types to their network adequacy standards to meet the needs of their CHIP programs and enrollees.

Comment: One commenter expressed concern with CMS retaining the general requirement for actuarial soundness in CHIP rates at § 457.1203. The commenter stated that CMS should apply the Medicaid actuarial soundness requirements to CHIP and reconsider its position.

Response: We agree that states must develop payment rates for MCOs, PIHPs, and PAHPs for CHIP using actuarially sound principles, as required under

§ 457.1203(a) of the 2016 final rule. However, as we stated in the 2016 final rule, Title XXI does not provide the same specificity about rate development standards as Title XIX, and while we agree that we have authority under section 2101 of the Act to establish additional standards, we have determined it would not be appropriate to impose all of the Medicaid rate-setting standards on separate CHIPs at this time, including those cited by commenters. Under § 457.1201 of the 2016 final rule, states are required to include payment rates in their managed care contracts submitted to CMS upon request of the Secretary. As we stated in the 2016 final rule, as we continue to gain additional experience with rate setting in CHIP, we may consider developing additional standards for CHIP in the future.

After consideration of the public comments, we are finalizing application to CHIP of the changes to the Medicaid managed care requirements in §§ 438.8(k), 438.10, 438.56, 438.68, 438.236, 438.242, 438.334, 438.340, 438.358, 438.364(d), 438.400, 438.402, and 438.406 as finalized in this final rule.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. For the purpose of the PRA and this section of the preamble, ''collection of information'' is defined under 5 CFR 1320.3 of the PRA's implementing regulations. To fairly evaluate whether a collection of information should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In our November 14, 2018 (83 FR 57264) proposed rule, we solicited public comment on each of the aforementioned issues for the following sections of the rule that contained information collection requirements (ICRs).

We did not receive any PRA-related public comments and are finalizing all provisions as proposed.

A. Wage Estimates

To derive average costs, we used data from the U.S. Bureau of Labor Statistics' May 2018 National Occupational Employment and Wage Estimates for all salary estimates (*http://www.bls.gov/oes/current/oes_nat.htm*). Table 1 presents the mean hourly wage, the cost of fringe benefits and overhead (calculated at 100 percent of salary), and the adjusted hourly wage.

TABLE 1—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

Occupation title	Occupation code	Mean hourly wage ($/hr)	Fringe benefits and overhead ($/hr)	Adjusted hourly wage ($/hr)
Business Operations Specialist	13–1000	35.52	35.52	71.04
Computer Programmer	15–1131	43.07	43.07	86.14
Actuary	15–2011	55.89	55.89	111.78
Office and Administrative Support Worker	43–9000	17.28	17.28	34.56

As indicated, we are adjusting our employee hourly wage estimates by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer, and because methods of estimating these costs vary widely from study to study. Nonetheless, we believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

B. Information Collection Requirements (ICRs)

To estimate the burden for the requirements in part 438, we utilized state submitted data for enrollment in managed care plans for CY 2017. The enrollment data reflected 55,601,033 enrollees in MCOs, 17,702,565 enrollees in PIHPs or PAHPs, and 5,462,769 enrollees in PCCMs, for a total of 80,242,585 managed care enrollees. This includes duplicative counts when enrollees are enrolled in multiple managed care plans concurrently. This data also showed 42 states that contract with 519 MCOs, 14 states that contract with 134 PIHPs or PAHPs, 16 states that contract with 21 non-emergency transportation PAHPs, 16 states with 26 PCCM or PCCM entities, and 20 states that contract with one or more managed care plans for managed LTSS).

To estimate the burden for these requirements in part 457, we utilized state submitted data for enrollment in managed care plans for CY 2016. The enrollment data reflected 9,013,687 managed care enrollees. This data also showed that 32 states use managed care entities for CHIP enrollment.

1. ICRs Regarding Standard Contract Requirements (§ 438.3(t))

The following requirements and burden will be submitted to OMB for approval under control number 0938–0920 (CMS–10108). Subject to renewal, it was last approved on December 16, 2016, and remains active.

Amendments to § 438.3(t) will permit states to choose between requiring their MCOs, PIHPs, and PAHPs to sign a COBA with Medicare, or requiring an alternative method for ensuring that each MCO, PIHP, and PAHP receives all appropriate crossover claims. If the state elects to use an alternative methodology the methodology must ensure that the submitting provider is promptly informed on the state's remittance advice that the claim has been sent to the MCO, PIHP, or PAHP for payment consideration. We estimate it will take 1 hour at $86.14/hr for a computer programmer to implement the message on the remittance advice. Given that 23 of the 33 states with duals in managed care have already required their plans to obtain COBAs, we estimate that half of the remaining states (5 states) will elect to pursue an alternative method. In aggregate, we estimate a one-time burden of 5 hours (5 states × 1 hr at a cost of $430.70 (5 hr × $86.14/hr)). Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 1.33 hours (5 hr/3 years) at a cost of $143.57 ($430.70/3 years). We are annualizing the one-time burden

estimate since we do not anticipate any additional burden after the 3-year approval period expires.

Additionally, for the 5 states that elect to require an alternative method, the amendments to § 438.3(t) will alleviate the 25 managed care plans that are operating within those states of the one-time requirement to obtain a COBA. In aggregate, we estimate a one time savings of −100 hr (25 plans × −4 hr for a business operations specialist) and −$7,104 (100 hr × $71.04/hr). As this will be a one-time savings, we annualize this amount to –33.33 hr (100 hr/3 years) and −$2,368 (−$7,104/3 years).

For the 5 states that elect to require that their plans obtain a COBA, in aggregate we estimate a one-time burden of 100 hrs (25 plans × 4 hr for a business operations specialist) at a cost of $7,104 (100 hrs × $71.04/hr specialist). As this will be a one-time burden, we annualize this amount to 33.33 hr (100 hr/3 years) and $2,368 ($7,104/3 years). We are annualizing the one-time burden estimate since we do not anticipate any additional burden after the 3-year approval period expires.

2. ICRs Regarding Special Contract Provisions Related to Payment (§ 438.6(c))

The following requirements and burden will be submitted to OMB for approval under control number 0938–1148 (CMS–10398 #52). Subject to renewal, it was last approved on March 1, 2018, and remains active.

Amendments to § 438.6(c) will remove the requirement for states to obtain prior approval for directed payment arrangements that utilize state plan approved rates. To obtain prior approval, states submit a preprint to CMS. Based on our experience, we estimate that 20 states may elect annually to request approval for 40 directed payments that utilize a state approved FFS fee schedule. By eliminating the requirement that states submit a preprint for each arrangement, we estimate that a state would save 1 hour at $71.04/hr for a business operations specialist per directed payment arrangement. In aggregate, we estimate an annual savings of −40 hours (20 states × −2 preprints/year × 1 hr per preprint) and −$2,842 (−40 hr × $71.04/hr).

3. ICRs Regarding Rate Certification Submission (§ 438.7(c)(3))

Amendments to § 438.7(c)(3) will permit CMS to require states to submit documentation attesting that +/− 1.5% modifications to a capitation rate comply with specified regulatory requirements. We estimate that CMS will require documentation from no more than 3 states annually and that it will take a state's actuary 1 hour to prepare the documentation. For the 3 states that may be required to submit documentation, in aggregate we estimate an annual burden of 3 hrs (3 plans × 1 hr for an actuary) at a cost of $335.34 (3 hrs × $111.78/hr specialist).

4. ICRs Regarding Information Requirements (§ 438.10(d)(2) and (3))

Amendments to § 438.10(d)(2) and (d)(3) will no longer require states or plans to add taglines in prevalent languages to all written materials, nor to use 18-point font size. Instead, states and plans will have the ability to include taglines only on materials critical to obtaining services and could select any font size they deem to be conspicuously visible. While we have no data indicating how many states experienced increased document length or an increase in postage costs as a result of these requirements, we believe that this provision will likely reduce paper, toner, and postage costs for some states and managed care plans. Assuming that this change saves one sheet of paper (average price $25 per 5000 sheet carton or $0.005 per sheet), toner (average price $125 for 25,000 pages or $0.005 per sheet), and postage ($0.38 bulk postage per ounce) per enrollee, we estimate a savings of −$2,542,513 ([−$0.005 per sheet of paper × 74,779,816 enrollees or sheets of paper] + [−$0.005 toner per sheet of paper × 74,779,816 enrollees or sheets of paper] + [−$.024 ($0.38/bulk postage × 0.16 oz per sheet of paper) × 74,779,816 enrollees or sheets of paper]). The estimates are based on commonly available prices for bulk paper, toner, and bulk postage rate. We estimate the −$2,542,513 will be shared equally between the states and managed care plans given that they each provide written materials to enrollees and potential enrollees.

5. ICRs Regarding Information Requirements § 438.10(h)(3)(i)(B)

Amendments to § 438.10(h)(3) will permit states that elect to offer a mobile enabled provider directory to update the hardcopy provider directory quarterly instead of monthly. We are unable to estimate with any accuracy the cost of creating a mobile enabled provider directory; however, we assume it is substantially more than the savings that may be recognized from reducing the frequency of updating the directory since many of the data elements that are in the directory must be maintained accurately for other purposes, such as claims payment. We are not estimating a burden for this provision at this time.

6. ICRs Regarding Network Adequacy Standards (§ 438.68(a))

The following requirements and burden will be submitted to OMB for approval under control number 0938–0920 (CMS–10108). Subject to renewal, it was last approved on December 16, 2016, and remains active.

Amendments to § 438.68(a) will eliminate a requirement that states develop time and distance standards for provider types set forth in § 438.68(b)(1) and for LTSS providers if covered in the MCO, PIHP, or PAHP contract. The provision replaces the requirement to adopt time and distance standards with a requirement to adopt a quantitative standard to evaluate network adequacy. We estimated in the May 6, 2016 final rule (81 FR 27777) a burden of $12,892 (20 states × 10 hrs at $64.46/hr for a business operations specialist) during the first year of developing the time and distance network adequacy standards for the provider types specified in § 438.68(b)(1). We further estimated a one-time state burden of $10,313.60 (16 states × 10 additional hours at $64.46/hr for a business operations specialist) to develop LTSS standards (81 FR 27777). In each case we did not estimate additional burden for states after the first year.

Since time and distance is one of many quantitative network adequacy standards, for states that used time and distance prior to the 2016 final rule or for those that have adopted time and distance to comply with the 2016 final rule, discontinuing the use of time and distance is merely an option that they may elect if they believe another measure better reflects the needs of their program. Additionally, as clarified in the 2016 final rule (81 FR 27661), states have always had the ability to have network adequacy standards in addition to time and distance if they choose. We believe the change increases flexibility for states without affecting burden on states since it does not require states to take any action.

7. ICRs Regarding Grievance and Appeal System: General Requirements (§§ 438.402(c)(3)(ii) and 438.406(b)(3)).

The following requirements and burden will be submitted to OMB for approval under control number 0938–0920 (CMS–10108). Subject to renewal, it was last approved on December 16, 2016, and remains active.

Amendments to §§ 438.402(c)(3)(ii) and 438.406(b)(3) will no longer require enrollees to follow up an oral appeal with a written appeal. This change will

alleviate the burden on plans to follow up with enrollees that do not submit the written appeal. We estimate it will take up to 2 hours at $34.56/hr for an Office and Administrative Support Worker to call or send letters to enrollees in an effort to receive the written appeal. We estimate that 300 plans in 20 states have an average of 200 oral appeals that are not followed up with a written appeal. In aggregate, we estimate an annual private sector savings of −120,000 hours (300 plans × 200 appeals × 2 hr) and −$4,147,200 (−120,000 hr × $34.56/hr).

8. ICRs Regarding Information Requirements (§ 457.1207)

The following requirements and burden will be submitted to OMB for approval under control number 0938–0920 (CMS–10108). Subject to renewal, it was last approved on December 16, 2016, and remains active.

Section 438.10(d)(2) and (3) are adopted by cross-reference in the CHIP regulations at § 457.1207. As discussed in section II.B.2 of this final rule, amendments to § 438.10(d)(2) and (3) will remove requirements for states or plans to add taglines in prevalent languages to all written materials, nor to use 18-point font size. Instead, states and plans will have the ability to include taglines only on materials critical to obtaining services and could select any font size they deem to be conspicuously visible. While we have no data indicating how many states experienced increased document length and an increase in postage costs as a result of these requirements, we believe that the provision will likely reduce paper, toner, and postage costs for some states. Assuming that, the change saves one sheet of paper (average price $25 per 5,000 sheet carton or $0.005 per sheet), toner (average price $125 per 25,000 pages or $0.005 per sheet), and postage ($0.38 bulk purchase per ounce) per enrollee, we estimate a savings of −$1,983,013.15 [$.005 per sheet of paper × 9,013,687 sheets of paper] + $.005 toner per sheet of paper × 9,013,687 sheets of paper] + (−$1,892,874.27= [$0.21/oz bulk postage × 9,013,687 sheets of paper]). The estimates are based on commonly available prices for bulk paper and toner.

9. ICRs for Grievance and Appeal System: Definitions (§ 457.1260)

The following requirements and burden will be submitted to OMB for approval under control number 0938–0920 (CMS–10108). Subject to renewal, it was last approved on December 16, 2016, and remains active.

Section 438.400(b) is adopted by cross-reference in the CHIP regulations at § 457.1260. As discussed in this final rule, the amendments to § 438.400(b) will revise the definition of an ''adverse benefit determination'' to exclude claims that do not meet the definition of ''clean claim'' at § 447.45(b), thus eliminating the requirement for the plan to send an adverse benefit notice. While we have no data on the number of adverse benefit notices are sent due to denials of unclean claims, we believe that at least one unclean claim may be generated for half of all enrollees; thus, this provision could reduce paper, toner, and postage costs for some states. Assuming that the change saves one sheet of paper (average price $25 per 5,000 sheet carton or $0.005 per sheet), toner (average price $125 for 25,000 pages or $0.005 per sheet), and postage ($0.38 bulk postage per ounce) per enrollee, we estimate a savings of −$1,757,669.16 [$.005 per sheet of paper × −4,506,844 adverse benefit notices] + [$.005 toner × −4,506,844 adverse benefit notices] + [$0.38/oz bulk postage × −4,506,844 adverse benefit notices]. The estimates are based on commonly available prices for bulk paper and toner purchases and bulk postage rates.

C. Summary of Added Burden and Burden Reduction Estimates

Tables 2 and 3 set out our annual burden and burden reduction estimates.

TABLE 2—SUMMARY OF ANNUAL PRA-RELATED REQUIREMENTS AND BURDEN UNDER PART 438

CFR section	Number of respondents	Number of responses	Burden per response (hours)	Total annual hours	Labor rate $/hr	Cost per response ($)	Total cost ($)	Frequency	Annualized hours	Annualized costs ($)
§ 438.3(t)	5	5	1	5	86.14	86.14	430	Once	0.333	143
§ 438.3(t)	5	25	−4	−100	71.04	−284	−7,104	Once	−33.333	−2,368
§ 438.3(t)	5	25	4	100	71.04	284	7,104	Once	33.333	2,368
§ 438.6(c)	20	2	−1	−40	71.04	−71.04	−2,842	Annual	−40	−2,841
§ 438.7(c)(3)	3	3	1	3	111.78	111.78	335.34	Annual	3	335.34
§ 438.10(d)(2) and (3)	42	74,779,816	n/a	n/a	n/a	−0.005	−373,899.08	Annual	n/a	−373,899.08
§ 438.10(d)(2) and (3)	42	74,779,816	n/a	n/a	n/a	−0.005	−373,899.08	Annual	n/a	−373,899.08
§ 438.10(d)(2) and (3)	42	74,779,816	n/a	n/a	n/a	−0.024	−1,794,715.58	Annual	n/a	−1,794,715.58
§ 438.10(h)										
§ 438.402(c)(3)(i)	300	60,000	−2	−120,000	34.56	−69.12	−4,147,200	Annual	−120,000	−4,147,200
Total	342	74,779,818	varies	−120,032	varies	varies	−6,691,789	n/a	−120,040	−6,692,746

TABLE 3—SUMMARY OF ANNUAL PRA-RELATED REQUIREMENTS AND BURDEN UNDER PART 457

CFR section	Number of respondents	Number of responses	Burden per response (hours)	Total annual hours	Labor rate $/hr	Cost per response ($)	Total cost ($)	Frequency	Annualized hours	Annualized costs ($)
§ 457.1207	32	9,013,687	n/a	n/a	n/a	$0.005	−$45,068.44	Annual	n/a	−$45,068.44
§ 457.1207	32	9,013,687	n/a	n/a	n/a	0.005	−45,068.44	Annual	n/a	−45,068.44
§ 457.1207	32	9,013,687	n/a	n/a	n/a	0.21	−1,892,874.27	Annual	n/a	−1,892,874.27
§ 457.1260	32	4,506,844	n/a	n/a	n/a	0.005	−22,534.22	Annual	n/a	−22,534.22
§ 457.1260	32	4,506,844	n/a	n/a	n/a	0.005	−22,534.22	Annual	n/a	−22,534.22
§ 457.1260	32	4,506,844	n/a	n/a	n/a	0.38	−1,712,600.72	Annual	n/a	−1,712,600.72
Total	192	40,561,593	n/a	n/a	n/a	0.61	−3,740,680.31	Annual	n/a	−3,740,680.31

IV. Regulatory Impact Analysis

A. Statement of Need

As described in detail in section I.B. of this final rule, many of the revisions to part 438 outlined in this final rule are part of the agency's broader efforts to reduce administrative burden and to achieve a better balance between appropriate Federal oversight and state flexibility, while also maintaining critical beneficiary protections, ensuring fiscal integrity, and improving the quality of care for Medicaid beneficiaries. This final rule streamlines the managed care regulations by reducing unnecessary and duplicative administrative burden and further reducing Federal regulatory barriers to help ensure that state Medicaid agencies are able to work efficiently and effectively to design, develop, and implement Medicaid managed care programs that best meet each state's local needs and populations.

B. Overall Impact

We have examined the impact of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of lnformation and Regulatory Affairs designated this rule as not a ''major rule'', as defined by 5 U.S.C. 804(2).''

We did not receive any public comments on our assumptions or analysis.

We have examined the provisions in this final rule and determined that most of the revisions to part 438 outlined in this final rule are expected to reduce administrative burden as we noted in the Collection of Information (COI) section (see section III. of this final rule). Aside from our analysis on burden reduction in the COI section, we believe that the only provision in this final rule that may have an economic impact is the provision with revisions to managed care pass-through payments because of the general magnitude associated with managed care payments and our previous efforts to analyze financial impacts associated with managed care pass-through payments.

The May 6, 2016 final rule (81 FR 27830) and the January 18, 2017 pass-through payment final rule (82 FR 5425) both contained regulatory impact analyses that discussed the financial and economic effects of pass-through payments. In the May 6, 2016 final rule, we did not project a significant fiscal impact for § 438.6(d). When we reviewed and analyzed the May 6, 2016 final rule, we concluded that states will have other mechanisms to build in the amounts currently provided through pass-through payments in approvable ways, such as approaches consistent with § 438.6(c). If a state was currently building in $10 million in pass-through payments to hospitals under their current managed care contracts, we assumed that the state will incorporate the $10 million into their managed care rates in permissible ways rather than spending less in Medicaid managed care. We expected that the long pass-through payment transition periods provided under the May 6, 2016 final rule will help states to integrate existing pass-through payments into actuarially sound capitation rates or permissible Medicaid financing structures, including enhanced fee schedules or the other approaches consistent with § 438.6(c) that tie managed care payments to services and utilization covered under the contract.

In the January 18, 2017 pass-through payment final rule, we noted that a number of states had integrated some form of pass-through payments into their managed care contracts for hospitals, nursing facilities, and physicians. We also noted that as of the effective date of the May 6, 2016 final rule, we estimated that at least eight states had implemented approximately $105 million in pass-through payments for physicians annually; we estimated that at least three states had implemented approximately $50 million in pass-through payments for nursing facilities annually; and we estimated that at least 16 states had implemented approximately $3.3 billion in pass-through payments for hospitals annually. We noted that the amount of pass-through payments often represented a significant portion of the overall capitation rate under a managed care contract, and that we had seen pass-through payments that had represented 25 percent, or more, of the overall managed care contract and 50 percent of individual rate cells. In our analysis of that final rule, we concluded that while it was difficult for CMS to conduct a detailed quantitative analysis given considerable uncertainty and lack of data, we believed that without the pass-through payment final rule, which prohibited new and increased pass-through payments that were not in place as of the effective date of the May 6, 2016 final rule, states will continue to increase pass-through payments in ways that were not consistent with the pass-through payment transition periods established in the May 6, 2016 final rule.

Since there is still considerable uncertainty regarding accurate and reliable pass-through payment data, we are only including a qualitative discussion in this RIA. Under § 438.6(d)(6), we are finalizing our proposal to assist states with transitioning some or all services or eligible populations from a Medicaid FFS delivery system into a Medicaid managed care delivery system by allowing states to make pass-through payments under new managed care contracts during a specified transition period if certain criteria in the final rule are met. One of the requirements in the final rule is that the aggregate amount of the pass-through payments for each rating period of the transition period that the state requires the managed care plan to make must be less than or equal to the payment amounts attributed to and actually paid as Medicaid FFS supplemental payments to hospitals, nursing facilities, or physicians in Medicaid FFS. This means that under this new pass-through payment transition period, the aggregate payments added to Medicaid managed care contracts as pass-through payments must be budget neutral to the aggregate payments transitioned from Medicaid FFS. We also note that under the new pass-through payment transition period, states will only have 3 years to include these payments as pass-through payments before needing to transition the payments into allowable payment structures under actuarially sound capitation rates.

We acknowledge that relative to the current pass-through payment baseline, this final rule permits states to incorporate new pass-through payments under a new transition period when states are transitioning some or all services or eligible populations from a Medicaid FFS delivery system into a

Medicaid managed care delivery system; however, the net financial impact to state and Federal governments, and the Medicaid program, must be zero given the requirements in this final rule that aggregate pass-through payments under the new transition period must be less than or equal to the payment amounts attributed to and actually paid as Medicaid FFS supplemental payments in Medicaid FFS. Since the final rule only permits payment amounts attributed to Medicaid FFS to be made under Medicaid managed care contracts, this is not an increase in Medicaid payments; rather, these payments only represent a movement of funding across Medicaid delivery systems for a limited and targeted amount of time when Medicaid populations or services are initially transitioning from a Medicaid FFS delivery system to a Medicaid managed care delivery system. Without the transition period, we believe that existing Federal pass-through payment requirements could incentivize states to retain some Medicaid populations or Medicaid services in their Medicaid FFS programs. We also believe that some states may choose to delay implementation of Medicaid managed care programs, especially if states have not already been working with stakeholders regarding existing Medicaid FFS supplemental payments. As we noted in this final rule, we wanted to ensure that Federal pass-through payment rules do not unintentionally incent states to keep populations or services in Medicaid FFS, and we do not want Federal rules to unintentionally create barriers that prevent states from moving populations or services into Medicaid managed care. As noted in the 2016 final rule (81 FR 27852), potential benefits to the changes in the Medicaid managed care rule include improved health outcomes for Medicaid enrollees through improved care coordination and case management, as well as improved access to care. We believe that this limited and targeted transition period will help states further these goals.

Finally, as noted throughout this final rule, this limited and targeted transition period is only available if the state actually made Medicaid FFS supplemental payments to hospitals, nursing facilities, or physicians during the 12-month period immediately 2 years prior to the first rating period of the transition period, and the aggregate amount of the pass-through payments that the state requires the managed care plan to make must be less than or equal to the amounts paid under Medicaid FFS. As noted in this final rule, states will be required to calculate and demonstrate that the aggregate amount of the pass-through payments for each rating period of the transition period is less than or equal to the amounts attributed to and actually paid as Medicaid FFS supplemental payments to hospitals, nursing facilities, or physicians. As a practical matter, states will be required to use MMIS-adjudicated claims data from the 12-month period immediately 2 years prior to the first rating period of the transition period for the purposes of these calculations, and we will verify that the pass-through payment amounts are permissible under this final rule, including that the aggregate payments added to Medicaid managed care contracts as pass-through payments must be budget neutral to the aggregate payments transitioned from Medicaid FFS. Therefore, we are not projecting a specific fiscal impact to state or Federal governments, or the Medicaid program, as we expect the net financial impact of this provision to be budget neutral. We requested public comments on our assumptions and analysis as part of the proposed rule.

We did not receive any public comments on our assumptions or analysis.

We are setting out savings based on amendments being finalized in this rule to § 438.400(b) which will revise the definition of an ''adverse benefit determination'' to exclude claims that do not meet the definition of ''clean claim'' at § 447.45(b), thus eliminating the requirement for the plan to send an adverse benefit notice per § 438.404(a). While we have no data on the number of adverse benefit notices that are sent due to denials of unclean claims, we believe that at least one unclean claim may be generated for half of all enrollees (37,389,908); thus, this proposal could reduce paper, toner, and postage costs for some managed care plans. If we assume that in the aggregate, this change saves one sheet of paper (average price $25 per 5,000 sheet carton or $0.005 per sheet), toner (average price $125 for 25,000 pages or $0.005 per sheet), and $0.024 bulk postage ($.038/per ounce × 0.16 oz per sheet of paper) per enrollee, we estimate an annual savings of $1,084,307.30

Based on the calculations in the Collection of Information (COI) section (see section III. of this final rule, Tables 2 and 3), and the additional cost savings identified for § 438.400(b) described above, we are estimating that this final rule will result in an annual cost savings of $12,071,068.

C. Anticipated Effects

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.5 million to $38.5 million in any 1 year. Individuals and states are not included in the definition of a small entity. We believe that all Medicaid managed care plans have annual revenues in excess of $38.5 million; therefore, we do not believe that this final rule will have a significant economic impact on a substantial number of small businesses. We sought comment on this belief.

We did not receive any public comments on our assumptions or analysis. Therefore, we are not preparing an analysis because we have determined, and the Secretary certifies, that this final rule will not have a significant impact on the operations of a substantial number of small businesses.

In addition, section 1102(b) of the Act requires CMS to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 100 beds. We do not anticipate that the provisions in this final rule will have a substantial economic impact on most hospitals, including small rural hospitals. The provisions in this rule place no direct requirements on individual hospitals, and we note that any impact on individual hospitals will vary according to each hospital's current and future contractual relationships with MCOs, PIHPs, and PAHPs. We expect that any additional burden (or burden reduction) on small rural hospitals should be negligible. We sought comment on this analysis and our assumptions. Therefore, we are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

We did not receive any public comments on our assumptions or analysis.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA)

also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2020, that is approximately $156 million. We believe that this final rule will have no consequential effect on state, local, or tribal governments or on the private sector.

We did not receive any public comments on our assumptions or analysis.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a final rule that imposes substantial direct requirements costs on state and local governments, preempts state law, or otherwise has federalism implications. This final rule does not impose any substantial direct costs on state or local governments; however, the provision at § 438.4(b)(1) may preempt state law if the differences among capitation rates for covered populations are not based on valid rate development standards and instead are based solely on network provider reimbursement requirements for covered populations that are mandated by state statute.

We did not receive any public comments on our assumptions or analysis.

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise issues, a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Many of the revisions to part 438 outlined in this final rule are expected to reduce administrative burden; therefore, this rule is an E.O. 13771 deregulatory action. We estimate that this final rule generates $11,704,348 million in annualized cost savings, discounted at 7 percent relative to year 2016, over a perpetual time horizon. Details on the estimated cost savings of this final rule can be found in the preceding analyses.

We did not receive any public comments on our assumptions or analysis.

D. Alternatives Considered

One alternative we considered was leaving the 2016 final rule as it is today; however, since the rule was finalized in 2016, we continued to hear from stakeholders that the 2016 final rule was overly prescriptive and included provisions that were not cost-effective for states to implement. As a result, we undertook a review of the current regulations to ascertain if there were ways to achieve a better balance between appropriate Federal oversight and state flexibility, while also maintaining critical beneficiary protections, ensuring fiscal integrity, and improving the quality of care for Medicaid beneficiaries. This final rule is the result of that review and streamlines the managed care regulations by reducing unnecessary and duplicative administrative burden and further reducing Federal regulatory barriers to help ensure that state Medicaid agencies are able to work efficiently and effectively to design, develop, and implement Medicaid managed care programs that best meet each state's local needs and populations.

We sought comment on a number of requirements included in this final rule to identify potential alternatives to proposed provisions.

The following is a summary of the public comments we received on the requirements included in this final rule to identify potential alternatives to proposed provisions.

Comment: One commenter expressed concerns that the only alternative considered was leaving the 2016 final rule as is. This commenter noted that there were already errors acknowledged in the previous rule and noted that rather than improving on the rule, these changes will not benefit families and their children.

Response: We understand the commenter's concerns; however, as noted, we undertook a comprehensive review of the current regulations and developed proposals to achieve a better balance between appropriate Federal oversight and state flexibility. As the commenter did not offer other alternatives for CMS to consider, we are not including additional alternatives under this final rule, other than the alternatives already discussed.

E. Uncertainties

We have attempted to provide a framework for common definitions and processes associated with the statutory provisions being implemented by this rule. It is possible that some states may need to use alternative definitions to be consistent with state law, and we sought comment on these kinds of issues with the intent to modify and add to the common terminology in this final rule as appropriate based on the comments received.

We did not receive any public comments on our assumptions or analysis.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

F. Accounting Statement

As discussed in this RIA, the benefits, costs, and transfers of this final rule are identified in Table 4.

TABLE 4—ACCOUNTING STATEMENT

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate	Period covered	
Benefits							
Non-Quantified	Benefits include: consistency with the statutory requirements in section 1903(m) of the Act and regulations for actuarially sound capitation rates; improved transparency in rate development processes; greater incentives for payment approaches that are based on the utilization and delivery of services to enrollees covered under the contract, or the quality and outcomes of such services; improved support for delivery system reform that is focused on improved care and quality for Medicaid beneficiaries; and improved health outcomes for Medicaid enrollees through improved care coordination and case management, as well as improved access to care.						

TABLE 4—ACCOUNTING STATEMENT—Continued

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate	Period covered	
Costs							
Annualized Monetized $ millions/year	−12			2018		Annual	
Non-Quantified	Costs to state or Federal governments should be negligible. Burden and/or burden reduction estimates associated with the activities (other than information collections as defined in the Paperwork Reduction Act) that will be necessary for generating the benefits listed in this final rule.						
Transfers							
Non-Quantified	Relative to the current pass-through payment baseline, this final rule permits states to incorporate new pass-through payments under a new transition period when states are transitioning some or all services or eligible populations from a FFS delivery system into a managed care delivery system; however, the net financial impact to state and Federal governments, and the Medicaid program, must be zero given the requirements in this rule that aggregate pass-through payments under the new transition period must be less than or equal to the payment amounts attributed to and actually paid as FFS supplemental payments in Medicaid FFS. Therefore, we are not projecting a specific fiscal impact to state or Federal governments, as we expect the net financial impact of the provision to be budget neutral.						

List of Subjects

42 CFR Part 438

Grant programs-health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 457

Administrative practice and procedure, Grant programs-health, Health insurance, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 438—MANAGED CARE

■ 1. The authority citation for part 438 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 2. Section 438.3 is amended by revising paragraph (t) to read as follows:

§ 438.3 Standard contract requirements.

* * * * *

(t) *Requirements for MCOs, PIHPs, or PAHPs responsible for coordinating benefits for dually eligible individuals.* In a State that enters into a Coordination of Benefits Agreement (COBA) with Medicare for Medicaid, an MCO, PIHP, or PAHP contract that includes responsibility for coordination of benefits for individuals dually eligible for Medicaid and Medicare must specify the methodology by which the State ensures that the appropriate MCO, PIHP, or PAHP receives all applicable crossover claims for which the MCO, PIHP, or PAHP is responsible. If the State elects to use a methodology other than requiring the MCO, PIHP, or PAHP to enter into a COBA with Medicare, that methodology must ensure that the submitting provider is promptly informed on the State's remittance advice that the State has not denied payment and that the claim has been sent to the MCO, PIHP, or PAHP for payment consideration.

* * * * *

■ 3. Section 438.4 is amended by revising paragraph (b)(1) to read as follows:

§ 438.4 Actuarial soundness.

* * * * *

(b) * * *

(1) Have been developed in accordance with the standards specified in § 438.5 and generally accepted actuarial principles and practices. Any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations must be based on valid rate development standards that represent actual cost differences in providing covered services to the covered populations. Any differences in the assumptions, methodologies, or factors used to develop capitation rates must not vary with the rate of Federal financial participation (FFP) associated with the covered populations in a manner that increases Federal costs. The determination that differences in the assumptions, methodologies, or factors used to develop capitation rates for MCOs, PIHPs, and PAHPs increase Federal costs and vary with the rate of FFP associated with the covered populations must be evaluated for the entire managed care program and include all managed care contracts for all covered populations. CMS may require a State to provide written documentation and justification that any differences in the assumptions, methodologies, or factors used to develop capitation rates for covered populations or contracts represent actual cost differences based on the characteristics and mix of the covered services or the covered populations.

* * * * *

■ 4. Section 438.4 is further amended, effective July 1, 2021, by adding paragraph (c) to read as follows:

§ 438.4 Actuarial soundness.

* * * * *

(c) *Option to develop and certify a rate range.* (1) Notwithstanding the provision at paragraph (b)(4) of this section, the State may develop and certify a range of capitation rates per rate cell as actuarially sound, when all of the following conditions are met:

(i) The rate certification identifies and justifies the assumptions, data, and methodologies specific to both the upper and lower bounds of the rate range.

(ii) Both the upper and lower bounds of the rate range must be certified as actuarially sound consistent with the requirements of this part.

(iii) The upper bound of the rate range does not exceed the lower bound of the rate range multiplied by 1.05.

(iv) The rate certification documents the State's criteria for paying MCOs, PIHPs, and PAHPs at different points within the rate range.

(v) The State does not use as a criterion for paying MCOs, PIHPs, and PAHPs at different points within the rate range any of the following:

(A) The willingness or agreement of the MCOs, PIHPs, or PAHPs or their network providers to enter into, or adhere to, intergovernmental transfer (IGT) agreements; or

(B) The amount of funding the MCOs, PIHPs, or PAHPs or their network providers provide through IGT agreements.

(2) When a State develops and certifies a range of capitation rates per rate cell as actuarially sound consistent with the requirements of this paragraph (c), the State must:

(i) Document the capitation rates, prior to the start of the rating period, for the MCOs, PIHPs, and PAHPs at points within the rate range, consistent with the criteria in paragraph (c)(1)(iv) of this section.

(ii) Not modify the capitation rates under § 438.7(c)(3).

(iii) Not modify the capitation rates within the rate range, unless the State is increasing or decreasing the capitation rate per rate cell within the rate range up to 1 percent during the rating period. However, any changes of the capitation rate within the permissible 1 percent range must be consistent with a modification of the contract as required in § 438.3(c) and are subject to the requirements at paragraph (b)(1) of this section. Any modification to the capitation rates within the rate range greater than the permissible 1 percent range will require the State to provide a revised rate certification for CMS approval, which demonstrates that—

(A) The criteria in paragraph (c)(1)(iv) of this section, as described in the initial rate certification, were not applied accurately;

(B) There was a material error in the data, assumptions, or methodologies used to develop the initial rate certification and that the modifications are necessary to correct the error; or

(C) Other adjustments are appropriate and reasonable to account for programmatic changes.

(iv) Post on the website required in § 438.10(c)(3) the following information prior to executing a managed care contract or contract amendment that includes or modifies a rate range:

(A) The upper and lower bounds of each rate cell;

(B) A description of all assumptions that vary between the upper and lower bounds of each rate cell, including for the assumptions that vary, the specific assumptions used for the upper and lower bounds of each rate cell; and

(C) A description of the data and methodologies that vary between the upper and lower bounds of each rate cell, including for the data and methodologies that vary, the specific data and methodologies used for the upper and lower bounds of each rate cell.

■ 5. Section 438.5 is amended by revising paragraph (c)(3)(ii) to read as follows:

§ 438.5 Rate development standards.

* * * * *

(c) * * *

(3) * * *

(ii) States that request an exception from the base data standards established in this section must set forth a corrective action plan to come into compliance with the base data standards no later than 2 years after the last day of the rating period for which the deficiency was identified.

* * * * *

■ 6. Section 438.6 is amended—

■ a. In paragraph (a) by adding the definitions of ''State plan approved rates'' and ''Supplemental payments'' in alphabetical order;

■ b. By revising paragraphs (b)(1), (c)(1)(iii), and (c)(2); and

■ c. By adding paragraphs (c)(3).

The revisions and additions read as follows:

§ 438.6 Special contract provisions related to payment.

(a) * * *

State plan approved rates means amounts calculated for specific services identifiable as having been provided to an individual beneficiary described under CMS approved rate methodologies in the Medicaid State plan. Supplemental payments contained in a State plan are not, and do not constitute, State plan approved rates.

Supplemental payments means amounts paid by the State in its FFS Medicaid delivery system to providers that are described and approved in the State plan or under a demonstration or waiver thereof and are in addition to State plan approved rates. Disproportionate share hospital (DSH) and graduate medical education (GME) payments are not, and do not constitute, supplemental payments.

* * * * *

(b) * * *

(1) If used in the payment arrangement between the State and the MCO, PIHP, or PAHP, all applicable risk-sharing mechanisms, such as reinsurance, risk corridors, or stop-loss limits, must be documented in the contract and rate certification documents for the rating period prior to the start of the rating period, and must be developed in accordance with § 438.4, the rate development standards in § 438.5, and generally accepted actuarial principles and practices. Risk-sharing mechanisms may not be added or modified after the start of the rating period.

* * * * *

(c) * * *

(1) * * *

(iii) The State may require the MCO, PIHP, or PAHP to:

(A) Adopt a minimum fee schedule for network providers that provide a particular service under the contract using State plan approved rates as defined in paragraph (a) of this section.

(B) Adopt a minimum fee schedule for network providers that provide a particular service under the contract using rates other than the State plan approved rates defined in paragraph (a) of this section.

(C) Provide a uniform dollar or percentage increase for network providers that provide a particular service under the contract.

(D) Adopt a maximum fee schedule for network providers that provide a particular service under the contract, so long as the MCO, PIHP, or PAHP retains the ability to reasonably manage risk and has discretion in accomplishing the goals of the contract.

(2) *Process for approval.* (i) All contract arrangements that direct the MCO's, PIHP's, or PAHP's expenditures under paragraphs (c)(1)(i) through (iii) of this section must be developed in accordance with § 438.4, the standards specified in § 438.5, and generally accepted actuarial principles and practices.

(ii) Contract arrangements that direct the MCO's, PIHP's, or PAHP's expenditures under paragraphs (c)(1)(i) and (ii) and (c)(1)(iii)(B) through (D) of this section must have written approval prior to implementation. Contract arrangements that direct the MCO's, PIHP's, or PAHP's expenditures under paragraph (c)(1)(iii)(A) of this section do not require written approval prior to implementation but are required to meet the criteria in paragraphs (c)(2)(ii)(A) through (F) of this section. To obtain written approval, a State must demonstrate, in writing, that the arrangement—

(A) Is based on the utilization and delivery of services;

(B) Directs expenditures equally, and using the same terms of performance, for a class of providers providing the service under the contract;

(C) Expects to advance at least one of the goals and objectives in the quality strategy in § 438.340;

(D) Has an evaluation plan that measures the degree to which the arrangement advances at least one of the

goals and objectives in the quality strategy in § 438.340;

(E) Does not condition provider participation in contract arrangements under paragraphs (c)(1)(i) through (iii) of this section on the provider entering into or adhering to intergovernmental transfer agreements; and

(F) May not be renewed automatically.

(iii) Any contract arrangements that direct the MCO's, PIHP's, or PAHP's expenditures under paragraph (c)(1)(i) or (ii) of this section must also demonstrate, in writing, that the arrangement—

(A) Must make participation in the value-based purchasing initiative, delivery system reform or performance improvement initiative available, using the same terms of performance, to a class of providers providing services under the contract related to the reform or improvement initiative;

(B) Must use a common set of performance measures across all of the payers and providers;

(C) May not set the amount or frequency of the expenditures; and

(D) Does not allow the State to recoup any unspent funds allocated for these arrangements from the MCO, PIHP, or PAHP.

(3) *Approval timeframes.* (i) Approval of a payment arrangement under paragraphs (c)(1)(i) and (ii) of this section is for one rating period unless a multi-year approval is requested and meets all of the following criteria:

(A) The State has explicitly identified and described the payment arrangement in the contract as a multi-year payment arrangement, including a description of the payment arrangement by year, if the payment arrangement varies by year.

(B) The State has developed and described its plan for implementing a multi-year payment arrangement, including the State's plan for multi-year evaluation, and the impact of a multi-year payment arrangement on the State's goals and objectives in the State's quality strategy in § 438.340.

(C) The State has affirmed that it will not make any changes to the payment methodology, or magnitude of the payment, described in the contract for all years of the multi-year payment arrangement without CMS prior approval. If the State determines that changes to the payment methodology, or magnitude of the payment, are necessary, the State must obtain prior approval of such changes under paragraph (c)(2) of this section.

(ii) Approval of a payment arrangement under paragraph (c)(1)(iii) of this section is for one rating period.

* * * * *

■ 7. Section 438.6 is further amended, effective July 1, 2021, by adding paragraph (d)(6) to read as follows:

§ 438.6 Special contract provisions related to payment.

* * * * *

(d) * * *

(6) *Pass-through payments for States transitioning services and populations from a fee-for-service delivery system to a managed care delivery system.* Notwithstanding the restrictions on pass-through payments in paragraphs (d)(1), (3), and (5) of this section, a State may require the MCO, PIHP, or PAHP to make pass-through payments to network providers that are hospitals, nursing facilities, or physicians under the contract, for each rating period of the transition period for up to 3 years, when Medicaid populations or services are initially transitioning from a fee-for-service (FFS) delivery system to a managed care delivery system, provided the following requirements are met:

(i) The services will be covered for the first time under a managed care contract and were previously provided in a FFS delivery system prior to the first rating period of the transition period.

(ii) The State made supplemental payments, as defined in paragraph (a) of this section, to hospitals, nursing facilities, or physicians during the 12-month period immediately 2 years prior to the first year of the transition period.

(iii) The aggregate amount of the pass-through payments that the State requires the MCO, PIHP, or PAHP to make is less than or equal to the amounts calculated in paragraph (d)(6)(iii)(A), (B), or (C) of this section for the relevant provider type for each rating period of the transition period. In determining the amount of each component for the calculations contained in paragraphs (d)(6)(iii)(A) through (C), the State must use the amounts paid for services during the 12-month period immediately 2 years prior to the first rating period of the transition period.

(A) *Hospitals.* For inpatient and outpatient hospital services, calculate the product of the actual supplemental payments paid and the ratio achieved by dividing the amount paid through payment rates for hospital services that are being transitioned from payment in a FFS delivery system to the managed care contract by the total amount paid through state plan approved rates for hospital services made in the State's FFS delivery system. Both the numerator and denominator of the ratio should exclude any supplemental payments made to the applicable providers.

(B) *Nursing facilities.* For nursing facility services, calculate the product of the actual supplemental payments paid and the ratio achieved by dividing the amount paid through state plan approved rates for nursing facility services that are being transitioned from payment in a FFS delivery system to the managed care contract by the total amount paid through payment rates for nursing facility services made in the State's FFS delivery system. Both the numerator and denominator of the ratio should exclude any supplemental payments made to the applicable providers.

(C) *Physicians.* For physician services, calculate the product of the actual supplemental payments paid and the ratio achieved by dividing the amount paid through state plan approved rates for physician services that are being transitioned from payment in a FFS delivery system to the managed care contract by the total amount paid through payment rates for physician services made in the State's FFS delivery system. Both the numerator and denominator of the ratio should exclude any supplemental payments made to the applicable providers.

(iv) The State may require the MCO, PIHP, or PAHP to make pass-through payments for Medicaid populations or services that are initially transitioning from a FFS delivery system to a managed care delivery system for up to 3 years from the beginning of the first rating period in which the services were transitioned from payment in a FFS delivery system to a managed care contract, provided that during the 3 years, the services continue to be provided under a managed care contract with an MCO, PIHP, or PAHP.

* * * * *

■ 8. Section 438.7 is amended by revising paragraph (c)(3) and adding paragraph (e) to read as follows:

§ 438.7 Rate certification submission.

* * * * *

(c) * * *

(3) The State may increase or decrease the capitation rate per rate cell, as required in paragraph (c) of this section and § 438.4(b)(4), up to 1.5 percent during the rating period without submitting a revised rate certification, as required under paragraph (a) of this section. However, any changes of the capitation rate within the permissible range must be consistent with a modification of the contract as required in § 438.3(c) and are subject to the requirements at § 438.4(b)(1). Notwithstanding the provisions in paragraph (c) of this section, CMS may

require a State to provide documentation that modifications to the capitation rate comply with the requirements in §§ 438.3(c) and (e) and 438.4(b)(1).

* * * * *

(e) *Provision of additional guidance.* CMS will issue guidance, at least annually, which includes all of the following:

(1) The Federal standards for capitation rate development.

(2) The documentation required to determine that the capitation rates are projected to provide for all reasonable, appropriate, and attainable costs that are required under the terms.

(3) The documentation required to determine that the capitation rates have been developed in accordance with the requirements of this part.

(4) Any updates or developments in the rate review process to reduce State burden and facilitate prompt actuarial reviews.

(5) The documentation necessary to demonstrate that capitation rates competitively bid through a procurement process have been established consistent with the requirements of §§ 438.4 through 438.8.

■ 9. Section 438.8 is amended—

■ a. In paragraph (e)(4) by removing the phrase ''fraud prevention as adopted'' and adding in its place the phrase ''fraud prevention consistent with regulations adopted''; and

■ b. Revising paragraph (k)(1)(iii).

The revision reads as follows:

§ 438.8 Medical loss ratio (MLR) standards

* * * * *

(k) * * *

(1) * * *

(iii) Fraud prevention activities as defined in paragraph (e)(4) of this section.

* * * * *

■ 10. Section 438.9 is amended by revising paragraph (b)(2) to read as follows:

§ 438.9 Provisions that apply to non-emergency medical transportation PAHPs.

* * * * *

(b) * * *

(2) The actuarial soundness requirements in § 438.4, except § 438.4(b)(9).

* * * * *

■ 11. Section 438.10 is amended by—

■ a. Revising paragraph (d)(2) and (3);

■ b. Removing paragraph (d)(6)(iv);

■ c. Revising paragraph (f)(1);

■ d. In paragraph (g)(2)(ii)(B) by removing the reference ''paragraph (g)(2)(i)(A) of this section'' and adding in its place the reference ''paragraph (g)(2)(ii)(A) of this section''; and

■ e. Revising paragraphs (h)(1)(vii) and (h)(3).

The revisions read as follows:

§ 438.10 Information requirements.

* * * * *

(d) * * *

(2) Make oral interpretation available in all languages and written translation available in each prevalent non-English language. Written materials that are critical to obtaining services for potential enrollees must include taglines in the prevalent non-English languages in the State, explaining the availability of written translations or oral interpretation to understand the information provided, information on how to request auxiliary aids and services, and the toll-free telephone number of the entity providing choice counseling services as required by § 438.71(a). Taglines for written materials critical to obtaining services must be printed in a conspicuously-visible font size.

(3) Require each MCO, PIHP, PAHP, and PCCM entity to make its written materials that are critical to obtaining services, including, at a minimum, provider directories, enrollee handbooks, appeal and grievance notices, and denial and termination notices, available in the prevalent non-English languages in its particular service area. Written materials that are critical to obtaining services must also be made available in alternative formats upon request of the potential enrollee or enrollee at no cost, include taglines in the prevalent non-English languages in the State and in a conspicuously visible font size explaining the availability of written translation or oral interpretation to understand the information provided, information on how to request auxiliary aids and services, and include the toll-free and TTY/TDY telephone number of the MCO's, PIHP's, PAHP's, or PCCM entity's member/customer service unit. Auxiliary aids and services must also be made available upon request of the potential enrollee or enrollee at no cost.

* * * * *

(f) * * *

(1) The MCO, PIHP, PAHP, and, when appropriate, the PCCM entity, must make a good faith effort to give written notice of termination of a contracted provider to each enrollee who received his or her primary care from, or was seen on a regular basis by, the terminated provider. Notice to the enrollee must be provided by the later of 30 calendar days prior to the effective date of the termination, or 15 calendar days after receipt or issuance of the termination notice.

* * * * *

(h) * * *

(1) * * *

(vii) The provider's cultural and linguistic capabilities, including languages (including American Sign Language) offered by the provider or a skilled medical interpreter at the provider's office.

* * * * *

(3) Information included in—

(i) A paper provider directory must be updated at least—

(A) Monthly, if the MCO, PIHP, PAHP, or PCCM entity does not have a mobile-enabled, electronic directory; or

(B) Quarterly, if the MCO, PIHP, PAHP, or PCCM entity has a mobile-enabled, electronic provider directory.

(ii) An electronic provider directory must be updated no later than 30 calendar days after the MCO, PIHP, PAHP, or PCCM entity receives updated provider information.

* * * * *

■ 12. Section 438.54 is amended by adding paragraph (b)(3) to read as follows:

§ 438.54 Managed care enrollment.

* * * * *

(b) * * *

(3) States must provide the demographic information listed in § 438.340(b)(6) for each Medicaid enrollee to the individual's MCO, PIHP, PAHP, or PCCM entity at the time of enrollment.

* * * * *

■ 13. Section 438.56 is amended by revising the paragraph (d)(5) heading and paragraphs (d)(5)(i) and (iii) to read as follows:

§ 438.56 Disenrollment: Requirements and limitations.

* * * * *

(d) * * *

(5) *Use of the MCO's, PIHP's, PAHP's grievance procedures.* (i) The State agency may require that the enrollee seek redress through the MCO's, PHIP's, or PAHP's grievance system before making a determination on the enrollee's request.

* * * * *

(iii) If, as a result of the grievance process, the MCO, PIHP, or PAHP approves the disenrollment, the State agency is not required to make a determination in accordance with paragraph (d)(4) of this section.

* * * * *

■ 14. Section 438.68 is amended by—

■ a. Revising paragraphs (b)(1) introductory text and (b)(1)(iv);

■ b. Removing paragraph (b)(1)(viii); and

■ c. Revising paragraph (b)(2).

The revisions read as follows:

§ 438.68 Network adequacy standards.

* * * * *

(b) * * *

(1) *Provider types.* At a minimum, a State must develop a quantitative network adequacy standard for the following provider types, if covered under the contract:

* * * * *

(iv) Specialist (as designated by the State), adult, and pediatric.

* * * * *

(2) *LTSS.* States with MCO, PIHP, or PAHP contracts which cover LTSS must develop a quantitative network adequacy standard for LTSS provider types.

* * * * *

§ 438.236 [Amended]

■ 15. Section 438.236 is amended in paragraph (b)(3) by removing the term ''contracting health care professionals'' and adding in its place the term ''network providers.''

■ 16. Section 438.242 is amended by revising paragraph (c)(3) to read as follows:

§ 438.242 Health information systems.

* * * * *

(c) * * *

(3) Submission of all enrollee encounter data, including allowed amount and paid amount, that the State is required to report to CMS under § 438.818.

* * * * *

■ 17. Section 438.334 is amended by revising paragraphs (b) and (c)(1) and (3) and adding paragraph (c)(4) to read as follows:

§ 438.334 Medicaid managed care quality rating system.

* * * * *

(b) *Quality rating system.* (1) CMS, after consulting with States and other stakeholders and providing public notice and opportunity to comment, will develop a framework for a Medicaid managed care quality rating system (QRS), including the identification of the performance measures, a subset of mandatory performance measures, and a methodology, that aligns where appropriate with the qualified health plan quality rating system developed in accordance with 45 CFR 156.1120, the Medicare Advantage 5-Star Rating System described in subpart D of part 422 of this chapter, and other related CMS quality rating approaches.

(2) CMS, after consulting with States and other stakeholders and providing public notice and opportunity to comment, may periodically update the Medicaid managed care QRS framework developed in accordance with paragraph (b)(1) of this section.

(c) * * *

(1) A state may implement an alternative Medicaid managed care quality rating system that utilizes different performance measures or applies a different methodology from that described in paragraph (b) of this section provided that—

(i) The alternative quality rating system includes the mandatory measures identified in the framework developed under paragraph (b) of this section;

(ii) The ratings generated by the alternative quality rating system yield information regarding MCO, PIHP, and PAHP performance which is substantially comparable to that yielded by the framework developed under paragraph (b) of this section to the extent feasible, taking into account such factors as differences in covered populations, benefits, and stage of delivery system transformation, to enable meaningful comparison of performance across States.

(iii) The State receives CMS approval prior to implementing an alternative quality rating system or modifications to an approved alternative Medicaid managed care quality rating system.

* * * * *

(3) In requesting CMS approval, the State must include the following:

(i) The alternative quality rating system framework, including the performance measures and methodology to be used in generating plan ratings; and,

(ii) Documentation of the public comment process specified in paragraphs (c)(2)(i) and (ii) of this section, including discussion of the issues raised by the Medical Care Advisory Committee and the public. The request must document any policy revisions or modifications made in response to the comments and rationale for comments not accepted; and,

(iii) Other information specified by CMS to demonstrate compliance with paragraph (c) of this section.

(4) The Secretary, after consulting with States and other stakeholders, shall issue guidance which describes the criteria and process for determining if an alternative QRS system is substantially comparable to the Medicaid managed care quality rating system in paragraph (b) of this section.

* * * * *

■ 18. Section 438.340 is amended—

■ a. By revising paragraphs (b)(2), (b)(3)(i), and (b)(6);

■ b. By removing paragraph (b)(8);

■ c. By redesignating paragraphs (b)(9), (10), and (11) as paragraphs (b)(8), (9), and (10), respectively;

■ d. In newly redesignated paragraph (b)(9) by removing ''; and'' and adding a period in its place.

■ e. By revising paragraph (c)(1)(ii); and

■ f. In paragraph (c)(3)(ii) by removing the reference ''paragraph (b)(11)'' and adding in its place the reference ''paragraph (b)(10)''.

The revisions read as follows:

§ 438.340 Managed care State quality strategy

* * * * *

(b) * * *

(2) The State's goals and objectives for continuous quality improvement which must be measurable and take into consideration the health status of all populations in the State served by the MCO, PIHP, PAHP, and PCCM entity described in § 438.310(c)(2).

(3) * * *

(i) The quality metrics and performance targets to be used in measuring the performance and improvement of each MCO, PIHP, PAHP, and PCCM entity described in § 438.310(c)(2) with which the State contracts, including but not limited to, the performance measures reported in accordance with § 438.330(c). The State must identify which quality measures and performance outcomes the State will publish at least annually on the website required under § 438.10(c)(3); and,

* * * * *

(6) The State's plan to identify, evaluate, and reduce, to the extent practicable, health disparities based on age, race, ethnicity, sex, primary language, and disability status. For purposes of this paragraph (b)(6), ''disability status'' means, at a minimum, whether the individual qualified for Medicaid on the basis of a disability. States must include in this plan the State's definition of disability status and how the State will make the determination that a Medicaid enrollee meets the standard including the data source(s) that the State will use to identify disability status.

* * * * *

(c) * * *

(1) * * *

(ii) If the State enrolls Indians in the MCO, PIHP, PAHP, or PCCM entity described in § 438.310(c)(2), consulting with Tribes in accordance with the State's Tribal consultation policy.

* * * * *

■ 19. Section 438.358 is amended by revising paragraph (b)(1)(iii) to read as follows:

§ 438.358 Activities related to external quality review.

* * * * *

(b) * * *

(1) * * *

(iii) A review, conducted within the previous 3-year period, to determine the MCO's, PIHP's, or PAHP's compliance with the standards set forth in subpart D of this part, the disenrollment requirements and limitations described in § 438.56, the enrollee rights requirements described in § 438.100, the emergency and post-stabilization services requirements described in § 438.114, and the quality assessment and performance improvement requirements described in § 438.330.

* * * * *

■ 20. Section 438.362 is amended by adding paragraph (c) to read as follows:

§ 438.362 Exemption from external quality review.

* * * * *

(c) *Identification of exempted MCOs.* The State must annually identify, on the website required under § 438.10(c)(3) and in the same location where the EQR technical reports are posted in accordance with § 438.364(c)(2)(i), the names of the MCOs exempt from external quality review by the State, including the beginning date of the current exemption period, or that no MCOs are exempt, as appropriate.

■ 21. Section 438.364 is amended by adding paragraph (a)(7) and revising paragraph (d) to read as follows:

§ 438.364 External quality review results.

(a) * * *

(7) The names of the MCOs exempt from external quality review by the State, including the beginning date of the current exemption period, or that no MCOs are exempt, as appropriate.

* * * * *

(d) *Safeguarding patient identity.* The information released under paragraph (c) of this section may not disclose the identity or other protected health information of any patient.

■ 22. Section 438.400 is amended in paragraph (b) by revising paragraph (3) of the definition of ''Adverse benefit determination'' to read as follows:

§ 438.400 Statutory basis, definitions, and applicability.

* * * * *

(b) * * *

Adverse benefit determination * * *

(3) The denial, in whole or in part, of payment for a service. A denial, in whole or in part, of a payment for a service solely because the claim does not meet the definition of a ''clean claim'' at § 447.45(b) of this chapter is not an adverse benefit determination.

* * * * *

■ 23. Section 438.402 is amended by revising paragraph (c)(3)(ii) to read as follows:

§ 438.402 General requirements.

* * * * *

(c) * * *

(3) * * *

(ii) *Appeal.* The enrollee may request an appeal either orally or in writing.

■ 24. Section 438.406 is amended by revising paragraph (b)(3) to read as follows:

§ 438.406 Handling of grievances and appeals.

* * * * *

(b) * * *

(3) Provide that oral inquiries seeking to appeal an adverse benefit determination are treated as appeals.

* * * * *

■ 25. Section 438.408 is amended by revising paragraph (f)(2) to read as follows:

§ 438.408 Resolution and notification: Grievances and appeals.

* * * * *

(f) * * *

(2) *State fair hearing.* The enrollee must have no less than 90 calendar days and no more than 120 calendar days from the date of the MCO's, PIHP's, or PAHP's notice of resolution to request a State fair hearing.

* * * * *

PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 26. The authority citation for part 457 continues to read as follows:

Authority: 42 U.S.C. 1302.

■ 27. Section 457.1207 is revised to read as follows:

§ 457.1207 Information requirements.

The State must provide, or ensure its contracted MCO, PAHP, PIHP, PCCM, and PCCM entities provide, all enrollment notices, informational materials, and instructional materials related to enrollees and potential enrollees in accordance with the terms of § 438.10 of this chapter, except that the terms of § 438.10(c)(2), (g)(2)(xi)(E), and (g)(2)(xii) of this chapter do not apply.

■ 28. Section 457.1233 is amended by revising paragraphs (b) and (d) to read as follows:

§ 457.1233 Structure and operation standards.

* * * * *

(b) *Subcontractual relationships and delegation.* The State must ensure, through its contracts, that each MCO, PIHP, PAHP, and PCCM entity complies with the subcontractual relationships and delegation requirements as provided in § 438.230 of this chapter.

* * * * *

(d) *Health information systems.* The State must ensure, through its contracts, that each MCO, PIHP, and PAHP complies with the health information systems requirements as provided in § 438.242 of this chapter, except that the applicability date in § 438.242(e) of this chapter does not apply. The State is required to submit enrollee encounter data to CMS in accordance with § 438.818 of this chapter.

* * * * *

■ 29. Section 457.1240 is amended by revising paragraphs (b), (d), and (e) to read as follows:

§ 457.1240 Quality measurement and improvement.

* * * * *

(b) *Quality assessment and performance improvement program.* (1) The State must require, through its contracts, that each MCO, PIHP, and PAHP establish and implement an ongoing comprehensive quality assessment and performance improvement program for the services it furnishes to its enrollees, in accordance with the requirements and standards in § 438.330 of this chapter, except that the terms of § 438.330(d)(4) of this chapter (related to dually eligible beneficiaries) do not apply.

(2) In the case of a contract with a PCCM entity described in paragraph (f) of this section, § 438.330(b)(2) and (3), (c), and (e) of this chapter apply.

* * * * *

(d) *Managed care quality rating system.* The State must determine a quality rating or ratings for each MCO, PIHP, and PAHP in accordance with the requirements set forth in § 438.334 of this chapter, except that the terms of § 438.334(c)(2)(i) and (c)(3) of this chapter (related to consultation with the Medical Care Advisory Committee) do not apply.

(e) *Managed care quality strategy.* The State must draft and implement a written quality strategy for assessing and improving the quality of health care and services furnished CHIP enrollees as described in § 438.340 of this chapter, except that the reference to consultation with the Medical Care Advisory Committee described in § 438.340(c)(1)(i) of this chapter does not apply.

* * * * *

■ 30. Section 457.1260 is revised to read as follows:

§ 457.1260 Grievance system.

(a) *Statutory basis and definitions*—(1) *Statutory basis.* This section implements section 2103(f)(3) of the Act, which provides that the State CHIP must provide for the application of section 1932(a)(4), (a)(5), (b), (c), (d), and (e) of the Act (relating to requirements for managed care) to coverage, State agencies, enrollment brokers, managed care entities, and managed care organizations. Section 1932(b)(4) of the Act requires managed care plans to establish an internal grievance procedure under which an enrollee, or a provider on behalf of such an enrollee, may challenge the denial of coverage of or payment for covered benefits.

(2) *Definitions.* The following definitions from § 438.400(b) of this chapter apply to this section—

(i) Paragraphs (1) through (5) and (7) of the definition of ''adverse benefit determination''; and

(ii) The definitions of ''appeal'', ''grievance'', and ''grievance and appeal system''.

(b) *General requirements.* (1) The State must ensure that its contracted MCOs, PIHPs, and PAHPs comply with the provisions of § 438.402(a), (b), and (c)(2) and (3) of this chapter with regard to the establishment and operation of a grievances and appeals system.

(2) An enrollee may file a grievance and request an appeal with the MCO, PIHP, or PAHP. An enrollee may request a State external review in accordance with the terms of subpart K of this part after receiving notice under paragraph (e) of this section that the adverse benefit decision is upheld by the MCO, PIHP, or PAHP.

(3) If State law permits and with the written consent of the enrollee, a provider or an authorized representative may request an appeal or file a grievance, or request a State external review in accordance with the terms of subpart K of this part, on behalf of an enrollee. When the term ''enrollee'' is used throughout this section, it includes providers and authorized representatives consistent with this paragraph (b).

(c) *Timely and adequate notice of adverse benefit determination.* (1) The State must ensure that its contracted MCOs, PIHPs, and PAHPs comply with the provisions at § 438.404(a) and (b)(1), (2), and (5) of this chapter (regarding the content of the notice of an adverse benefit determination).

(2) In addition to the requirements referenced in paragraph (c)(1) of this section, the notice must explain:

(i) The enrollee's right to request an appeal of the MCO's, PIHP's, or PAHP's adverse benefit determination, including information on exhausting the MCO's, PIHP's, or PAHP's one level of appeal described at § 438.402(b) of this chapter referenced in paragraph (b)(1) of this section, and the right to request a State external review in accordance with the terms of subpart K of this part; and

(ii) The procedures for the enrollee to exercise his or her rights provided under this paragraph (c).

(3) The MCO, PIHP, or PAHP must provide timely written notice to the enrollee of the adverse benefit determination. The terms of §§ 438.404(c)(6) and 438.210(d)(2) of this chapter apply in the circumstances of expedited service authorization decisions.

(d) *Handling of grievances and appeals.* The State must ensure that its contracted MCOs, PIHPs, and PAHPs comply with the provisions at § 438.406 of this chapter.

(e) *Resolution and notification: Grievances and appeals.* (1) The State must ensure that its contracted MCOs, PIHPs, and PAHPs comply with the provisions at § 438.408(b) (relating to the timeframe for resolution of grievances and appeals), (c)(1) and (2) (the extension of timeframes for resolution of grievances and appeals), (d) (relating to the format of the notice of resolution for grievances and appeals), and (e)(1) (relating to the content of the notice of resolution for grievances and appeals) of this chapter.

(2) Each MCO, PIHP, or PAHP must resolve each grievance and appeal, and provide notice, as expeditiously as the enrollee's health condition requires, within State-established timeframes that may not exceed the timeframes specified in this paragraph (e).

(3) In the case of an MCO, PIHP, or PAHP that fails to adhere to the notice and timing requirements in this section, the enrollee is deemed to have exhausted the MCO's, PIHP's, or PAHP's appeals process. The enrollee may initiate a State external review in accordance with the terms of subpart K of this part.

(4) For appeals not resolved wholly in favor of an enrollee, in addition to the information required under paragraph (e)(1) of this section and § 438.408(e)(1) of this chapter, the content of the notice of appeal resolution must include the enrollee's right to request a State external review in accordance with the terms of subpart K of this part, and how to do so.

(5) Except as provided in paragraph (e)(3) of this section, an enrollee may request a State external review only after receiving notice that the MCO, PIHP, or PAHP is upholding the adverse benefit determination. The State must provide enrollees no less than 90 calendar days and no more than 120 calendar days from the date of the MCO's, PIHP's, or PAHP's notice of resolution to request a State external review. The parties to the State external review include the MCO, PIHP, or PAHP, as well as the enrollee and his or her representative or the representative of a deceased enrollee's estate.

(f) *Expedited resolution of appeals.* The State must ensure that its contracted MCOs, PIHPs, and PAHPs comply with the provisions at § 438.410 of this chapter.

(g) *Information about the grievance and appeal system to providers and subcontractors.* The State must ensure that its contracted MCOs, PIHPs, and PAHPs comply with the provisions at § 438.414 of this chapter.

(h) *Recordkeeping requirements.* The State must ensure that its contracted MCOs, PIHPs, and PAHPs comply with the provisions at § 438.416 of this chapter.

(i) *Effectuation of reversed appeal resolutions.* If the MCO, PIHP, or PAHP, or the result of a State external review, in accordance with the terms of subpart K of this part, reverses a decision to deny, limit, or delay services, the MCO, PIHP, or PAHP must authorize or provide the disputed services promptly and as expeditiously as the enrollee's health condition requires but no later than 72 hours from the date it receives notice reversing the determination.

■ 31. Section 457.1270 is revised to read as follows:

§ 457.1270 Sanctions.

(a) *General.* The State must comply with §§ 438.700 through 438.704, 438.706(c) and (d), and 438.708 through 438.730 of this chapter.

(b) *Optional imposition of temporary management.* Except as provided in paragraph (c) of this section, the State may impose temporary management under § 438.702(a)(2) of this chapter as referenced in paragraph (a) of this section, only if it finds (through onsite surveys, enrollee or other complaints, financial status, or any other source) any of the following:

(1) There is continued egregious behavior by the MCO, including but not limited to behavior that is described in § 438.700 of this chapter (as referenced in paragraph (a) of this section), or that

is contrary to any of the requirements of this subpart.

(2) There is substantial risk to enrollees' health.

(3) The sanction is necessary to ensure the health of the MCO's enrollees—

(i) While improvements are made to remedy violations under § 438.700 of this chapter as referenced in paragraph (a) of this section.

(ii) Until there is an orderly termination or reorganization of the MCO.

(c) *Required imposition of temporary management.* The State must impose temporary management (regardless of any other sanction that may be imposed) if it finds that an MCO has repeatedly failed to meet substantive requirements in this subpart. The State must also grant enrollees the right to terminate enrollment without cause, as described in § 438.702(a)(3) of this chapter as referenced in paragraph (a) of this section, and must notify the affected enrollees of their right to terminate enrollment.

■ 32. Section 457.1285 is revised to read as follows:

§ 457.1285 Program integrity safeguards.

The State must comply with the program integrity safeguards in accordance with the terms of subpart H of part 438 of this chapter, except that the terms of §§ 438.604(a)(2) and 438.608(d)(4) of this chapter do not apply.

Dated: September 14, 2020.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: September 21, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–24758 Filed 11–9–20; 11:15 am]

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Part III

Department of Labor

Employee Benefits Security Administration

29 CFR Parts 2509 and 2550
Financial Factors in Selecting Plan Investments; Final Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2509 and 2550

RIN 1210–AB95

Financial Factors in Selecting Plan Investments

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department) is adopting amendments to the ''investment duties'' regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The amendments require plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.

DATES: The final rule is effective on January 12, 2021.

FOR FURTHER INFORMATION CONTACT: Jason A. DeWitt, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department of Labor's website (*www.dol.gov/ebsa*).

SUPPLEMENTARY INFORMATION:

A. Background

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards that govern the operation of private-sector employee benefit plans, including fiduciary responsibility rules. Section 404 of ERISA, in part, requires that plan fiduciaries act prudently and diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Sections 403(c) and 404(a) also require fiduciaries to act solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.

Courts have interpreted the exclusive purpose rule of ERISA section 404(a)(1)(A) to require fiduciaries to act with ''complete and undivided loyalty to the beneficiaries,'' [1] observing that their decisions must ''be made with an eye single to the interests of the participants and beneficiaries.'' [2] The Supreme Court as recently as 2014 unanimously held in the context of ERISA retirement plans that such interests must be understood to refer to ''*financial*'' rather than ''nonpecuniary'' benefits,[3] and Federal appellate courts have described ERISA's fiduciary duties as ''the highest known to the law.'' [4] The Department's longstanding and consistent position, reiterated in multiple forms of sub-regulatory guidance, is that when making decisions on investments and investment courses of action, plan fiduciaries must be focused solely on the plan's financial returns, and the interests of plan participants and beneficiaries in their benefits must be paramount.

The Department has been asked periodically over the last 30 years to consider the application of these principles to pension plan investments selected because of the non-pecuniary benefits they may further, such as those relating to environmental, social, and corporate governance considerations. Various terms have been used to describe this and related investment behaviors, such as socially responsible investing, sustainable and responsible investing, environmental, social, and corporate governance (ESG) investing, impact investing, and economically targeted investing. The terms do not have a uniform meaning and the terminology is evolving.[5]

The Department's first comprehensive guidance addressing these types of investment issues was in Interpretive Bulletin 94–1 (IB 94–1).[6] There, the term used was ''economically targeted investments'' (ETIs). The Department's objective in issuing IB 94–1 was to state that ETIs [7] are not inherently incompatible with ERISA's fiduciary obligations. The preamble to IB 94–1 explained that the requirements of sections 403 and 404 of ERISA do not prevent plan fiduciaries from investing plan assets in ETIs if the investment has an expected rate of return commensurate to rates of return of available alternative investments with similar risk characteristics, and if the investment vehicle is otherwise an appropriate investment for the plan in terms of such factors as diversification and the investment policy of the plan. Some commentators have referred to this as the ''all things being equal'' test or the ''tie-breaker'' standard. The Department stated in the preamble to IB 94–1 that when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such non-pecuniary considerations as the deciding factor for an investment decision.

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[1] *Donovan* v. *Mazzola,* 716 F.2d 1226, 1238 (9th Cir. 1983) (quoting *Freund* v. *Marshall & Ilsley Bank,* 485 F. Supp. 629, 639 (W.D. Wis. 1979)).

[2] *Donovan* v. *Bierwirth,* 680 F.2d 263, 271 (2d Cir. 1982).

[3] *Fifth Third Bancorp* v. *Dudenhoeffer,* 573 U.S. 409, 421 (2014) (the ''benefits'' to be pursued by ERISA fiduciaries as their ''exclusive purpose'' does not include ''nonpecuniary benefits'') (emphasis in original).

[4] See, *e.g., Tibble* v. *Edison Int'l,* 843 F.3d 1187, 1197 (9th Cir. 2016).

[5] For a concise history of the current ESG movement and the evolving terminology, see Max Schanzenbach & Robert Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee,* 72 Stan. L. Rev. 381, 392–97 (2020).

[6] 59 FR 32606 (June 23, 1994) (appeared in Code of Federal Regulations as 29 CFR 2509.94–1). Interpretive Bulletins are a form of sub-regulatory guidance that are published in the **Federal Register** and included in the Code of Federal Regulations. Prior to issuing IB 94–1, the Department had issued a number of letters concerning a fiduciary's ability to consider the non-pecuniary effects of an investment and granted a variety of prohibited transaction exemptions to both individual plans and pooled investment vehicles involving investments that produce non-pecuniary benefits. See Advisory Opinions 80–33A, 85–36A and 88–16A; Information Letters to Mr. George Cox, dated Jan. 16, 1981; to Mr. Theodore Groom, dated Jan. 16, 1981; to The Trustees of the Twin City Carpenters and Joiners Pension Plan, dated May 19, 1981; to Mr. William Chadwick, dated July 21, 1982; to Mr. Daniel O'Sullivan, dated Aug. 2, 1982; to Mr. Ralph Katz, dated Mar. 15, 1982; to Mr. William Ecklund, dated Dec. 18, 1985, and Jan. 16, 1986; to Mr. Reed Larson, dated July 14, 1986; to Mr. James Ray, dated July 8, 1988; to the Honorable Jack Kemp, dated Nov. 23, 1990; and to Mr. Stuart Cohen, dated May 14, 1993; PTE 76–1, part B, concerning construction loans by multiemployer plans; PTE 84–25, issued to the Pacific Coast Roofers Pension Plan; PTE 85–58, issued to the Northwestern Ohio Building Trades and Employer Construction Industry Investment Plan; PTE 87–20, issued to the Racine Construction Industry Pension Fund; PTE 87–70, issued to the Dayton Area Building and Construction Industry Investment Plan; PTE 88–96, issued to the Real Estate for American Labor A Balcor Group Trust; PTE 89–37, issued to the Union Bank; and PTE 93–16, issued to the Toledo Roofers Local No. 134 Pension Plan and Trust, et al. In addition, one of the first directors of the Department's benefits office authored an influential article on this topic in 1980. See Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May It Be Done Lawfully Under ERISA?,* 31 Labor L.J. 387, 391–92 (1980) (stating that ''[t]he Labor Department has concluded that economic considerations are the only ones which can be taken into account in determining which investments are consistent with ERISA standards,'' and warning that fiduciaries who exclude investment options for non-economic reasons would be ''acting at their peril'').

[7] IB 94–1 used the terms ETI and economically targeted investments to broadly refer to any investment or investment course of action that is selected, in part, for its expected non-pecuniary benefits, apart from the investment return to the employee benefit plan investor.

Since 1994, the Department's sub-regulatory guidance has gone through an iterative process, but the Department's emphasis on the primacy of plan participants' economic interests has stayed constant. In 2008, the Department replaced IB 94–1 with Interpretive Bulletin 2008–01 (IB 2008–01).[8] In 2015, the Department replaced IB 2008–01 with Interpretive Bulletin 2015–01 (IB 2015–01),[9] which is codified at 29 CFR 2509.2015–01. Each Interpretive Bulletin has consistently stated that the paramount focus of plan fiduciaries must be the plan's financial returns and providing promised benefits to participants and beneficiaries. The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. Thus, each Interpretive Bulletin, while restating the ''all things being equal'' test, also cautioned that fiduciaries violate ERISA if they accept reduced expected returns or greater risks to secure social, environmental, or other policy goals.

The preamble to IB 2015–01 explained that if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from ESG factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote. In 2018, the Department clarified in Field Assistance Bulletin 2018–01 (FAB 2018–01) that IB 2015–01 had merely recognized that there could be instances when ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan, and that qualified investment professionals would treat the issues as material economic considerations under generally accepted investment theories. As appropriate economic considerations, they should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments. In other words, in these instances the factors are not ''tie-breakers,'' but pecuniary (or ''risk-return'') factors affecting the economic merits of the investment.

The Department cautioned, however, that ''[t]o the extent ESG factors, in fact, involve business risks or opportunities that are properly treated as economic considerations themselves in evaluating alternative investments, the weight given to those factors should also be appropriate to the relative level of risk and return involved compared to other relevant economic factors.'' [10] The Department further emphasized in FAB 2018–01 that fiduciaries ''must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision,'' as ''[i]t does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors.'' Rather, ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits and ''[a] fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives.'' [11]

B. Purpose of Regulatory Action

Available research and data show a steady upward trend in use of the term ''ESG'' among institutional asset managers, an increase in the array of ESG-focused investment vehicles available, a proliferation of ESG metrics, services, and ratings offered by third-party service providers, and an increase in asset flows into ESG funds. This trend has been underway for many years, but recent studies indicate the trajectory is accelerating. For example, according to Morningstar, the assets invested in sustainable funds was nearly four times larger in 2019 than in 2018.[12]

As ESG investing has increased, it has engendered important and substantial questions with numerous observers identifying a lack of precision and consistency in the marketplace with respect to defining ESG investments and strategies, as well as shortcomings in the rigor of the prudence and loyalty analysis by some participating in the ESG investment marketplace.[13] There is no consensus about what constitutes a genuine ''ESG'' investment, and ESG rating systems are often vague and inconsistent, despite featuring prominently in marketing efforts.[14] The use of terms such as ESG, impact investing, sustainability, and non-financial performance metrics, among others, encompass a wide variety of considerations without a common nexus and can take on different meanings to different people. In part, the confusion stems from the fact that, from its beginning, the ESG investing movement has had multiple goals, both pecuniary

[8] 73 FR 61734 (Oct. 17, 2008).

[9] 80 FR 65135 (Oct. 26, 2015).

[10] Field Assistance Bulletin 2018–01 (Apr. 23, 2018).

[11] Id.

[12] See Jon Hale, *The ESG Fund Universe Is Rapidly Expanding* (March 19, 2020), *www.morningstar.com/articles/972860/the-esg-fund-universe-is-rapidly-expanding.* This trend is most pronounced in Europe, where authorities are actively promoting consideration of ESG factors in investing. See, *e.g.,* Principles for Responsible Investment (PRI), *Fiduciary Duty in the 21st Century* (Oct. 2019), *www.unpri.org/download?ac=9792,* at 34–35 (quoting official from EU securities regulator that ''ESG is part of [their] core mandate.''); Emre Peker, *What Qualifies as a Green Investment? EU Sets Rules,* Wall Street Journal (Dec. 17, 2019), *www.wsj.com/articles/eu-seals-deal-to-create-regulatory-benchmark-for-green-finance-11576595600* (''European officials have been racing to set the global benchmark for green finance''); Principles for Responsible Investment, *Investor priorities for the EU Green Deal* (April 30, 2020), *www.unpri.org/sustainable-markets/investor-priorities-for-the-eu-green-deal/5710.article* (discussing proposal to require ESG data to be disclosed alongside traditional elements of corporate and financial reporting, including a core set of mandatory ESG key performance indicators).

[13] See, *e.g., OECD Business and Finance Outlook 2020* (Sept. 2020), *www.oecd.org/daf/oecd-business-and-finance-outlook-26172577.htm,* at 29 (''The review of academic and industry literature reveals a wide range of approaches and results, which are largely inconsistent with one another. The research highlights the difficulty of identifying the real impact of ESG on investment performance.''); *Scarlet Letters: Remarks of SEC Commissioner Hester M. Peirce before the American Enterprise Institute* (June 18, 2019), *www.sec.gov/news/speech/speech-peirce-061819;* Paul Brest, Ronald J. Gilson, & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value,* European Corporate Governance Institute, Law Working Paper No. 394 (Mar. 29, 2018), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3150347,* at 5; Ogechukwu Ezeokoli et al., *Environmental, Social, and Governance (ESG) Investment Tools: A Review of the Current Field* (Dec. 2017), *www.dol.gov/sites/dolgov/files/OASP/legacy/files/ESG-Investment-Tools-Review-of-the-Current-Field.pdf,* at 11–13.

[14] See, *e.g., OECD Business and Finance Outlook 2020* (Sept. 2020), at 26–33, 47–58; Feifei Li & Ari Polychronopoulos, *What a Difference an ESG Ratings Provider Makes!* (Jan. 2020), *www.researchaffiliates.com/documents/770-what-a-difference-an-esg-ratings-provider-makes.pdf;* Florian Berg, Julian Kölbel, & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings* (Aug. 2019), MIT Sloan Research Paper No. 5822–19, *https://ssrn.com/abstract=3438533;* Schroders, *2018 Annual Sustainable Investment Report* (March 2019), *www.schroders.com/en/insights/economics/annual-sustainable-investment-report-2018,* at 22–23 (majority of passive ESG funds rely on a single third party ESG rating provider that ''typically emphasize tick-the-box policies and disclosure levels, data points unrelated to investment performance and/or backward-looking negative events with little predictive power'').

and non-pecuniary.[15] Moreover, ESG funds often come with higher fees, because additional investigation and monitoring are necessary to assess an investment from an ESG perspective.[16]

The Securities and Exchange Commission (SEC) has also undertaken initiatives related to ESG. The examination priorities of the Securities and Exchange Commission (SEC) for 2020 include a particular interest in the accuracy and adequacy of disclosures provided by registered investment advisers offering clients new types or emerging investment strategies, such as strategies focused on sustainable and responsible investing, which incorporate ESG criteria.[17] The SEC also solicited public comment on the appropriate treatment for funds that use terms such as ''ESG'' in their name and whether these terms are likely to mislead investors.[18]

ESG investing raises heightened concerns under ERISA. Public companies and their investors may legitimately pursue a broad range of objectives, subject to the disclosure requirements and other requirements of the securities laws. Pension plans and other benefit plans covered by ERISA, however, are bound by statute to a narrower objective: Prudent management with an ''eye single'' to maximizing the funds available to pay benefits under the plan.[19] Providing a secure retirement for American workers is the paramount, and eminently worthy, ''social'' goal of ERISA plans; plan assets may never be enlisted in pursuit of other social or environmental objectives at the expense of ERISA's fundamental purpose of providing secure and valuable retirement benefits.

Section 404(a)(1)(A) of ERISA expressly requires that plan fiduciaries act ''for the exclusive purpose of: (i) Providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.'' The Department is concerned, however, that the growing emphasis on ESG investing may prompt ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. The Department is also concerned that some investment products may be marketed to ERISA fiduciaries on the basis of purported benefits and goals unrelated to financial performance.[20] For example, the Department understands that the fund managers of some ESG investment funds offered to ERISA defined contribution plans represent that the fund is appropriate for ERISA plan investment platforms, while acknowledging in disclosure materials that the fund may perform differently, forgo investment opportunities, or accept different investment risks, in order to pursue the ESG objectives.

This regulatory project was undertaken in part to make clear that ERISA plan fiduciaries may not subordinate return or increase risks to promote non-pecuniary objectives. The duty of loyalty—a bedrock principle of ERISA, with deep roots in the common law of trusts—requires those serving as fiduciaries to act with a single-minded focus on the interests of beneficiaries.[21] The duty of prudence prevents a fiduciary from choosing an investment alternative that is financially less beneficial than reasonably available alternatives. These fiduciary standards are the same no matter the investment vehicle or category.

The Department believes that confusion with respect to these investment requirements persists, perhaps due in part to varied statements the Department has made on the use of non-pecuniary or non-financial factors over the years in sub-regulatory guidance. Accordingly, the Department intends, by this final regulation, to promulgate principles of fiduciary standards for selecting and monitoring investments, and set forth the scope of fiduciary duties surrounding non-pecuniary issues. Under the final rule, plan fiduciaries, when making decisions on investments and investment courses of action, must focus solely on the plan's financial risks and returns and keep the interests of plan participants and beneficiaries in their plan benefits paramount. The fundamental principle is that an ERISA fiduciary's evaluation of plan investments must be focused solely on economic considerations that have a material effect on the risk and return of an investment based on appropriate investment horizons, consistent with the plan's funding policy and investment policy objectives. The corollary principle is that ERISA fiduciaries must never sacrifice investment returns, take on additional investment risk, or pay higher fees to promote non-pecuniary benefits or goals.

The final rule recognizes that there are instances where one or more environmental, social, or governance factors will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations under generally accepted investment theories. For example, a company's improper disposal of hazardous waste would likely implicate business risks and opportunities, litigation exposure, and regulatory obligations. Dysfunctional corporate governance can likewise present pecuniary risk that a qualified investment professional would appropriately consider on a fact-specific basis.

The purpose of this action is to set forth a regulatory structure to assist ERISA fiduciaries in navigating these ESG investment trends and to separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return, increase costs, or assume additional investment

[15] See, *e.g., Who Cares Wins: Connecting Financial Markets to a Changing World* (2004), *www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf,* at v. (''Overall goals'' include ''[s]tronger and more resilient financial markets'' and ''[c]ontribution to sustainable development'').

[16] See, *e.g.,* Principles for Responsible Investment, *How Can a Passive Investor Be a Responsible Investor?* (Aug. 2019), *www.unpri.org/download?ac=6729,* at 15 (ESG passive investing strategies likely result in higher fees compared to standard passive funds); Wayne Winegarden, *ESG Investing: An Evaluation of the Evidence,* Pacific Research Institute (May 2019), *www.pacificresearch.org/wp-content/uploads/2019/05/ESG_Funds_F_web.pdf,* at 11–12 (finding average expense ratio of 69 basis points for ESG funds compared to 9 basis points for broad-based S&P 500 index fund). In recent years, the asset-weighted expense ratio for ESG funds has decreased as ESG funds with lower expense ratios have attracted more fund flows than ESG funds with higher expense ratios. See Elisabeth Kashner, *ETF Fee War Hits ESG and Active Management* (Jan. 22, 2020), *https://insight.factset.com/etf-fee-war-hits-esg-and-active-management.*

[17] See Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission, *2020 Examination Priorities,* at 15, *www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf.*

[18] See Request for Comment on Fund Names, Release No. IC–33809 (Mar. 2, 2020) (85 FR 13221 (Mar. 6, 2020)).

[19] *Donovan* v. *Bierwirth,* supra note 2, 680 F.2d at 271.

[20] See, *e.g.,* James MacKintosh, *A User's Guide to the ESG Confusion,* Wall Street Journal (Nov. 12, 2019), *www.wsj.com/articles/a-users-guide-to-the-esg-confusion-11573563604* (''It's hard to move in the world of investment without being bombarded by sales pitches for running money based on 'ESG' ''); Mark Miller, *Bit by Bit, Socially Conscious Investors Are Influencing 401(k)'s,* New York Times (Sept. 27, 2019), *www.nytimes.com/2019/09/27/business/esg-401k-investing-retirement.html.*

[21] See Unif. Prudent Inv. Act section 5 cmt. (1995) (''The duty of loyalty is perhaps the most characteristic rule of trust law.''); see also Susan N. Gary, George G. Bogert, & George T. Bogert, *The Law of Trusts and Trustees: A Treatise Covering the Law Relating to Trusts and Allied Subjects Affecting Trust Creation and Administration* section 543 (3d ed. 2019) (quoting Justice Cardozo's classic statement in *Meinhard* v. *Salmon,* 249 N.Y. 458, 464 (1928) that ''[a] trustee is held to something stricter than morals of the market place. . . . Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty.'').

risk to promote non-pecuniary benefits or objectives. The Department believes that addressing these issues in the form of a notice and comment regulation will help safeguard the interests of participants and beneficiaries in the plan benefits.

C. June 2020 Proposed Rule

In June 2020 (85 FR 39113 (June 30, 2020)), the Department published in the **Federal Register** a proposed rule to amend the ''investment duties'' regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to confirm that ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action. The proposal was intended to provide regulatory guideposts for plan fiduciaries in light of recent trends involving ESG investing that the Department is concerned may lead ERISA plan fiduciaries to choose investments or investment courses of action to promote environmental, social, and other public policy goals unrelated to the interests of plan participants and beneficiaries in receiving financial benefits from the plan, and expose plan participants and beneficiaries to inappropriate investment risks or lower returns than reasonably available investment alternatives. The proposal retained the core principles in the current regulation that set forth requirements for satisfying the prudence duty under ERISA section 404(a)(1)(B) when deciding on plan investments and investment courses of action.

The proposal suggested five major additions to the investment duties regulation. First, the proposal included new regulatory text that would require plan fiduciaries to select investments and investment courses of action based on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action. Second, the proposal added an express statement that compliance with the exclusive purpose (loyalty) duty in ERISA section 404(a)(1)(A) prohibits fiduciaries from subordinating the interests of plan participants and beneficiaries in retirement income and financial benefits to non-pecuniary goals. Third, a proposed new provision required fiduciaries to consider other available investments to meet their prudence and loyalty duties under ERISA. Fourth, the proposal acknowledged that ESG factors can be pecuniary factors, but only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The proposal added new regulatory text, setting forth required investment analysis and documentation requirements in the rare circumstances when fiduciaries are choosing among truly ''indistinguishable'' investments (related to the so-called ''tie breaker rule''). The documentation requirement was intended to prevent fiduciaries from improperly finding economic equivalence and making decisions based on non-pecuniary benefits without a proper analysis and evaluation. Fiduciaries already commonly document and maintain records about their investment selections. The provision in the proposal would have made that general practice required where a fiduciary determines that alternative investment options are economically indistinguishable and where the fiduciary chooses one of the investments on the basis of a non-pecuniary factor. Fifth, the proposal added a new provision on selecting designated investment alternatives for a defined contribution individual account plan (commonly referred to as 401(k)-type plans). The proposal reiterated the Department's view that the prudence and loyalty standards set forth in ERISA apply to a fiduciary's selection of an investment alternative to be offered to plan participants and beneficiaries in a defined contribution individual account plan. The proposal described the requirements for the selection of investment alternatives for such plans that purport to pursue one or more environmental, social, and corporate governance-oriented objectives in their investment mandates or that include such parameters in the fund name.

Overall, the proposed rule was designed to assist fiduciaries in carrying out their responsibilities, while promoting the financial interests of current and future retirees. The Department acknowledged in the proposal that some plans would have to modify their processes for selecting and monitoring investments—in particular, plans whose current document and recordkeeping practices were insufficient to meet the proposal's requirements.

The Department invited interested persons to submit comments on the proposed rule. In response to this invitation, the Department received more than 1,100 written comments submitted during the open comment period, and more than 7,600 submissions made as part of six separate petitions (*i.e.,* form letters). These comments and petitions came from a variety of parties, including plan sponsors and other plan fiduciaries, individual plan participants and beneficiaries, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support of and in opposition to the proposed rule. These comments were available for public review on the ''Public Comments'' page under the ''Laws and Regulations'' tab of the Department's Employee Benefits Security Administration website.[22]

Many comments submitted on the proposal offered general support for, or opposition to, the Department's proposal. These comments did not contain specific or detailed arguments on provisions of the proposal or otherwise include relevant, empirical information in the form of data or cited studies. As such, the Department does not separately identify or discuss these general comments in this document, although the preamble, in its entirety, addresses the reasons for undertaking this regulatory initiative and the rationales for the Department's specific regulatory choices.

Some commenters asserted that the proposal was ''unsupported by substantial evidence'' and was ''unwarranted by the facts,'' does not meet the minimum requirements of the Administrative Procedure Act, the Paperwork Reduction Act, or Executive order and Office of Management and Budget guidelines on cost-benefit analysis, and argued that the proposal could not withstand legal challenge in court. Several commenters argued for withdrawal of the proposed rule stating that the proposal neither demonstrated a compelling need for regulatory action nor demonstrated any fiduciary action that was injurious to plans. Some additionally argued that the Department had failed to employ the least burdensome method to effect any necessary change or to present any empirical data or evidence of a problem that justified the regulation. The Department, the commenters asserted, failed to provide a single example of any ERISA fiduciary allocating any investment on the basis of non-pecuniary criteria or any investigations or enforcement activity based on these concerns.

[22] See *www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95*. The Department received some comment letters on the proposed rule that were submitted after the close of the comment period. Those late comments were not considered or posted on the Department's website.

Other commenters indicated that current guidance is sufficient to enable the Department to bring enforcement actions against fiduciaries who fail to meet their responsibilities. Further, they asserted, the regulation was not proposed pursuant to either an explicit statutory mandate or evidence of an actual documented problem. Some commenters responded to the Department's observation of the growing emphasis on ESG in the marketplace by arguing that the more frequent use of the term ''ESG'' does not indicate any improper fiduciary decision making. Some also argued that the Department's approach is incongruent with that of other regulators who require consideration of financially material ESG factors and focus on the importance of disclosure of those factors.

With respect to the arguments of commenters concerning the Administrative Procedure Act, the Department believes that there are sufficient reasons to justify the promulgation of this final rule, including the lack of precision and consistency in the marketplace with respect to defining ESG investments and strategies, shortcomings in the rigor of the prudence and loyalty analysis by some participating in the ESG investment marketplace, and perceived variation in some aspects of the Department's past guidance on the extent a fiduciary may consider non-pecuniary factors in making investment decisions. Further, the iterative Interpretive Bulletins since 1994, followed by the Field Assistance Bulletin issued in 2018, and the number of advisory opinions and information letters historically issued on this topic demonstrate the need for notice and comment guidance issued under the Administrative Procedure Act.[23] The Department does not believe that there needs to be specific evidence of fiduciary misbehavior or demonstrated injury to plans and plan participants in order to issue a regulation addressing the application of ERISA's fiduciary duties to the issue of investing for non-pecuniary benefits. The need for this regulation was also demonstrated by some commenters who indicated their intention to make, or current practice in making, plan investment decisions based on non-pecuniary factors, rather than based on investment risk and return. For example, some commenters claimed that ERISA fiduciaries must prioritize the long-term, absolute returns for ''universal owners,'' and that collective investor action to manage social and environmental systems is necessary. As another example, other commenters argued that fiduciaries should be permitted to consider the potential for an investment to create jobs for workers who in turn would participate in the plan. These comments signal that the Department needs to address the use of non-pecuniary factors by fiduciaries when making decisions about ERISA plan investments and investment courses of action. Under the Department's authority to administer ERISA, the Department may promulgate rules that are preemptive in nature and is not required to wait for widespread harm to occur. The Department can ensure that demonstrated injury to plans and plan participants and beneficiaries are protected prospectively. Investing for non-pecuniary objectives raises heightened concerns under ERISA.

As the Department noted in the proposal, public companies and their investors may legitimately and properly pursue a broad range of objectives, subject to the disclosure requirements and other requirements of the securities laws. However, fiduciaries of pension and other benefit plans covered by ERISA are statutorily bound to manage those plans with a singular goal of maximizing the funds available to pay benefits under the plan. Indeed, the final rule furthers the paramount goal of ERISA plans to provide a secure retirement for American workers, and states that plans may not forego investment opportunities or assume investment risk to promote other non-financial goals.[24] In response to comments stating that the current guidance is sufficient, the Department believes that there is a reasonable need for this rulemaking, for the reasons explained earlier. The Department also believes that proceeding through notice-and-comment rulemaking rather than promulgating further interpretive guidance has other benefits, including the benefit of public input and the greater stability of codified rules. Proceeding in this manner is also consistent with the principles of Executive Order 13891 and the Department's recently issued PRO Good Guidance rule, which emphasize the importance of public participation, fair notice, and compliance with the Administrative Procedure Act.[25]

Some commenters complained that the 30-day comment period was too short given the complexity of the proposed changes, the magnitude of such changes to the retirement marketplace, and the need to prepare supporting data. They stated that those challenges were exacerbated by the present COVID–19 pandemic. Many commenters requested an extension of the comment period and that the Department schedule a public hearing on the proposal and allow the public record to remain open for post-hearing comments from interested parties. The Department has considered these requests, but has determined that it is neither necessary nor appropriate to extend the public comment period, hold a public hearing, or withdraw or republish the proposed regulation. A substantial and comprehensive public comment record was developed on the proposal sufficient to substantiate promulgating a final rule. The scope and depth of the public record that has been developed itself belies arguments that a 30-day comment period was insufficient. In addition, most issues relevant to the proposal have been analyzed and reviewed by the Department and the public in the context of three separate Interpretive Bulletins issued in 1994, 2008, and 2015 and the public feedback that resulted.[26] Finally, public hearings are not required under the Department's general rulemaking authority under section 505 of ERISA, nor under the Administrative Procedure Act's procedures for rulemaking at 5 U.S.C. 553(c). In this case, a public hearing is not necessary to supplement an already comprehensive public record.

Thus, this final rulemaking follows the notice and comment process required by the Administrative Procedure Act, and fulfills the Department's mission to protect, educate, and empower retirement investors as they face important choices

[23] See Executive Order 13891, 84 FR 55235 (Oct. 15, 2019) promoting notice and comment regulation for guidance.

[24] Executive Order 13868 on Promoting Energy Infrastructure and Economic Growth directed the Department to complete a review of available data filed with the Department in order to identify whether there are discernible trends with respect to plan investments in the energy sector. The order also required the Department to provide an update to the Assistant to the President for Economic Policy on any discernible trends in energy investments by such plans and to complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting. Nothing in the order dealt with investing for non-pecuniary purposes. As a result, no reports related to the proposal were required by the Executive order.

[25] See 85 FR 53163 (Aug. 28, 2020) (promulgating the Department's rule on promoting regulatory openness through good guidance).

[26] Further, the Department has also considered this subject in the context of specific questions submitted by stakeholders since the 1980s. See, *e.g.,* DOL Inf. Ltr to George Cox (Jan. 16, 1981); DOL Adv. Op. to Theodore R. Groom (Jan. 16, 1981); DOL Adv. Op. to Daniel E. O'Sullivan, Union Labor Life Ins. Co (Aug. 2, 1982); Ltr from Ass't Sec. Dennis Kass to Sen. Howard Metzenbuam (May 27, 1985); DOL Adv. Op to James Ray, Union Labor Life Ins. Co. (July 8, 1988); DOL Inf. Ltr. to Stuart Cohen, General Motors Corp. (May 14, 1993).

in saving for retirement in their employee benefit plans. This rule is considered to be an Executive Order (E.O.) 13771 regulatory action. Details on the estimated costs of this rule can be found in the final rule's economic analysis. The Department concluded that the additions to § 2550.404a–1 (404a–1 regulation) and the rule's improvements to the Department's previous sub-regulatory guidance are appropriate and warranted. Accordingly, after consideration of the written comments received, the Department has determined to adopt the proposed regulation as modified and set forth below.

D. The Final Rule

The final regulation sets forth fiduciary standards for selecting and monitoring investments held by ERISA plans, and addresses the scope of fiduciary duties surrounding non-pecuniary issues. The final regulation contains several important changes from the proposal in response to public comments. The fact that the loyalty principles of section 404(a)(1)(A) of ERISA are now coupled with the previous prudence regulation under section 404(a)(1)(B) confirms that, in making investment decisions of any kind, ERISA requires that both the principles of loyalty and of prudence must be considered. The final rule expressly applies these principles not just to investments and investment courses of action, but also to the selection of available investment options for plan participants in individual account plans.

As more fully described below, the final rule makes five major amendments to the investment duties regulation under Title I of ERISA at 29 CFR 2550.404a–1. First, the final rule adds provisions to confirm that ERISA fiduciaries must evaluate investments and investment courses of action based solely on pecuniary factors—financial considerations that have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and funding policy. The term ''investment course of action'' is defined in paragraph (f)(2) of the final rule to mean ''any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated investment alternative under the plan.'' Second, the final rule includes an express regulatory provision stating that compliance with the exclusive purpose (loyalty) duty in ERISA section 404(a)(1)(A) prohibits fiduciaries from subordinating the interests of participants to unrelated objectives, and bars them from sacrificing investment return or taking on additional investment risk to promote non-pecuniary goals. Third, the final rule includes a provision that requires fiduciaries to consider reasonably available alternatives to meet their prudence and loyalty duties under ERISA. Fourth, new regulatory text sets forth required investment analysis and documentation requirements for those circumstances in which plan fiduciaries use non-pecuniary factors when choosing between or among investments that the fiduciary is unable to distinguish on the basis of pecuniary factors alone. The final rule includes a related documentation requirement for such decisions intended to prevent fiduciaries from improperly finding economic equivalence or making investment decisions based on non-pecuniary benefits without appropriately careful analysis and evaluation. Fifth, the final rule states that the prudence and loyalty standards set forth in ERISA apply to a fiduciary's selection of designated investment alternatives to be offered to plan participants and beneficiaries in a participant-directed individual account plan. The final rule expressly provides that, in the case of selecting investment alternatives for an individual account plan that allows plan participants and beneficiaries to choose from a broad range of investment alternatives, as defined in 29 CFR 2550.404c–1(b)(3), a fiduciary is not prohibited from considering or including an investment fund, product, or model portfolio merely because the fund, product, or model portfolio promotes, seeks, or supports one or more non-pecuniary goals, provided that the fiduciary satisfies the prudence and loyalty provisions in ERISA and the final rule, including the requirement to evaluate solely on pecuniary factors, in selecting any such investment fund, product, or model portfolio. However, the provision prohibits plans from adding any investment fund, product, or model portfolio as a qualified default investment alternative described in 29 CFR 2550.404c–5, or as a component of such an investment alternative, if the fund, product, or model portfolio's investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

The provisions of the final rule are discussed below along with relevant public comments.

1. Section 2550.404a–1(a) and (b)—General Prudence and Loyalty Investment Duties

The final rule builds upon the core principles provided by the original investment duties regulation on the issue of prudence under section 404(a)(1)(B) of ERISA, at 29 CFR 2550.404a–1, which the regulated community has been relying upon for more than 40 years.[27] For example, as stated in the preamble to the 1979 regulation, it remains the Department's view that (1) generally the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either per se prudent or per se imprudent, and (2) the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio. It also remains the Department's view that an investment reasonably designed—as part of the portfolio—to further the purposes of the plan, and that is made with appropriate consideration of the relevant facts and circumstances, should not be deemed to be imprudent merely because the investment, standing alone, would have a relatively high degree of risk. The Department also continues to believe that appropriate consideration of an investment to further the purposes of the plan must include consideration of the characteristics of the investment itself and how it relates to the plan portfolio.

Paragraph (a) of the final rule is unchanged from the proposal and includes a restatement of the statutory language of the exclusive purpose requirements of ERISA section 404(a)(1)(A) and the prudence duty of ERISA section 404(a)(1)(B). The existing 404a–1 regulation already included a restatement of the prudence duties that apply to fiduciary investment decisions under ERISA section 404(a)(1)(B). The final rule thus reinforces the core principles provided in the investment duties regulation by expressly referencing the separate loyalty duty imposed on fiduciary investment decisions under ERISA section 404(a)(1)(A). In effect, paragraph (a) of this final rule amends paragraph (a) in the 1979 investment duties regulation by adding the exclusive purpose requirements to the existing duty of prudence. That application of these

[27] 44 FR 37221, 37225 (June 26, 1979).

prudence and loyalty requirements is context-specific and depends on the facts and circumstances as made clear by the rest of the provisions of the rule.

Some commenters asserted that the combination of prudence and loyalty in paragraph (a) of the proposal, together with the requirements of paragraph (b) as to how to satisfy those joint requirements when evaluating investments, were not simple clarifications of the existing investment duties regulation. Rather, in their view, that combination of amendments would have constituted the development of a new theory of loyalty beyond the Department's stated objective to address ESG investment developments, and which would have resulted in confusion regarding investment duties more generally. Some commenters, moreover, argued that the proposal's combination of amendments could violate established principles of statutory construction by establishing a regulation under which compliance with a single set of objective requirements would be sufficient to satisfy the requirements of both section 404(a)(1)(A)'s duty of loyalty and (B)'s duty of prudence. Unlike ERISA's duty of prudence, the duty of loyalty has not been interpreted by the courts to be an objective test requiring compliance with appropriate procedures, but has instead been measured by the subjective intent or motivation of the fiduciaries, according to the commenters. Nor have the courts extended the duty of loyalty to prohibit a fiduciary from considering implications external to the fiduciary's self-interest, so long as the fiduciary was focused on benefiting participants and beneficiaries and defraying reasonable plan expenses, according to the commenters. And finally, some commenters asserted that at least some authority interprets ERISA section 404(a)(1)(A) to permit some incidental benefits to others' interests as long as the primary purpose and effect of the action is to benefit the plan.

As to the interplay between paragraphs (a), (b), and (c) of the proposal, one commenter requested clarification that paragraph (b) of the proposal was intended to continue as a safe harbor, and was not the exclusive means for satisfying prudence. This commenter observed that the Department originally described paragraph (b) as a safe harbor in 1979 when the investment duties regulation was originally published. This commenter was concerned that the specific requirements of paragraph (c) of the proposal did not appear to constitute a safe harbor. This commenter argued that if the Department's intent is to transform paragraph (b) from a safe harbor into minimum requirements, the Department must provide specific notice of this fact and solicit comments from the public while also assessing the costs and benefits of such a change.

Some commenters also raised concerns that the Department should not have multiple prongs in the regulation variously stating that a fiduciary ''should not subordinate'' and ''should not otherwise subordinate.'' Similarly, one commenter argued that the phrase in the proposal ''and has otherwise complied with the duty of loyalty'' is circular because it includes compliance with the duty of loyalty as an element of complying with the duty of loyalty. Commenters argued that the addition of the phrase ''the duty of loyalty'' inside the definition of the duty of loyalty creates an invitation for courts to graft on additional responsibilities not included within either the Department's rule or section 404(a)(1)(A) of ERISA.

One commenter asked the Department to replace its multi-part articulation of the duty of loyalty in the proposal with a simple clarification stating that ''a fiduciary may not subordinate the interests of participants and beneficiaries as retirement savers to any other interests of the participants, beneficiaries, the fiduciary itself or any other party.'' This commenter also proposed eliminating paragraph (c) regarding pecuniary factors in investment decisions altogether. The commenter argued that the advantage would be an easily understood, one-part test that captures both elements of the proposal without the need for special rules for ''pecuniary factors'' and other rules for ''non-pecuniary factors.''

Other commenters argued that the prohibition in paragraph (b) against subordinating the interest of the participants and beneficiaries to the fiduciary's or another's interest is unnecessary in light of ERISA's prohibited transaction provisions, and, moreover, would likely have unintended consequences by making many common, accepted, and generally beneficial practices suspect, such as the use of proprietary products, fee sharing, and fee aggregation.

The principles of loyalty under section 404(a)(1)(A) of ERISA prohibit a fiduciary from subordinating the interests of the participants and beneficiaries in their retirement income or other financial benefits under the plan to unrelated objectives. No commenter suggested to the contrary. Thus, the Department believes that including the duty of loyalty in a regulatory provision regarding investment activity should not be the surprise nor innovation some commenters alleged.

The Department is persuaded by the comments that there is a better way than presented in the proposal to express the view that a fiduciary engaged in investments and investment courses of action may not subordinate the interests of the plan to unrelated objectives and that the fiduciary needs to focus on the pecuniary interests of the plan in complying with its prudence obligation under the plan. The Department is persuaded by the comments that it would be preferable to retain paragraph (b) as a provision addressing only the ERISA section 404(a)(1)(B) prudence duty and revising paragraphs (c) and (d) to more specifically address the element of the duty of loyalty that requires fiduciaries to focus investment decision-making on providing financial benefits to participants under the plan and prohibits fiduciaries from subordinating the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to unrelated objectives. This approach incorporates the duty of loyalty into the regulation while recognizing that the statute sets forth the duty of prudence and the duty of loyalty as separate fiduciary obligations.

Further, the Department is persuaded by the comments that the ''safe harbor'' nature of paragraph (b) in the original investment duties regulation should be preserved. However, the Department does not agree that its safe-harbor characterization of the 404a–1 regulation in 1979 can fairly be read to suggest an unrestricted open field. Rather, in describing the regulation as a safe harbor, the Department cautioned that it was expressing no view on whether the prudence duty could be satisfied outside of the ''safe harbor'' provisions in the regulation: ''It should also be noted that the Department does not view compliance with the provisions of the regulation as necessarily constituting the exclusive method for satisfying the requirements of the 'prudence' rule. Rather, the regulation is in the nature of a 'safe harbor' provision; it is the opinion of the Department that fiduciaries who comply with the provisions of the regulation will have satisfied the requirements of the 'prudence' rule, *but no opinion is expressed in the regulation as to the status of activities undertaken or performed that do not so comply.*'' [28] Although there may be

[28] 44 FR at 37222 (June 26, 1979) (emphasis added).

distinct circumstances where some other process would be prudent, in every case, ERISA fiduciaries are required to have a soundly reasoned and supported investment decision or strategy to satisfy the ERISA prudence requirement.

As a result, proposed paragraph (b)(1) is modified in the final rule to remove the general references to the duty of loyalty under section 404(a)(1)(A) of ERISA, such as those contained in paragraphs (b)(1)(iii) and (iv) of the proposal, and to maintain its character as a safe harbor for prudent investment and investment courses of action as described in the original 1979 investment duties regulation. However, the safe harbor in paragraph (b) applies only to the duty of prudence under section 404(a)(1)(B) of ERISA. Under the final rule, the provisions set forth in paragraphs (c) and (d) are set forth as minimum requirements with respect to the aspects of the duty of loyalty addressed in those paragraphs, including the obligation to focus on pecuniary factors when making investment decisions. Thus, the final rule does not revise the current requirements that the fiduciary give appropriate consideration to a number of factors concerning the composition of the plan portfolio with respect to diversification, the liquidity and current return of the portfolio relative to the anticipated cash flow needs of the plan, and the projected return of the portfolio relative to the funding objectives of the plan. Paragraph (b)(1) of the final rule continues to provide that with regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary's investment duties, the requirements of section 404(a)(1)(B) of the Act set forth in paragraph (a) are satisfied if the fiduciary (i) has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties, and (ii) has acted accordingly.

Paragraph (b)(2) of the proposal provided that for purposes of paragraph (b)(1) of the proposal, ''appropriate consideration'' shall include, but is not necessarily limited to (i) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and (ii) consideration of the composition of the portfolio with regard to diversification, the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, the projected return of the portfolio relative to the funding objectives of the plan as those factors relate to such portion of the portfolio, and how the investment or investment course of action compares to available alternative investments or investment courses of action with regard to those factors listed.

Paragraph (b)(2) of the proposal was essentially the same as the provision in the 1979 investment duties regulation except for proposed paragraph (b)(2)(ii)(D) which required the consideration of how the investment or investment course of action compares to available alternative investments or investment courses of action with regard to those factors listed in paragraphs (b)(2)(ii)(A) through (C). Thus, most related comments concerned proposed paragraph (b)(2)(ii)(D). Commenters assert that this provision is unclear as to extent of the requirement to evaluate alternatives. In some cases, commenters alleged, there may be no true alternative to a particular investment, because the opportunity is so unique. In other cases, the opportunity may lapse if a thorough undertaking of all alternatives is pursued. In yet other situations, the number of potential alternatives might be so numerous that consideration of every alternative is impossible. This lack of clarity may give rise to inappropriate second-guessing in which questions are raised as to whether a particular alternative (selected with the benefit of hindsight) should have been considered. Similarly, some commenters complained that the requirement does not necessarily take into account the complexities involved in defined benefit plan investment, which varies, among other items, by plan design, participant census, the sponsor's risk tolerance and a company's cash, and whether a proposed investment adds litigation risk. Commenters also argued the proposed provision may be at odds with the ERISA section 404(c) regulation because it is unclear what ''available alternative investments'' means in the context of satisfying the 404(c) regulation's requirement to make available at least three investment alternatives meant to provide a broad-based selection. Further, commenters asked how to apply the obligation to consider alternative investments applies in situations where company stock is purchased for a plan through a plan provision that mandates such purchase.

Commenters were concerned that the proposed rule provides no guidance as to how the relevant alternatives would be determined and how many of those alternatives the fiduciary is to use in performing the newly required comparison. For example, one commenter posited that the proposal might be read to require a fiduciary making a decision on a diversified stock fund that falls within Morningstar's large cap growth category to compare that investment to all of the approximately 1,350 mutual funds within that category. Some commenters suggested that the Department should tell fiduciaries exactly how to conduct such an analysis to make the best prospective decision. Some expressed concern that the requirement opened fiduciaries to ''20/20 hindsight'' legal attacks by class action lawyers.

The Department notes that the concept of comparing available investment alternatives is not new. Interpretive Bulletins on ESG and ETI investing issued by the Department expressed the view that facts and circumstances relevant to an investment or investment course of action would, in the view of the Department, include consideration of the expected return on alternative investments with similar risks available to the plan. Specifically, the Department observed that, because every investment necessarily causes a plan to forego other investment opportunities, an investment would not be prudent if it were expected to provide a plan with a lower rate of return than available investment alternatives with commensurate degrees of risk, or were riskier than available investment alternatives with commensurate rates of return.[29] Such an analysis is similar to that required by paragraph (b)(2)(ii)(D) of the proposal. As a result, the concept of comparing investment opportunities as set forth in paragraph (b)(2)(ii)(D) cannot fairly be cast as new to the retirement investing community.

Furthermore, the proposal was not intended to require fiduciaries to ''scour the market'' and incur search costs on a practically infinite number of potential portfolios, nor could such a requirement be consistent with the duty

[29] See 29 CFR 2509.94–1 and 2509.2015–01.

of prudence.[30] Rather, as the Department noted when it issued the 404a–1 regulation in 1979, the Department recognizes that a fiduciary should be required neither to expend unreasonable efforts in discharging his duties, nor to consider matters outside the scope of those duties. Accordingly, the regulation requires fiduciaries to give consideration to those facts and circumstances which, taking into account the scope of his investment duties, the fiduciary knows or should know are relevant to the particular investment decision involved.[31] The scope of the fiduciary's inquiry in this respect, therefore, is limited to those facts and circumstances that a prudent person having similar duties and familiar with such matters would consider relevant. That same principle applies to consideration of alternative investment opportunities.

Accordingly, the Department has determined to keep the general concept of paragraph (b)(2)(ii)(D) in the final rule. However, we believe a better approach than the proposal is one that incorporates the concept in a way that is consistent with the Department's prior IB statements and at the same time addresses the requests of commenters for guidance as to the extent of the requirement to evaluate alternatives. The Department added new language to paragraph (b)(2)(i) to state that the consideration of risk and loss and the opportunity for gain (or other return) associated with the investment or investment courses of action should take place ''compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks.'' Under the final rule, a fiduciary is required only to compare alternatives that are reasonably available under the circumstances. The Department used the phrase ''reasonably available alternatives'' not only to confirm that the rule does not require fiduciaries to scour the market or to consider every possible alternative, but also to allow for the possibility that the characteristics and purposes served by a given investment or investment course of action may be sufficiently rare that a fiduciary could prudently determine, and document, that there were no other reasonably available alternatives for purpose of this comparison requirement. As a result, paragraph (b)(2) of the final rule provides that for purposes of paragraph (b)(1), ''appropriate consideration'' shall include, but is not necessarily limited to (i) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks, and (ii) consideration of the composition of the portfolio with regard to diversification, the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, the projected return of the portfolio relative to the funding objectives of the plan as those factors relate to such portion of the portfolio, and how the investment or investment course of action compares to alternative investments or investment courses of action that were considered with regard to those factors listed.

With respect to the comments arguing that ERISA section 404(a)(1)(A) is purely a subjective motivation test, the Department does not believe that is a viable analytical approach and is concerned that such an interpretation would raise substantial feasibility questions about the application and enforcement of such a requirement. Rather, while motivation is undeniably a proper focus in applying a loyalty requirement under which fiduciary action must be based solely on the interests of participants and beneficiaries and for their ''exclusive benefit,'' the Department believes that establishing regulatory guideposts, like the requirement to focus on pecuniary factors in investment decision-making, is an appropriate way to establish objective criteria that help fiduciaries understand how to comply with their duty of loyalty in the context of evaluating financial factors when selecting investments or investment courses of action.

Since the scope of paragraph (b) in the final rule has been revised from the proposal to encompass only the obligations set forth in ERISA section 404(a)(1)(B), the proposal's inclusion in paragraph (b)(1)(iv) of a specific prohibition on a fiduciary subordinating the interests of participants and beneficiaries to the fiduciary's or another's interest is unnecessary. The Department further agrees that it is not necessary to have multiple provisions of the final rule contain the prohibition on ''not subordinating'' the interests of participants and beneficiaries. Thus, the Department eliminated paragraph (b)(1)(iv) of the proposal from the final rule, and, as described below, revised the final rule to address the Department's concerns regarding a focus in fiduciary investment activity on ''pecuniary factors'' through a revised provision in paragraph (c).[32]

Paragraph (b)(3) of the final rule merely moves what was paragraph (d) of the proposal to this new position in the regulatory text. This move was judged appropriate because the paragraph concerns compliance with the immediately preceding regulatory text of paragraphs (b)(1) and (2). Paragraph (d) of the proposal repeated a paragraph in the current 404a–1 regulation which states that an investment manager appointed pursuant to the provisions of section 402(c)(3) of the Act to manage all or part of the assets of a plan may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of the proposal, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if such information is provided for the stated purpose of assisting the manager in the performance of the manager's investment duties, and the manager does not know and has no reason to know that the information is incorrect. This provision was originally part of the 1979 regulation, has remained unchanged since then, and no commenter suggested that the substance of the provision be changed. Paragraph (b)(3) of the final rule is essentially the same as the parallel provision in the original 1979 investment duties regulation.

2. Section 2550.404a–1(c)(1)—Consideration of Pecuniary Factors

Paragraph (c)(1) of the proposed rule required that a fiduciary's evaluation of an investment be focused only on pecuniary factors. The proposal expressly provided that it is unlawful for a fiduciary to sacrifice return or

[30] See *Hecker* v. *Deere & Co.,* 556 F.3d 575, 586 (7th Cir. 2009) (''nothing in ERISA requires every fiduciary to scour the market'').

[31] See 44 FR at 37223 (June 26, 1979).

[32] For similar reasons, the final rule does not carry forward the reference to the parallel exclusive purpose provision in ERISA section 403 that was in the proposal. The Department also concluded that the final rule should continue the focus of the current 404a–1 regulation on section 404 of ERISA. Section 403(c) of ERISA provides in relevant part that the assets of the plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose for providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of the plan. Although similar, the text of ERISA section 403 is not identical to section 404(a)(1)(A) of ERISA, and the Department wanted to avoid any possible inference that compliance with the provisions of the final rule would also necessarily satisfy all the provisions of section 403 of ERISA.

accept additional risk to promote a public policy, political, or any other non-pecuniary goal. Paragraph (c)(1) also expressly acknowledged that ESG factors and other similar considerations may be pecuniary factors and economic considerations, but only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The proposal emphasized that such factors, if determined to be pecuniary, must be considered alongside other relevant economic factors to evaluate the risk and return profiles of alternative investments. The proposal further provided that the weight given to pecuniary ESG factors should reflect a prudent assessment of their impact on risk and return—that is, they cannot be disproportionately weighted. The proposal also emphasized that fiduciaries' consideration of ESG factors must be focused on their potential pecuniary elements by requiring fiduciaries to examine the level of diversification, degree of liquidity, and the potential risk-return profile of the investment in comparison with available alternative investments that would play a similar role in their plans' portfolios.

A number of commenters offered nearly unqualified support for the rule, and endorsed the Department's efforts in moving forward with the proposal. Although some commenters expressed concern that the rule was complex and posited possible attendant compliance costs and uncertain legal liabilities, they deemed these costs justified by the protections offered by the proposal. Commenters also shared the concern of the Department that the growing emphasis on ESG investing may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. They agreed that the proposal was designed to make clear that ERISA plan fiduciaries may not invest in ESG vehicles when they understand an underlying investment strategy of the vehicle is to subordinate return or increase risk for the purpose of non-pecuniary objectives. They stated that investments should be made based on an evaluation of whether the investments will improve the financial performance of the plan. Other commenters stated that while they support individual investors' ability to pursue ESG investments that align with their values, they support the proposal's focus on decisions made by ERISA fiduciaries on plan participants' behalf, where enhancing financial returns is the overriding legal obligation of ERISA plan fiduciaries when making investment decisions. Some commenters supported the proposal's acknowledgement that ESG factors and other similar considerations may be economic considerations and the proposal's guidance to fiduciaries regarding how to consider pecuniary ESG factors when contemplating an investment decision, such as the importance of understanding the ''economic risks or opportunities'' attached to such considerations and appropriately weighing pecuniary ESG factors based on ''a prudent assessment of their impact on risk and return'' alongside other relevant economic factors necessary to make an investment decision. These commenters said that the proposed regulation would protect plan participants by ensuring that ERISA fiduciaries are making reasoned investment decisions based on all material information, including pecuniary ESG factors, available to them. Other commenters shared DOL's concern that the growing emphasis on ESG investing may be prompting fiduciaries to make investment decisions for reasons other than maximizing return to beneficiaries. Some commenters asserted that some ESG-focused funds have a stated goal of subordinating investor return or increasing investor risk for the purpose of achieving political or social objectives, citing ESG funds' disclosures that the commenters said highlighted the potential for reduced returns, increased risks, and heightened fees in service of social goals. These commenters asserted that the proposed rule clarifies that ERISA plan fiduciaries may not invest in ESG funds when the investment strategy of the fund subordinates return or takes on additional investment risk or costs for purposes of non-pecuniary objectives.

Many commenters, however, expressed concern that the Department did not classify ESG as material financial factors that should be considered by fiduciaries in their investment evaluation and decision-making. They pointed to evidence and research that they asserted makes clear that ESG factors *are* material economic considerations that *must* be integrated into fiduciary investment decisions. Some commenters asserted that ESG integration has been evolving and growing for decades primarily to help manage investment risks and to provide a proxy for management quality, which, they argued, were both pecuniary factors. Other commenters stated that the proposed rule appeared to be based on a presumption that ESG funds commonly select portfolio constituents based on ''non-pecuniary'' factors, without regard to risk and return. These commenters stated that they were not aware of any fund managers that select portfolio constituents without regard to financial performance, or risk and return.

Some commenters acknowledged that the proposal expressly provided that ESG factors and other similar considerations may be pecuniary factors and economic considerations, but argued that, if the purpose of the rule is to establish a clear distinction between ESG used for risk-return assessment and ESG used for collateral benefits (*e.g.* ESG investing for moral or ethical reasons or to benefit a third party), the Department should better define ESG risk-return factors to more clearly distinguish between the permissible and impermissible uses thereof, which are the heart of this issue. Some commenters similarly argued that the proposal would cause confusion because of its failure to distinguish ESG integration and economically targeted investing. ESG integration, the commenters assert, is the consideration of ESG factors as part of prudent risk management and a strategy to take investment actions aimed at responding to those risks, whereas economically targeted investing, by comparison, is investing with the aim to provide financial as well as collateral, non-financial benefits. These commenters argued that the proposal is aimed at ETIs and problems associated with ETIs rather than ESG integration into the risk-return analysis of investments, and raised concerns that the lack of a clearer distinction between the two in the proposal will discourage proper ESG risk-return integration. Another commenter raised a similar concern, but in the specific context of selecting investment funds for individual account plans, by asking that the Department distinguish between ESG-themed investment funds, where the primary investment strategy or principal purpose is to promote impermissible collateral benefits, and those investment funds that are not primarily focused on ESG factors, but instead use one or more ESG factors as part of their overall investment analysis.

Some commenters asserted that instead of providing the needed flexibility to consider all material factors, the proposal would unnecessarily limit the discretion of the fiduciary to determine that ESG factors

may have a ''material effect on the return and risk of an investment'' by requiring ''qualified investment professionals'' to treat the factor as material economic considerations under generally accepted investment theories. They argued that the proposal, although based on generally accepted investment theories which by definition include changes to reflect an evolving financial marketplace, would still place restraints on the discretion fiduciaries need to adjust their investment practices to keep pace with the constantly changing investment landscape and emerging theories that develop alongside. For example, some commenters stated that the Department should avoid a regulatory structure that would require the Department and plan fiduciaries to referee references to ''qualified investment professionals,'' ''material,'' and ''generally accepted investment theories.'' The commenters expressed concern that those terms invite subjective interpretations. One commenter expressed concern that some parties will likely attempt to undermine the rule's intent with claims that ESG-focused investing is already ''generally accepted.'' Other commenters argued that the proposal creates a heightened level of scrutiny for investments that involve ESG-integration that do not apply to any other type of investment.

Many commenters stated that EBSA ignored academic and financial studies and papers showing that more sustainable companies and funds do not sacrifice performance compared with less sustainable peers, and in fact are somewhat more likely to outperform than to underperform. They cite, for example, a 2018 Government Accountability Office study that concluded the majority of asset managers interviewed found that incorporating ESG factors enhanced retirement plans' risk management.[33] The GAO also noted more than half of the asset managers interviewed were ''incorporating ESG factors to improve the long-term performance of retirement plan portfolios.'' Another commenter cited a study saying that sustainable funds provided returns in line with comparable traditional funds while reducing downside risk. During a period of extreme volatility, the commenters assert that they saw strong statistical evidence that sustainable funds are more stable. A 2015 Harvard Business School paper found that firms with strong ratings on material sustainability issues have better future performance than firms with inferior ratings on the same issues. In contrast, firms with strong ratings on immaterial issues do not outperform. Some commenters stated that numerous sophisticated investors have indicated that their ESG investments, social benefits notwithstanding, are fundamentally driven by expected financial returns, including considerations regarding long-term value, opportunity, and risk, and cited studies indicating that an ESG perspective can improve performance, including studies that purport to show, according to the commenters, that ESG-focused indexes have matched or exceeded returns of their standard counterparts, with comparable volatility. They also cited studies purporting to show that investors who screened for ESG factors could have avoided 90 percent of S&P 500 bankruptcies from 2005 to 2015 and that S&P 500 companies in the top 25 percent by ESG ratings experienced lower future earnings-per-share volatility than those in the bottom 25 percent. A commenter observed, in its view, that there was better risk-adjusted performance across ''sustainable'' products globally under recent market stress (including severe turmoil in the first quarter of 2020).

Representatives of the multiemployer plan community commented on the proposal's provisions requiring that the focus of fiduciaries when making investment decisions must be on pecuniary interests of the plan, and requested that the Department add a particular consideration within the meaning of ''pecuniary'' factor. According to these commenters, the proposal failed to consider and distinguish between the different types of defined benefit pension plans and how relevant pecuniary factors might differ between different types of ERISA plans. They asserted that there are several differences between multiemployer and single employer defined benefit pension plans relevant for purposes of this regulation: The source and nature of plan contributions; the pecuniary impact of contributions on the plan, its participants, and beneficiaries; and the consequent ability of the plan to make investments that advance, promote, and support the pecuniary interests of the plan, its participants, and beneficiaries through plan contributions. These commenters argued that, unlike single employer plans, multiemployer plans have a significant track record of being able to make investments that earn competitive risk-adjusted returns and that directly put plan participants to work, thereby generating new contributions to the plan. According to these commenters, if a given investment results in a pension fund receiving additional contributions, such contributions are as much a pecuniary factor as any gain or loss on the investment. Some commenters made a similar point with respect to defined contribution plans. They asserted that increased participation and contributions should be recognized as pecuniary factors for defined contribution plans and pointed to surveys demonstrating that including ESG investment alternatives has a positive effect on employees' interest in participating in and contributing to retirement savings plans.

Some commenters questioned the proposal's requirement to consider only pecuniary factors when ERISA investment fiduciaries routinely consider non-pecuniary interests as part of their fiduciary process. They argued, for example, that ERISA specifically provides for plan investments in qualifying employer securities. In the case of employee stock ownership plans (ESOPs), they noted that such plans are designed for investment primarily in employer securities. They said that the proposal conflicted with statutory authorization to invest in employer securities by requiring plan fiduciaries to justify the inclusion of company stock based solely on ''pecuniary'' factors and by comparison to ''available alternative investments or investment courses of action.'' Other commenters suggested that the proposal's focus on risk-return features of an investment or investment course of action would likely have unintended consequences on many common, accepted, and generally beneficial practices by rendering them suspect, such as the use of proprietary products, fee sharing, and fee aggregation. Some comments contended that investment managers and fiduciaries routinely take into consideration a variety of factors that do not necessarily have a ''material effect on the risk and/or return'' of a particular investment. They cited, for example, that a plan committee may consider a fund manager's brand or reputation when determining whether to include that fund in the plan's menu. A fiduciary might account for operational considerations when selecting one investment fund over another, where those operational considerations may have a bearing on the fees borne by participants or the smooth operation of the plan. A fiduciary also might decide to choose an investment regulated in

[33] Government Accountability Office Report No. 18–398, *Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful* (2018).

one legal regime over another because of the protection the fiduciary believes the particular regulatory regime offers, or it might find the disclosures produced by one investment provider easier for participants to understand. Another commenter noted that reasonable and necessary plan administrative expenses are commonly offset with payments or credits attributable to the plan's investment options, and asked whether the focus on risk-return characteristics would prohibit a fiduciary from considering the administrative fee offset the plan would receive when selecting an investment option. Some commenters expressed concern that the proposal also could encourage litigation by having the plaintiffs' bar second-guess whether a decision is solely for the financial benefit of participants and beneficiaries based on incidental benefits that may accrue to plan fiduciaries (even though case law and Departmental guidance have approved such benefits if they are merely incidental and flow from a fiduciary decision that satisfies ERISA's prudence and loyalty requirements).[34] One of these commenters also expressed concern about such litigation alleging that the selection of one investment over another sacrificed investment returns even if the decision was justified by the use of revenue sharing to obtain lower administrative fees.

Some commenters argued that the Department's focus on risk and return was not an appropriate approach for addressing ESG considerations in decisions regarding management of plan investments. They argued that given the critical importance of overall market return, and the danger to that return from company activities that damage social and environmental systems, plan beneficiaries need protection from individual companies that focus on their own performance in ways that damage overall market return. Commenters argued that in order to protect the interest of plans and beneficiaries, plan fiduciaries must consider whether they can effectively engage with companies to limit or eliminate conduct that threatens the social and economic systems that diversified portfolios rely on over the long term. They argued that fiduciary investors must focus on and prioritize outcomes at the economy or society-wide scale, or ''beta'' issues such as climate change and corruption, not just on the risks and returns of individual holdings. They contended that fiduciary investment duties must prioritize the long-term, absolute returns for ''universal owners,'' and that collective investor action to manage social and environmental systems is needed in order to satisfy the fiduciary duties of investment trustees.

One commenter suggested that the definition of ''pecuniary factor'' was too narrow and recommended modifying it to mean a factor *that could reasonably be expected* to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA.

Still another commenter suggested that ''appropriate investment horizon'' be better defined in the definition of ''pecuniary factor'' to ensure that the long-term horizons for certain policy objectives are not substituted for those relating to the time-horizon of retirees.

As the Department explained in the proposal, it is the long-established view of the Department that ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits. A fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives. In the preamble to the proposal, the Department recognized that there could be instances when ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories. In such situations, these issues are themselves appropriate economic considerations, and thus should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments. The proposal even provided additional guidance as to when it was appropriate to consider ESG matters as pecuniary factors in making investment decisions. Thus, the proposal fundamentally accepted, rather than ignored as claimed by some commenters, the economic literature and fiduciary investment experience that showed ESG considerations may present issues of material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories. Rather, the proposal sought to make clear that, from a fiduciary perspective, the relevant question is not whether a factor under consideration is ''ESG'', but whether it is a pecuniary factor relevant to an evaluation of the investment or investment course of action under consideration. Nonetheless, the Department is persuaded by its review of the public comments that ''ESG'' terminology, although used in common parlance when discussing investments and investment strategies, is not a clear or helpful lexicon for a regulatory standard. As one commenter put it, '''ESG investing' resists precise definition.'' Rather, ''[r]oughly speaking, it is an umbrella term that refers to an investment strategy that emphasizes a firm's governance structure or the environmental or social impacts of the firm's products or practices.'' The Department agrees that ESG terminology suffers from two distinct shortcomings as a regulatory standard. First, as the Department noted in the proposal, and many commenters agreed, various other terms have been used to describe this and related investment behaviors, such as socially responsible investing, sustainable and responsible investing, impact investing, and economically targeted investing. Moreover, the terms do not have a uniform meaning and the terminology is evolving, and the non-pecuniary goals being advocated today may not be the same as those advocated in future years. Second, by conflating unrelated environmental, social, and corporate governance factors into a single term, ESG invites a less than appropriately rigorous analytical approach in evaluating whether any given E, S, or G consideration presents a material business risk or opportunity to a company that corporate officers and directors should manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations in evaluating an investment in that company. The Department also believes that adopting ESG terminology in an investment duties regulation invites the arguments, made by some commenters, that all manner of ESG considerations are always and in every case a pecuniary factor that must be

[34] See *Lockheed Corp.* v. *Spink,* 517 U.S. 882 (1996); *Hughes Aircraft Co.* v. *Jacobsen,* 525 U.S. 432 (1999). See also Advisory Opinion 2011–05A (noting that a fiduciary decision to use plan assets to add a wellness benefit to plan benefits under existing, supplemental or new insurance policies or contracts would not violate ERISA because the employer sponsoring the plan may receive incidental benefits, such as lower plan costs, as a result of the wellness benefits being added to the plan).

considered as such in all investment decisions, or even that ESG should be a mandatory investment strategy for prudent fiduciaries. Such positions are inconsistent with the Department's considered view and sound policy.

Thus, the final rule removes all ESG terminology from the proposed regulatory text. The Department anticipates that when a fiduciary is faced with a purported ESG factor in an investment, the regulatory requirement will be clearer and more consistent if it demands that fiduciaries focus on providing participants with the financial benefits promised under the plan and focus on whether a factor is pecuniary, rather than being required to navigate imprecise and ambiguous ESG terminology. The ERISA fiduciary duty of prudence requires portfolio-level attention to risk and return objectives reasonably suited to the purpose of the account, diversification, cost-sensitivity, documentation, and ongoing monitoring. The proposal was not intended to suggest that these principles apply other than neutrally to all investment decisions by a trustee or other fiduciary, whether in the context of a direct investment or menu construction in an individual account plan. For similar reasons, the Department declines to follow suggestions from some commenters that ESG factors are necessarily pecuniary and that the Department should specifically mandate that fiduciaries consider ESG factors as part of their investment duties.

At the time of the investment decision, fiduciaries should be focused on whether or not any given factor would materially affect the risk and/or return of the investment over an appropriate time horizon. The intent of the proposal was to address the Department's continued concern about the growing emphasis on ESG investing that seeks to achieve non-pecuniary objectives or goals that are unrelated to the interests of the plan's participants and beneficiaries in their retirement income or financial benefits under the plan, and the consequence that ERISA plan fiduciaries may be prompted to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. Thus, the proposal was intended to ensure that ERISA fiduciaries comply with their investment duties in a consistent and appropriate fashion in the face of ESG-driven market developments.[35] The Department believes that the generally applicable prudence requirements in paragraph (a) of the final rule, together with a requirement in paragraphs (c) and (d) of the final rule demanding a focus on pecuniary factors and the definition of pecuniary factors in paragraph (f), are sufficient to establish an appropriate regulatory standard in this context.

As a result, paragraph (c)(1) of the final rule retains the requirement in the proposal that fiduciary evaluation of an investment must be focused only on pecuniary factors. As in the proposal, the final rule's paragraph (c)(1) is a legal requirement and not a safe harbor. The final rule also retains the text from the proposal that expressly states that plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or any other non-pecuniary goals, but has been revised to include text from proposed paragraph (b)(1)(iii), modified slightly, that a fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives. Even commenters that opposed the Department's proposal generally agreed that such a provision appropriately described a fiduciary's duty of loyalty under ERISA.[36]

With respect to the provisions of paragraph (c) of the proposal that would have separately required compliance with prudence obligations set forth in paragraph (b) (*e.g.,* that the weight given to any particular pecuniary factors should appropriately reflect a prudent assessment of their impact on risk and return, and that fiduciaries considering pecuniary factors examine the level of diversification, degree of liquidity, and the potential risk-return in comparison with other available alternative investments that would play a similar role in their plans' portfolios), the Department agrees with the observation of one commenter that identifying these requirements separately in paragraph (c)(1) and tying them to regulatory text about ''environmental, social, corporate governance, or other similarly oriented factors'' could be misconstrued as applying these general prudence criteria in some unique (or at least more rigorous) fashion to ESG and ''other similarly oriented'' investment strategies. Accordingly, in order to avoid redundant and potentially confusing regulatory requirements, the specific provisions on those obligations that were in paragraph (c) of the proposal have been eliminated from paragraph (c) of the final rule and replaced with a more general requirement that the weight given to any pecuniary factor by a fiduciary should appropriately reflect a prudent assessment of its impact on risk and return. As modified, this provision will provide fiduciaries the necessary flexibility to evaluate and consider the particular pecuniary factors relevant to a specific investment or investment course of action, while focusing paragraph (c) on the principal objective of adding to the regulation an express provision that the duty of fiduciaries is to act with an eye single toward furthering participants' ''financial'' rather than ''nonpecuniary'' benefits.

Further, the Department did not intend the reference to ''generally accepted investment theories'' to foreclose ERISA fiduciaries from considering emerging theories regarding prudent investment practices or otherwise freeze investment practice as of the date of the rule. Rather, the intent was to establish a regulatory guardrail against situations in which plan investment fiduciaries might be inclined to use, as one example, policy-based metrics in their assessment of the pecuniary value of an investment or investment plan that are inherently biased toward inappropriate overestimations of the pecuniary value of policy-infused investment criteria. The Department intended to communicate the idea that the fiduciary is required to have a soundly reasoned and supported investment decision or strategy to satisfy the ERISA prudence requirement. However, the Department has decided not to include this provision in the final rule, but rather to rely on the definition of pecuniary factor as the governor for investment decisions without specifically constraining the criteria that a fiduciary

[35] See, *e.g.,* James MacKintosh, *A User's Guide to the ESG Confusion,* Wall Street Journal (Nov. 12, 2019), *www.wsj.com/articles/a-users-guide-to-the-esg-confusion-11573563604* (''It's hard to move in the world of investment without being bombarded by sales pitches for running money based on 'ESG' ''); Mark Miller, *Bit by Bit, Socially Conscious Investors Are Influencing 401(k)'s,* New York Times (Sept. 27, 2019), *www.nytimes.com/2019/09/27/business/esg-401k-investing-retirement.html.*

[36] The language in proposed (b)(1)(iii) referred to ''unrelated objectives,'' rather than ''other objectives.'' The Department has used ''unrelated objectives'' in previous sub-regulatory guidance. However, that language could be misconstrued as providing a loophole to allow fiduciaries to consider and to subordinate participants and beneficiaries' financial interests to objectives that are in any way related to the interests of participants and beneficiaries in their retirement income or financial benefits under the plan. It was not the Department's intent—and nor would it be consistent with ERISA—to allow fiduciaries to subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to any other objective, and the Department has revised the language used in the final rule text to ensure that it is not misconstrued.

could consider in making a prudent judgment. Although not retained as express regulatory text in the final rule, the Department believes that it would be consistent with ERISA and the final rule for a fiduciary to treat a given factor or consideration as pecuniary if it presents economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. In this regard, it is based on the essence of the 1979 investment duties regulation, the conditions of which basically require the judgment of a prudent expert—and if the decision maker does not have the expertise himself, he should consult such an expert. For example, in a 1996 letter to Eugene Ludwig, Comptroller of the Currency, regarding the ERISA duty of prudence in the context of an evaluation of the prudence of derivative investments, the Department stated that among other things, the fiduciary should determine whether it possesses the requisite expertise, knowledge, and information to understand and analyze the nature of the risks and potential returns involved in a particular derivative investment. The letter pointed out that the fiduciary must determine whether the plan has adequate information and risk management systems in place given the nature, size, and complexity of the plan's investment activity, and whether the plan fiduciary has personnel who are competent to manage those systems.[37]

The Department also did not intend that the provision be read, as some commenters did, as a limitation on the ability of ERISA fiduciaries to consider all relevant factors in evaluating whether factors may have a ''material effect on the return and risk of an investment.'' Rather, when comparing investment or investment courses of action, including selection of designated investment alternatives in the case of participant-directed individual account plans, a fiduciary satisfies its obligations under paragraph (c)(1) by evaluating factors that are expected to result in a material difference among reasonably available alternatives with respect to risk and/or return. Thus, the final rule neither specifically prohibits nor permits the use of proprietary products, fee sharing, and fee aggregation, but requires the fiduciary to evaluate whether such practices are expected to have a material effect on risk and/or return as compared to the reasonably available alternatives. If a fiduciary were to prudently conclude that a fund manager's brand or reputation will materially affect the expected risk and/or return as funds, then such factors would be pecuniary. Similarly, to the extent that the net expenses incurred by the plan, such as for plan administration or to develop disclosures that are easier for participants to understand, are expected to materially affect the risk and return of one alternative as compared to another, such factors would be considered pecuniary. Finally, in response to some commenters, the Department did not intend to imply in the proposal that, in evaluating investments or investment courses of action, a fiduciary must always select the one with the lowest cost. Depending on the facts and circumstances, a fiduciary may conclude that a particular investment or investment course of action is prudent even though it entails higher risk or cost.

The Department, however, cautions fiduciaries against too hastily concluding that ESG-themed funds may be selected based on pecuniary factors or are not distinguishable based on pecuniary factors, thereby triggering the tie-breaking provision of paragraph (c)(2) of the final rule. A number of commenters touted the performance of ESG-themed funds for selected time periods, particularly after the widespread COVID–19 outbreak, as compared to more conventional alternatives. However, questions have been raised as to whether such performance was caused by a particular ESG strategy or merely correlated with broader economic trends unrelated to a specific ESG factor. The Department observes that many ESG-themed funds have been over-weighted in technology and underweighted in energy as compared to more conventional alternatives, which has affected certain funds' returns in recent periods. Technology assets performed relatively better during the recent pandemic, while energy markets that were already in turmoil from global excess supply declined further due to widespread decrease in demand, including due to reductions in travel. This difference in portfolio composition can affect the level of risk associated with the corresponding return and a fiduciary would need to prudently balance such considerations when comparing alternatives.

In response to the commenter who suggested that the definition of ''pecuniary factor'' should be modified to include a ''reasonably be expected'' provision, the Department has revised the definition to mean a factor that a fiduciary prudently determines is expected to have a material effect on risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA. The Department believes that a prudent determination incorporates a reasonableness standard of care, but has revised the definition to use terminology that is more consistent with the statutory language of ERISA section 404(a)(1)(B), which includes more than reasonableness. Thus, the final rule recognizes that the nature of the fiduciary investment judgments will necessarily involve forward-looking expectations when evaluating investment alternatives and strategies. The Department is also retaining the concept of materiality in the definition of ''pecuniary factor'' as it believes that fiduciaries and investment managers are generally familiar with that concept from its use in connection with both ERISA and the Federal securities laws.

With respect to the consideration of how the final rule and its emphasis on pecuniary factors would influence the selection of company stock for a plan, the Department notes first that commenters should not have concern on this issue. The basic ERISA principles governing fiduciaries have coexisted with the use of ESOPs for many years, and this rule does not disturb them. This rule is focused on principles of pecuniary and nonpecuniary investing in the broader marketplace. This rule does not have as one of its objectives any changes to the long-established use of ESOPs by companies that wish to do so.

Second and relatedly, the Department recognizes that ESOPs are typically set in most respects by the employer's settlor function, and further that they are congressionally sanctioned under a particularized statutory framework compatible with this rule. Most acquisitions of company stock and use of company stock funds in individual account plans are directed by the plan or instruments governing the plan. Investments in qualifying employer securities are explicitly authorized by statutory provisions in ERISA, and subject to specific statutory conditions that Congress enacted as elements of Federal employee benefits law. For example, there are specific provisions for employer securities in the requirements under ERISA section 101(i) related to notice of blackout periods to participants or beneficiaries under individual account plans. Section 101(m) includes special disclosure rules

[37] See Letter to Eugene A. Ludwig from Olena Berg (March 21, 1996), and also Advisory Opinions 2002–14A and 2006–08A; and Letter to J. Mark Iwry (Oct. 23, 2014).

for individual account plans on the right to divest employer securities with respect to any type of contribution. Section 105 on individual benefit statements requires individual account plans to include an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately diversified. Section 204(j) of ERISA includes special diversification requirements for certain individual account plans governing investments in employer securities. ERISA sections 404(a)(2) and 407 provide specific rules for the application of ERISA's diversification requirements to the acquisition of ''qualifying employer securities.'' The U.S. Supreme Court has concluded that there is no special presumption of prudence under ERISA favoring ESOP fiduciaries, stating that ''the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings.'' [38] Similarly, the duties of prudence and loyalty set forth in this regulation apply in the context of the pertinent provisions of ERISA. In short, the statutory provisions in ERISA, and others in the Internal Revenue Code, make clear that plan fiduciaries are permitted to invest in employer securities following the direction of a plan document with respect to acquisitions or holding of employer stock,[39] provided the fiduciary satisfies the applicable conditions in the statute, and acts prudently and loyally.

With respect to the comments by the multiemployer plan community requesting that the Department adjust its definition of pecuniary factor to include increased contributions to plans as a result of investments, the Department has previously addressed this and similar issues in a number of advisory opinions and information letters.[40] Specifically, the Department has repeatedly explained that increased plan contributions and similar factors are not economic factors, but that they are the type of non-economic factor that may be considered where a fiduciary is permitted to make an investment decision on the basis of a non-pecuniary factor.[41] Increasing plan contributions and similar factors do not assist a fiduciary in determining the expected return on or riskiness of an investment, as plan contributions do not constitute a ''return'' on investment.

The Department's position on this issue has not changed and as a result we disagree with these commenters. The potential for increased contributions to a plan as a result of an investment is not a pecuniary factor associated with the return on a particular investment. Nor may increased contributions be considered a return on an investment. In terms of determining what is or is not a pecuniary factor, the relevant performance to be measured is that of the investment in question, not future plan contributions. The purpose of plan investments under ERISA is to provide and protect retirement benefits—not to strengthen employers or unions or provide job security. Under ERISA, plans are to be operated solely in the interest of participants and beneficiaries *as participants and beneficiaries,* not in some other role or capacity, such as union members, employees, or members of some other interest group. However, the Department agrees—consistent with the advisory opinions and information letters referenced above—that an objective to increase contributions or respond to participant interest in investment options for their retirement savings are permissible factors to use in the tie-breaker provisions in paragraph (c)(2), discussed below, based on their connection to the interests of the plan and plan participants and beneficiaries.

Finally, the Department does not agree with the position that ERISA permits or requires plan fiduciaries to premise investment decisions on the idea that, as investors, they own a share of the world economy, and, therefore, that their financial interests demand that they adapt their investment-related actions to promote a theoretical benefit to the world economy that might redound, outside the plan, to the benefit of the participants in the plan.[42] The Department has acknowledged in the proposal and in this final rule that particular environmental or social factors may present material and current business risks or opportunities for specific companies (and may be reflected in potential market risk and return). But the Department cannot reconcile the approach described above with the requirements of prudence and loyalty under ERISA. On the contrary, that approach and the potential consequences of advocacy to plan fiduciaries based on that approach is one of the concerns that underlies this final rule, and illustrates why the Department considers the rule to be warranted at this time. As the Department has stated, it does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors. Rather, ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits. A fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives.

3. Section 2550.404a–1(c)(2)—Choosing Between or Among Investment Alternatives That the Plan Fiduciary Is Unable to Distinguish on the Basis of Pecuniary Factors Alone

Prior to the proposal, the Department's interpretive guidance provided that if, after an evaluation, alternative investments appear economically indistinguishable, a fiduciary may then, in effect, ''break the tie'' by relying on a non-pecuniary factor. The proposal carried forward this idea and paragraph (c)(2) of the proposal was designed to guide application of the ''all things being equal'' test by requiring fiduciaries to adequately document any such occurrences. In the preamble to the proposal, the Department noted that there are highly

[38] *Dudenhoeffer,* 573 U.S. at 418–419.

[39] The Department has taken the position that there is a class of activities that relate to the formation, rather than the management, of plans. These activities, generally referred to as settlor functions, include decisions relating to the formation, design, and termination of plans and, except in the context of multi-employer plans, generally are not activities subject to Title I of ERISA. As such, decisions that are settlor functions would not be subject to the final rule provisions that govern fiduciary investment duties. The Department notes, however, that actions taken to implement settlor decisions may involve fiduciary activities, and, to the extent those activities involve fiduciary investment decisions, they would be subject to the provisions of this final rule. See Advisory Opinion 2001–01A; Advisory Opinion 97–03A; Letters to Kirk Maldonado from Elliot Daniel (March 2, 1987); and Letter to John Erlenborn from Dennis Kass (March 13, 1986).

[40] See, *e.g.,* DOL Inf. Ltr to George Cox (Jan. 16, 1981); DOL Adv. Op. to Theodore Groom (Jan. 16, 1981); DOL Adv. Op. to Daniel O'Sullivan, Union Labor Life Ins. Co (Aug. 2, 1982); DOL Adv. Op to James Ray, Union Labor Life Ins. Co. (July 8, 1988); DOL Inf. Ltr. to Stuart Cohen, General Motors Corp.. (May 14, 1993).

[41] See, *e.g.,* DOL Inf. Ltr. to Ralph Katz (March 15, 1982) (''A decision to make an investment may not be influenced by a desire to stimulate the construction industry and generate employment, unless the investment, when judged solely on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan.'').

[42] See *also* supra at 83–84.

correlated investments and otherwise very similar ones. The Department observed that seldom, however, will an ERISA fiduciary consider two investment funds, looking only at objective measures, and find the same target risk-return profile or benchmark, the same fee structure, the same performance history, and the same investment strategy, but a different underlying asset composition. The Department explained that, even then, those two alternatives may function differently in the overall context of the fund portfolio and going forward may perform differently based on external economic trends and developments.[43] As a result, the Department expressed concern that the ''all things being equal'' test could invite fiduciaries to find ties without a proper analysis in order to justify the use of non-pecuniary factors in making an investment decision. Nonetheless, because it appeared that some form of ties may theoretically occur, and the Department did not have sufficient evidence to say they do not occur in fact, the Department proposed to retain a version of an ''all things being equal'' test. However, in the proposal, the Department specifically requested comment on the tie-breaker concept, whether true ties exist, and, if they do, how fiduciaries may appropriately break ties.

The Department also believed that using non-pecuniary factors to choose among investments merited closer scrutiny. As one commenter noted, trust fiduciary law recognizes that there are circumstances, mainly in the context of conditionally permitted conflicts of interest, that call for enhanced scrutiny of the substance of the fiduciary's decision.[44] The Department believes that relying on non-pecuniary factors to select among investments is a circumstance that similarly warrants some form of enhanced scrutiny. Thus, paragraph (c)(2) of the proposal was designed to guide application of the ''all things being equal'' test by requiring fiduciaries to adequately document any such occurrences. If, under proposed paragraph (c)(2) after completing an appropriate evaluation, alternative investments appear economically indistinguishable, and one of the investments is selected on the basis of a non-pecuniary factor or factors such as environmental, social, and corporate governance considerations, the fiduciary must document why pecuniary factors were not sufficient to select the investment or investment courses of action, how the investment compares to alternative investments with respect to the factors listed in paragraphs (b)(2)(ii)(A) through (C), and how the non-pecuniary factor or factors was chosen based upon the purposes of the plan, the diversification of investments, and the interests of the participants and beneficiaries in receiving benefits from the plan. The Department included the documentation requirement to provide a safeguard against the risk that fiduciaries will improperly find economic equivalence and make decisions based on non-pecuniary factors without a proper analysis and evaluation.

Many commenters characterized proposed paragraph (c)(2) of the proposal as a new stricter ''tie breaker'' or ''all things being equal test'' that was inappropriately rigid. One commenter asserted that proposed paragraph (c)(2) effectively required plan fiduciaries to demonstrate that the chosen investment was ''outright superior'' to the available alternative investments. Many commenters stated that the standard in the Department's interpretive guidance was an easier standard to comply with and required the comparison only of investments of comparable financial value. Some commenters stated that the proposal appeared to require that the alternatives under consideration have ''the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, [and that it not] function differently in the overall context of the fund portfolio, and [not] perform differently based on external economic trends and developments.'' In short, the commenters argued the prior standard, which they said is best characterized as functional equivalence, was replaced with a new, more restrictive economically identical standard. These commenters asserted that the impossibility of satisfying this standard suggested that the Department's objective in designing the provisions was to deter fiduciaries from considering investments with non-pecuniary benefits.

Some commenters argued that true ''ties'' of the sort envisioned in the proposal do not exist because they read the proposal as requiring investments to have identical characteristics, not just equivalent roles in the plan's investment portfolio. They argued that such indistinguishability in liquid markets is all but impossible. The risk of any two assets, even if identical on some risk metric, will nonetheless not be perfectly correlated. Further, they argued that breaking the tie is not the correct response. Rather, if there is no liquidity constraint and trading costs are low, they assert that textbook financial economics teaches that in the event of two economically equivalent investments so defined, the investor should buy both of them and achieve improved diversification.

Other commenters said that ''ties'' are actually quite common in the investment process and that for almost every portfolio, there are some economically indistinguishable alternatives when viewed in terms of the role the investments would play in the plan's portfolio. The commenters argued that two or even several investments' expected overall economic impact on a plan may be essentially the same even if the investments' risk-return profile, fee structure, performance history, and investment strategy are not each literally identical. Some mutual fund commenters suggested that the proposal appears to assume that evaluation of two alternative investments based solely on pecuniary factors can be reduced to a single number. That assumption, they asserted, underestimates the complexity of portfolio construction.

Some commenters said that putting the burden on the fiduciary to justify a finding of economic equivalence that would permit a non-pecuniary tie-breaker is an appropriate policy response. They claimed there is considerable opportunity in the assessment of investment alternatives for those with an incentive to favor an ESG plan to nudge the process so that a slightly economically inferior ESG investment could be considered ''economically indistinguishable'' from a non-ESG alternative.

Other commenters argued that the tie-breaker idea should be available to fiduciaries when selecting investment alternatives for defined contribution plans. Those commenters argued that applying the tie breaker test to investment choices with the same overall economic role and impacts in a plan's portfolio, within a reasonable range of expected outcomes, rather than only those that are identical in each and every respect (except for asset composition), would more appropriately reflect the process by which ERISA fiduciaries select plan investments.

Some commenters claimed that the proposal was vague and nonspecific as to what form the additional documentation required under proposed paragraph (c)(2) should take. Further, the commenters asserted, prudent plan fiduciaries already document their decision-making process. Other

[43] See Schanzenbach & Sitkoff, supra note 5, at 410 (describing a hypothetical pair of truly identical investments as a ''unicorn'').

[44] See, *e.g.,* Restatement (Third) of Trusts section 37 cmt. f(1) (2007) (''especially careful scrutiny'').

commenters asserted that no other Federal regulator mandates this much documentation. One commenter noted that there is no ESG documentation for investment managers under the Investment Advisers Act or the Investment Company Act. The commenter said the SEC Regulation Best Interest provides significant flexibility by leaving it largely up to individual firms to determine how best to memorialize decisions. Commenters asserted that although the Department explained in the preamble that the documentation safeguards against fiduciaries making decisions based on non-pecuniary factors without proper analysis or rigor, a lack of rigor is not synonymous with a lack of writing and does not explain why ESG factors are treated differently than other investment factors. Commenters also asserted that the proposed rule's documentation requirement would effectively create a unique and unwarranted presumption against ESG investing that does not apply to any other kind of investment. Some commenters asserted that the proposed rule if implemented would add new costs and these new costs would chill sponsors from considering any investment incorporating ESG factors, even if pecuniary and part of the risk assessment of the investment. Some commenters argued that paragraph (c)(2) would result in additional documentation burdens on plans that did not actually rely on the tie-breaker because fiduciaries would feel compelled to document ESG risk-reward integration as non-pecuniary collateral consideration for strategies in order to protect against second-guessing about the fiduciary's determination that the ESG factor was properly treated as a pecuniary factor. Some commenters stated that by requiring the documentation the proposed regulation would invite manufactured breach-of-fiduciary-duty lawsuits based on claimed documentation failures even in cases where there was no evidence of a failure in fiduciary decision-making.

Another commenter called for the documentation requirement to be expanded. The commenter argued that paragraph (c)(2) of the proposal, while a valuable addition, would not capture situations in which plan managers who are inclined toward policy-based investment have used policy-based metrics in their evaluation of the pecuniary value of an investment or investment plan that are inherently biased toward inappropriate overestimations of the pecuniary value of policy-infused investment decisions. This commenter suggested that the requirement be expanded to require complete explanation and documentation any time policy-based analysis plays any role in the determination of the anticipated pecuniary value of an investment or investment strategy.

Fiduciaries are not compelled to break ties on the basis of non-pecuniary factors, and—consistent with their core obligation to discharge their duties solely in the interests of participants and beneficiaries—fiduciaries are encouraged to make their best judgment on the basis of pecuniary factors alone, or where prudent to diversify by selecting all indistinguishable alternatives. As described in the proposal and above, proposed paragraph (c)(2) is intended to provide a safeguard against the possibility that fiduciaries interested in making policy-based investments would improperly find economic equivalence and make decisions based upon non-pecuniary benefits without proper analysis and evaluation.

The Department does not agree that the final rule should adopt what some commenters referred to as a less restrictive ''all things being equal'' test. However, the Department notes there was disagreement among commenters as to whether true ties actually occur, and a great deal of confusion as to the meaning of ''economically distinguishable'' and whether that requires mathematical precision in the evaluation of investment characteristics that is unrealistic with respect to how investment professionals operate. After considering the public comments, the Department is persuaded that the tie-breaker test should be simplified and focus on situations in which the fiduciary is unable to distinguish investment alternatives on the basis of pecuniary factors alone, rather than demanding that investments be identical in each and every respect before the tie-breaker provision would be available.

The Department remains convinced, however, that it is appropriate for the regulation to include a safeguard against the risk that fiduciaries will improperly find economic equivalence and make decisions based on non-pecuniary factors without a proper analysis and evaluation. The Department thus decided to retain, with some modifications, the documentation requirements as part of the ''all things being equal'' test in paragraph (c)(2). The Department does not believe those requirements prohibit investments with non-pecuniary ESG or other components. Moreover, because the final rule does not require any documentation of decisions that use pecuniary ESG factors, the Department does not believe that it will inappropriately chill fiduciaries from considering investments that incorporate ESG factors that can be shown to be pecuniary as part of the investment's risk assessment relative to non-ESG factors. In other words, the final rule does not single out ESG investing or any other particular investment theory for particularized treatment.

Rather, and specifically, paragraph (c)(2) of the final rule provides that if a fiduciary is unable to determine which investment is in the best interests of the plan on the basis of pecuniary factors alone, the fiduciary may base the investment decision on non-pecuniary factors, provided the fiduciary documents the following: why pecuniary factors were not sufficient to select the investment or investment course of action; how the investment compares to the alternative investments with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C); and how the chosen non-pecuniary factor or factors are consistent with the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan. With respect to the third documentation requirement, the Department has consolidated the proposed requirement to document why the selected investment was chosen based on the purposes of the plan and the interests of plan participants and beneficiaries in receiving benefits from the plan into a single requirement. When a fiduciary makes an investment decision based on non-pecuniary factors as permitted under the final rule, the fiduciary remains subject to ERISA's general loyalty obligation and must act in a manner that is consistent with the interests of participants and beneficiaries in their retirement income or financial benefits. For example, responding to participant demand in order to increase retirement plan savings or investments in contribution creating jobs for current or future plan participants may be consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan, while selecting based on which investment would bring greater personal accolades to the chief executive officer of the sponsoring employer, or solely on the basis of a fiduciary's personal policy preferences, would not.

The proposal did not expressly incorporate the tie-breaker provision in paragraph (c)(2) on ''economically indistinguishable alternative investments'' into the regulatory

provision on selection of investment options for individual account plans. The Department explained in the proposal that it was of the view that the concept of ''ties'' may have little relevance in the context of fiduciaries' selection of menu options for individual account plans as such investment options are often chosen precisely for their varied characteristics and the range of choices they offer plan participants. Further, the Department explained that because the proposal did not restrict the addition of prudently selected, well managed investment options for individual account plans which include non-pecuniary factors if they can be justified solely on the basis of pecuniary factors, there would be little need for a tie-breaker between selected investment funds. Nonetheless, some commenters expressed some uncertainty regarding the interaction of paragraph (c)(2) and the provisions of the proposal on selecting investment options for individual account plans. Some commenters asked the Department to expressly make the tie-breaker available for such investment decisions. The Department continues to doubt that the concept of a ''tie'' when adding designated investment alternatives to a platform of investments that allow participants and beneficiaries to choose from a broad range of investment alternatives as defined in 29 CFR 2550.404c-1(b)(3) is relevant. Nevertheless, the final rule makes the tie-breaker provisions in paragraph (c) generally available for use in selecting investment options for individual account plans in the event the fiduciaries of the plan believe that it gives them some added flexibility and protection when adding an investment fund, product, or model portfolio that promotes, seeks, or supports one or more non-pecuniary goals in circumstances where the fiduciary could not distinguish such investment option from an alternative on the basis of pecuniary factors alone.

4. Section 2550.404a–1(d)—Investment Alternatives in Participant-Directed Individual Account Plans

Paragraph (c)(3) of the proposed rule contained standards applicable to participant-directed individual account plans. Participant-directed plans are a subset of individual account retirement plans that provide for the allocation of investment responsibilities to participants and beneficiaries of the plans, sometimes referred to as ''self-directed'' plans. Paragraph (c)(3) of the proposal, in relevant part, stated the general proposition that sections 403 and 404 of ERISA apply to a fiduciary's selection of an investment fund as a designated investment alternative in an individual account plan.

Paragraph (c)(3) of the proposal further provided that a fiduciary's addition (for the platform) of one or more prudently selected, well managed, and properly diversified investment alternatives that include one or more environmental, social, corporate governance, or similarly oriented assessments or judgments in their investment mandates, or that include these parameters in the fund name, would not violate the standards in section 403 and 404 provided three conditions were met. The first condition, at paragraph (c)(3)(i) of the proposed rule, was that the fiduciary uses only objective risk-return criteria, such as benchmarks, expense ratios, fund size, long-term investment returns, volatility measures, investment manager investment philosophy and experience, and mix of asset types (*e.g.,* equity, fixed income, money market funds, diversification of investment alternatives, which might include target date funds, value and growth styles, indexed and actively managed funds, balanced and equity segment funds, non-U.S. equity and fixed income funds), in selecting and monitoring all investment alternatives for the plan including any environmental, social, corporate governance, or similarly oriented investment alternatives. The second condition, at paragraph (c)(3)(ii) of the proposed rule, was that the fiduciary must document its compliance with the first condition. The third condition, at paragraph (c)(3)(iii) of the proposed rule, was that the environmental, social, corporate governance, or similarly oriented investment mandate alternative is not added as, or as a component of, a qualified default investment alternative described in 29 CFR 2550.404c-5.

Paragraph (d) of the final rule contains standards applicable to participant-directed individual account plans. The standards in paragraph (d) of the final rule reflect substantial revisions from the proposed rule. The predecessor provisions in paragraph (c)(3) of the proposal are revised, reorganized, and relocated into paragraph (d) of the final rule in response to concerns raised by the public commenters.[45] As in the proposal, the final rule's paragraph (d) is a legal requirement and not a safe harbor.

Paragraph (d)(1) of the final rule provides that the standards set forth in paragraph (a) (relating to the statutory duties of loyalty and prudence) and paragraph (c) (the pecuniary-only and anti-subordination provisions, including the tie-breaker test) of the final rule apply to a fiduciary's selection of designated investment alternatives that will be made available to participants and beneficiaries for investing their individual accounts. This provision makes clear that the same prudence and loyalty duties that apply generally to evaluating investments under ERISA (such as stock selection) also apply to a fiduciary's evaluation and selection of designated investment alternatives from which participants and beneficiaries select where to direct their retirement assets. Thus, when assembling, choosing, or modifying an investment menu for participants' investment choices, a fiduciary must evaluate the designated investment alternatives on the menu based solely on pecuniary factors, not subordinate the interests of participants to unrelated objectives, and not sacrifice investment return or take on additional investment risk to promote non-pecuniary objectives or goals.

Paragraph (d)(1) of the final rule responds to commenters who objected to what they perceived as the proposal's establishment of stricter or different rules for self-directed individual account plans than for all other types of plans. For instance, a number of commenters on the proposal questioned the relationship between the ''objective-criteria only'' standard in paragraph (c)(3)(i) of the proposal, and the ''pecuniary only'' standard in paragraph (c)(1) of the proposal. The commenters argued that these two standards did not harmonize with each other, and that their overlay was unnecessarily protective and would have created ambiguity or possibly even inconsistency. This concern was generated, in part, by the fact that some of the listed examples of permissible objective criteria were seen as neither ''objective'' nor pecuniary, according to the commenters. Many commenters also questioned the accuracy of the list of objective criteria contained in the paragraph (c)(3)(i) of the proposal, with some commenters suggesting additions and other commenters suggesting deletions. A number of commenters also strongly objected to the objectivity standard on the basis that it disfavors active investment strategies for self-directed plans, and that the Department should refrain from interfering in the

[45] For the reasons explained above in footnote 32, supra, the final rule no longer contains an explicit reference to section 403 of ERISA. This omission better aligns the scope of paragraph (d) of the final rule with the scope of paragraph (a) of the final rule.

investment marketplace by favoring or disfavoring any particular investment alternatives or strategies.

In response to these concerns, the final rule omits the ''objective-criteria only'' standard. The Department agrees that this standard, as structured in the proposal, was perhaps more restrictive than necessary and potentially confusing as to exactly how it was intended to relate to other proposed provisions subsequently removed from the proposal. The Department does not agree with the commenters, however, to the extent that their comments could be construed as suggesting that the duty of prudence does not apply to a fiduciary's selection of designated investment alternatives for investment menus. Nor does the Department agree that a plan fiduciary need not consider objective risk-return criteria or need not document the selection and monitoring processes to comply with ERISA's duty of prudence. Since the final rule makes it clear that ERISA's duty of prudence (as contained in paragraph (a) of the final rule) and the pecuniary factor provisions in paragraph (c) of the final rule apply to the selection of designated investment alternatives that will be made available to participants and beneficiaries for investing their individual accounts, it is unnecessary to retain the ''objective-criteria only'' provisions from the proposal.

Paragraph (d)(1) of the final rule, moreover, responds to commenters who raised concerns with the ESG terminology in the introductory portion of paragraph (c)(3) of the proposal. The objected-to terminology made reference to investment alternatives ''that include one or more environmental, social, corporate governance, or similarly oriented assessments or judgments in their investment mandates, or that include these parameters in the fund name.'' The principal concern with this terminology, which operated as the triggering mechanism for the substantive requirements in paragraphs (c)(3)(i) through (iii) of the proposal, was that it improperly equated all ESG considerations with non-financial considerations, according to commenters. Greatly compounding this concern, according to the commenters, was that this terminology lacked sufficient clarity and definition to enable implementation and compliance by fiduciaries as well as the investment managers they oversee. The final rule does not contain this or similar terminology in paragraph (d)(1) or elsewhere. This omission makes it clear that the Department understands that at least some ESG factors, at times, may also be pecuniary factors.

Paragraph (d)(2) of the final rule reinforces the principles in paragraph (d)(1) by providing that a fiduciary is not automatically prohibited from considering or including an investment fund, product, or model portfolio merely because the fund, product, or model portfolio promotes, seeks, or supports one or more non-pecuniary goals, provided that the fiduciary satisfies the requirements of paragraphs (a) and (c) of this section in selecting any such investment fund, product, or model portfolio. This provision makes it clear that fiduciaries are indeed permitted to add, to platforms or menus, designated investment alternatives that may produce collateral benefits or otherwise are viewed by some as socially desirable. But, importantly, these alternatives may be added only if they can be justified solely on the basis of pecuniary factors. Fiduciaries who choose investments with expected reduced returns or greater risks to secure non-pecuniary benefits are in violation of ERISA. Thus, fiduciaries who are considering investment alternatives for individual account plans should carefully review the prospectus or other investment disclosures for statements regarding ESG investment policies and investment approaches. Fiduciaries should be particularly cautious in exercising their diligence obligations under ERISA when disclosures, whether in prospectuses or marketing materials, contain references to non-pecuniary factors or collateral benefits in a fund's investment objectives or goals or its principal investment strategies.

With further regard to paragraph (d)(2) of the final rule, many commenters reported evidence of strong participant preference for investment alternatives that promote, seek, or support one or more non-financial goals. These commenters, moreover, suggested a positive correlation between the in-plan availability of such alternatives and increased participation and savings rates by participants in plans with such alternatives. For example, one commenter in the business of providing financial services cited research finding that 76 percent of consumers think it important for their employer to apply ESG principles to workplace benefits, and that 60 percent would likely contribute more to an ESG-aligned retirement plan if it were certified. Another commenter cited a 2018 GAO study finding that more than half of the asset managers interviewed stated that incorporating ESG factors into retirement plan investment options would help meet participant expectations and increase participation, especially of younger investors.[46] Nothing in the final rule precludes a fiduciary from looking into certain types of investment alternatives in light of participant demand for those types of investments. But in deciding whether to include such investment options on a 401(k)-style menu, the fiduciary must weigh only pecuniary (as that term is defined in this rule) factors. Paragraph (d)(2) does not diminish the pecuniary-only standards in paragraph (c)(1) of the final rule; rather, it applies the principles in paragraph (c)(1) to the search for and selection of designated investment alternatives. In addition, participant preferences of the type discussed in this paragraph also can be directly relevant to compliance with the tie-breaking provision in paragraph (c)(2) of the final rule. In such tie-breaker scenarios, plan fiduciaries may consider the express demands or interests of plan participants to be consistent with the interests of participants and beneficiaries for purposes of the documentation requirement in paragraph (c)(2)(iii) of the final rule.

Paragraph (d)(2) of the final rule does not contain the documentation requirement that existed in paragraph (c)(3)(ii) of the proposal. That provision of the proposal would have required a fiduciary to document its compliance with the requirement, in paragraph (c)(3)(i) of the proposal, to use only objective risk-return criteria in the selection and monitoring of investment platform or menu alternatives. Some commenters objected to this requirement on the grounds that it would have applied more stringent requirements to ESG investment alternatives than other types of investment alternatives. These commenters argued that it is inappropriate to impose separate documentation requirements that vary by investment strategy. Other commenters objected to this requirement on the grounds that it would increase costs to plans and potentially provide grounds for unwarranted class action lawsuits. As discussed above, the final rule does not contain the ''objectivity'' test from paragraph (c)(3)(i) of the proposal. Therefore, the final rule similarly omits the related requirement to document compliance with that test.

Paragraph (d)(2)(ii) of the final rule provides special treatment for qualified

[46] Government Accountability Office Report No. 18–398, *Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful* (2018).

default investment alternatives (QDIA or QDIAs) as defined in 29 CFR 2550.404c–5. As was more fully explained in the preamble to the proposed rule, QDIAs warrant special treatment because they are unique arrangements under ERISA that help ensure that the retirement savings of plan participants who have not provided affirmative investment directions for their individual accounts, *e.g.,* because they may not be comfortable making such investment decisions, are put into a single investment capable of meeting the participant's long-term retirement savings needs. Indeed, the relevant provisions of ERISA and the Department's implementing regulations encourage plans to offer QDIAs by providing fiduciaries with relief from liability for investment outcomes by deeming a participant to have exercised control over assets in his or her account if, in the absence of investment direction from the participant, the plan fiduciary invests the assets in a QDIA. Thus, selection of an investment fund as a QDIA is not analogous to merely offering participants an additional investment alternative as part of a prudently constructed lineup of investment alternatives from which participants may choose.

The proposed rule, in relevant part, therefore provided that even a prudently selected, well managed, and properly diversified investment alternative could not be added as, or as a component of, a QDIA if the investment alternative included ''one or more environmental, social, corporate governance, or similarly oriented assessments or judgements'' in its ''mandate'' or included those parameters in the fund name. Thus, paragraph (c)(3)(iii) of the proposal would have banned any alternative containing this type of mandate from being a QDIA even if it was selected using only objective risk-return criteria and was otherwise prudent. This ban was limited to QDIAs and would not have affected an otherwise compliant alternative from being added to an investment platform or investment menu.

Many commenters interpreted paragraph (c)(3)(iii) of the proposal as a ban on any investment alternative serving as a QDIA if the investment alternative (or any component of the investment alternative) was constructed using any 'E', 'S', or 'G' factor even if such factor was pecuniary in nature, (*i.e.,* it has a material effect on the risk and/or return of the investment based on an appropriate time horizon). That was not the Department's intention or, in the Department's view, a reasonable reading of paragraph (c)(3)(iii) of the proposal. The intent behind that paragraph, rather, was to prohibit an investment alternative (or any component of the investment alternative) whose investment objectives or principal strategies included a non-financial goal from being a QDIA. Investment alternatives falling into this category often are referred to as ''ESG-themed funds,'' ''impact funds,'' ''sustainability funds,'' ''social funds,'' ''society-first funds,'' and so on, according to the commenters.

The foregoing misinterpretation notwithstanding, some commenters supported a ban on any investment alternative serving as a QDIA if the investment alternative (or any component of the investment alternative) was constructed using ESG factors. According to these commenters, ESG is a vague and contradictory concept, ESG performance is difficult to measure and does not convey the same information as traditional performance measures, ESG investments may contain unidentified risks, many ESG funds do not execute on their stated principles, some ESG alternatives involve considerations other than purely economic considerations, and social issues are contentious and will vary across plan participants. Consequently, these commenters argued that allowing ESG funds to be included as, or as a component of, a QDIA could encourage plan participants to hold ESG investments that are either inappropriate or not consistent with their individual investment goals.

A number of commenters, however, were not supportive of paragraph (c)(3)(iii) of the proposal. Many commenters believe no special treatment is needed for QDIAs. If an investment alternative is chosen based only on pecuniary factors, according to these commenters, the alternative should be eligible to serve as a QDIA if it otherwise meets the requirements of the QDIA regulation. These commenters question why an otherwise compliant investment alternative, constructed only on the basis of sound pecuniary factors as defined in the proposal, should be per se ineligible to be a QDIA. Further, commenters were concerned that the breadth of the proscription in paragraph (c)(3)(iii) of the proposal, as they understood it, would be extremely disruptive to the market and that it might inadvertently result in a lack of available investment alternatives that could qualify as QDIAs, to the detriment of participants and beneficiaries of ERISA covered plans.

After considering the comments, the final rule limits the scope of the special rule for QDIAs. Paragraph (d)(2)(ii) of the final rule expressly provides that in no circumstances may any investment fund, product, or model portfolio be ''added as, or as a component of, a qualified default investment alternative described in 29 CFR 2550.404c–5 if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.''

Thus, by omitting all references to ''environmental,'' ''social,'' ''corporate governance,'' and ''similarly oriented'' assessments and judgments, paragraph (d)(2)(ii) of the final rule clarifies that the special rule for QDIAs is not focused on whether an investment alternative employs or applies any particular 'E', 'S', or 'G' factors in operation. This omission responds directly to the many commenters who stated their belief that the proposal's use of these terms unhelpfully conflated financial and non-financial factors. In place of these terms, paragraph (d)(2)(ii) of the final rule focuses on whether the investment alternative includes, considers, or indicates the use of non-pecuniary factors in its investment objectives or goals or its principal investment strategies. This refocusing is an acknowledgement that individual 'E', 'S', and 'G' factors can be both pecuniary and non-pecuniary in nature, and that the selection of ESG funds is not per se prudent or imprudent.[47]

Accordingly, paragraph (d)(2)(ii) clarifies that the special rule for QDIAs only prevents a designated investment alternative, which otherwise satisfies the requirements in paragraph (d)(1) of the final rule, from being selected as a QDIA if it, or any of its components, has investment objectives or goals or principal investment strategies that include, consider, or indicate the use of one or more non-pecuniary factors. These circumstances would trigger the ban in paragraph (d)(2)(ii) of the final rule against a particular designated investment alternative from being selected as a QDIA, even if the investment alternative could otherwise permissibly be selected as a designated investment alternative for the investment platform or investment menu by fiduciaries only on the basis of pecuniary factors.

In these circumstances, the Department agrees with those commenters who believe a heightened prophylactic approach for QDIAs is the best course of action. QDIAs by

[47] This acknowledgement does not change the Department's views expressed on ESG rating systems. See Section 8.e. of this preamble for further discussion on ESG ratings systems and comments received on them.

definition exist for participants and beneficiaries who do not actively direct their investments, and by operation tend to sweep in many participants and beneficiaries with less investment experience and sophistication than more active investors, according to the commenters. ERISA is a statute whose overriding concern relevant here has always been providing a secure retirement for America's workers and retirees, and it is inappropriate for participants to be defaulted into a retirement savings fund that may have other objectives absent their affirmative decision. This is especially true if the default investment alternative, or any of its components, has investment objectives or principal strategies that reflect one or more non-pecuniary factors. The use of non-pecuniary factors, even if co-existing with financially-oriented strategies or goals, raise questions as to the extent to which the QDIA's managers may be forgoing financial returns in pursuit of non-financial objectives.

The test in paragraph (d)(2)(ii) of the final rule can be applied objectively without difficulty. A plan fiduciary, for instance, can simply look at the investment fund's prospectus to determine whether the fund is subject to the prohibition on its use as a QDIA or as a component investment of a QDIA. Under the Investment Company Act of 1940, as amended,[48] investment companies and their managers have routinely dealt with the concepts underpinning the provisions in paragraph (d)(2)(ii) of the final rule, *i.e.,* providing disclosure on an investment alternative's ''investment objectives'' and ''principal investment strategies.'' Under Form N–1A,[49] for example, to the extent that non-pecuniary considerations form a material part of a fund's investment objective or principal strategies, these factors would need to be disclosed accordingly in the fund's prospectus. For example, if the prospectus or similar disclosure states that the fund (or any component) is constructed using an ESG or sustainability rating system or index, and that ratings system or index evaluates one or more factors that are not financially material to investments (*i.e.,* evaluates non-pecuniary factors), then paragraph (d)(2)(ii) of the final rule would prohibit such fund from being used as a default investment alternative.[50] The Department understands that the final rule applies to investment alternatives other than registered investment companies, such as bank collective investment trusts and insurance company separate accounts. However, these vehicles typically adhere to similar rules and maintain operating documents comparable to a prospectus.

Paragraph (d)(2)(ii) of the final rule also responds to concerns with so-called ''screening strategies,'' which include, for example, the act of excluding from a fund certain sectors or companies involved in activities deemed unacceptable or controversial, such as screens or exclusions on investments in companies engaged in the production or distribution, for example, of alcohol, tobacco, fossil fuels, weapons, or gaming. Other screening strategies will only select sectors or companies that satisfy certain attributes, such as carbon emissions, board diversity, or employee compensation. Screening strategies, regardless of whether they are characterized or described as ''positive screening'' or ''negative screening,'' may implicate paragraph (d)(2)(ii) of the final rule if the screening involves non-pecuniary factors that effectively results in the exclusion of certain sectors or categories of investments. Investment alternatives that use these exclusions may not be QDIAs (or components of QDIAs) if these exclusions involve non-pecuniary goals and are reflected in the investment alternatives' objectives or goals or its principal investment strategies. This is because such an exclusion in an investment alternative's objectives or principal strategies raises questions as to the extent to which the QDIA's manager may be foregoing financial returns in pursuit of non-financial objectives.

If these exclusions are not reflected in an investment alternative's objectives or principal strategies, however, the alternative is not prohibited as a QDIA (or a component). It must be prudently selected as required by paragraph (a) of the final rule, and comply with paragraph (c) of the final rule and the Department's QDIA regulation. ERISA's duty of prudence dictates that before a fiduciary of an ERISA covered pension plan can make a decision to exclude a category of investments for non-pecuniary purposes, the fiduciary must first make a determination that the exclusion of such category of investments would not reduce the return or increase the risk of the plan's investment portfolio. An investment policy or strategy that is exclusionary runs the risk of being imprudent because, if the decision results in the exclusion, for example, of certain sectors or markets, without first doing an economic analysis of the economic consequences to the plan of such an exclusion and determining that such an exclusionary policy would not be economically harmful to the plan, the fiduciary making such a decision would be imprudent under ERISA.[51]

Finally, a commenter stated that, although paragraph (c)(3) of the proposal helpfully clarifies that ERISA's duties of loyalty and prudence apply to ''designated investment alternatives,'' the final regulation should further clarify that these statutory duties (and, hence, the requirements of the final rule) do not apply more broadly to other investment alternatives that may be available through the plan. For instance, some participant-directed individual account plans contain brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. The commenter appears to have had these arrangements in mind and specifically requested that the final rule define the term ''designated investment alternative'' so as to exclude investments of this type from the requirements of the rule.

In response to this commenter, the final regulation defines the term ''designated investment alternative'' for purposes of paragraph (d) of the final rule. Specifically, paragraph (e)(5) of the final rule defines this term as ''any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts.'' Thus, whether an investment alternative is a ''designated investment alternative'' for purposes of the regulation depends on whether it is specifically identified as available under the plan. This necessarily is a fact driven analysis. Further, the definition specifically clarifies that the term does not include ''brokerage windows,'' ''self-directed brokerage accounts,'' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by

[48] 17 CFR 270.0–1 through 270.60a–1.

[49] Referenced at 17 CFR 239.15A and 274.11A. See, *e.g.,* Item 2 and Item 4 of Part of Form N–1A.

[50] See Section 8.e. below, which further discusses ESG and similar rating systems and indexes.

[51] See Letter to Sen. Howard Metzenbaum from Dennis Kass (May 27, 1986) (defending statement in press that ''an investment policy that is on its face exclusionary runs the risk of being on its face imprudent'' and explaining that ''before a fiduciary of an ERISA covered pension plan can make a decision to exclude a category of investments for social purposes, the fiduciary must first make a determination that the exclusion of such category of investments would not reduce the return or raise the risk of the plan's investment portfolio. If such a determination can be made, then social judgments as to the composition of the portfolio would be permissible.'').

the plan. The inclusion of this definition in the final rule also obviates the need for explicit references in the operative regulatory text to ''platforms,'' which appeared in the proposal essentially as a synonym for menus of designated investment alternatives.

Consequently, this regulation does not apply to investment alternatives that are not designated investment alternatives under the plan. The Department in other contexts has made it clear, however, that ERISA's duties of loyalty and prudence do not contain exceptions for circumstances in which plans with brokerage windows, self-directed brokerage accounts, or similar plan arrangements enable participants and beneficiaries to select investments beyond those designated by the plan. For instance, in addressing questions under 29 CFR 2550.404a–5 (a disclosure regulation focusing on fees in 401(k)-type plans) in the case of participant-directed individual account plans that do not designate any of the funds on the platform or available through the brokerage window, self-directed brokerage account, or similar plan arrangement as ''designated investment alternatives'' under the plan, the Department stated that fiduciaries ''are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the brokerage window, self-directed brokerage account, or similar plan arrangement.'' [52] In this same context, the Department also stated that a plan fiduciary's failure to designate investment alternatives, for example, to avoid the standards and obligations under ERISA or implementing regulations raises questions under ERISA section 404(a)'s general statutory fiduciary duties of prudence and loyalty.[53] The Department has also stated in the context of the 404(c) regulation that the relief from fiduciary liability for participant or beneficiary exercises of control over their individual accounts does not extend to any instruction, which if implemented (A) would not be in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of title I of ERISA; (B) would cause a fiduciary to maintain the indicia of ownership of any assets of the plan outside the jurisdiction of the district courts of the United States other than as permitted by section 404(b) of the Act and 29 CFR 2550.404b–1; (C) would jeopardize the plan's tax qualified status under the Internal Revenue Code; or (D) could result in a loss in excess of a participant's or beneficiary's account balance. Similarly, relief from fiduciary liability under the 404(c) regulation would not extend to: (1) The implementation of instructions which would result in a direct or indirect sale, exchange, or lease of property between a plan sponsor or any affiliate of the sponsor and the plan except for the acquisition or disposition of any interest in a fund, subfund, or portfolio managed by a plan sponsor or an affiliate of the sponsor, or the purchase or sale of any qualifying employer security (as defined in section 407(d)(5) of the Act) which meets the conditions of section 408(e) of ERISA and 29 CFR 2550.404c–1(d)(2)(ii)(E)(*4*); (2) a loan or extension of credit to a plan sponsor or any affiliate of the sponsor; or (3) the acquisition or sale of any employer real property (as defined in section 407(d)(2) of the Act).[54] The Department has not addressed in these other contexts whether, or under what circumstances, the duties of prudence or loyalty compel a fiduciary to disregard or overrule a participant's or beneficiary's affirmative selection of a particular investment or investments through a brokerage window or similar arrangement, and these matters similarly are not addressed here. Accordingly, nothing in this regulation should be construed as addressing the application of ERISA's duties of prudence and loyalty to such investments or to the particular investment options (*e.g.,* brokerage windows) that grant participants and beneficiaries access to investments that are not designated investment alternatives. Although the Department has determined that the establishment of regulatory standards governing such arrangements is beyond the scope of this particular regulation, this issue could be addressed in future rulemaking or sub-regulatory guidance if necessary. The Department, therefore, is available as necessary to engage in discussions with interested parties to help determine how best to assure compliance with these duties in a practical and cost effective manner.

[52] Field Assistance Bulletin 2012–02R, Q&A 39 (July 30, 2012).

[53] Id. at Q&A 39.

[54] See 29 CFR 2550.404c–1(d)(2) (imposing limits on the relief otherwise available to plan fiduciaries in the case of implementing improper investment instructions of participants and beneficiaries).

5. Section 2550.404a–1(e)—Reserved

Paragraph (e) is reserved for the operative text, if finalized, of the rulemaking on proxy voting and exercise of shareholder rights.

6. Section 2550.404a–1(f)—Definitions

Paragraph (f) of the final rule provides definitions and is largely unchanged from the proposal.

The term ''investment duties'' in the proposal was unchanged from the current 404a–1 regulation. It was defined to mean any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in section 3(21)(A)(i) or (ii) of the Act. The term ''investment course of action'' is amended from the current 404a–1 regulation to mean any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and the selection of an investment fund as a plan investment, and now includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated alternative under the plan, as part of this term. One commenter noted that neither the definition of ''investment duties'' nor the definition of ''investment course of action'' expressly included the notion of stewardship activity and argued that the allocation of resources to voting, engagement, and related activity should be treated as an ''action related to'' the investment of plan assets. The commenter expressed that the focus on investment is less on the risks and returns of individual holdings and more on addressing systemic or ''beta'' issues such as climate change and corruption where outcomes are prioritized at the economy or society-wide scale with long-term, absolute returns for universal owners, including real-term financial and welfare outcomes for beneficiaries.

The Department does not see how it is possible for the stewardship approach advocated by the commenters to be justified, given the requirements of prudence and loyalty under ERISA. As the Department has stated, it does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement investors. Rather, ERISA fiduciaries must always put first the economic interests of the plan in

providing retirement benefits. A fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives.[55] Accordingly, as noted above, paragraphs (f)(1) and (2) of the final rule are the same as the language of the proposal.

The term ''pecuniary factor'' was a new definition in the proposal. The proposal defined it as a factor that has a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(a)(1) of ERISA. Many commenters urged the Department to re-examine the definition of ''pecuniary factor.'' The Department's discussion of those comments is included in the section of this preamble that addresses paragraph (c)(1) above.

Finally, the term ''plan'' was unchanged from the current 404a–1 regulation. It was defined in the proposal to mean an employee benefit plan to which Title I of ERISA applies. Although not commenting specifically on the proposal, some commenters raised issues regarding the consequences for plans maintained for their employees by states, political subdivisions of states, and the agencies or instrumentalities of either. Section 4(b)(1) of ERISA excludes from coverage under ERISA all such governmental plans. Accordingly, issues regarding the investment practices of such plans or the duties of persons who may be fiduciaries with respect to such plans are outside the scope of both the Department's jurisdiction under Title I of ERISA and this regulation.

Some commenters suggested that the Department define ''ESG,'' ''ESG vehicle,'' ''ESG consideration,'' or any other similar term, and ''environmental,'' ''social,'' or ''corporate governance,'' or give guidance on what might be ''similarly oriented assessments or judgments.'' These commenters argued that without an ESG definition, fiduciaries would be left in the undesirable position of being unable to determine exactly what the Department seeks to regulate and the scope of that regulation, opening the door to expensive litigation that seeks to exploit those ambiguities. Other commenters stated that a definitive list of ESG issues does not exist and that it would not be possible or desirable to produce a list or set of definitions, and any attempt at such list or definition would soon be outdated in any event. The same commenter said a definition of ESG was needed so that fiduciaries would know whether the Department intends for ''ESG'' to apply narrowly, such as with respect to only those investment alternatives that prominently call themselves ''ESG,'' or if the Department intended to sweep in a much broader set of investment alternatives under ''ESG,'' because the resulting impact, burden, expense, and collateral consequences of the proposed amendments could significantly differ. As described earlier in this preamble, the Department has concluded, based on the comments, that the use of ESG terminology is not appropriate for a regulatory standard precisely because of the ambiguity and lack of precision that exists in the use of ESG in the marketplace. Since the Department has removed ESG terminology from the operative text of the final rule, inclusion of the sort of definitions requested by commenters is no longer necessary.

7. Section 2550.404a–1(g) and (h)—Effective Date and Severability

The proposal included a provision under which the effective date for the rule would be a date 60 days after the date of the publication of the final rule. The Department requested comment in the proposal, including whether any transition or applicability date provisions should be added to any of the proposed provisions. Some commenters suggested that a grandfather provision of existing investments be adopted to avoid market disruption, including forced sales at sub-optimal prices. Other commenters said grandfathering is necessary not only because fiduciaries will be unable to comply retrospectively with prescriptive requirements, but also to avoid the wide-ranging economic harms that could follow a sudden investment mandate. The commenters suggested that, at a minimum, the provisions of the final rule would not apply to investments made on or prior to the effective date of any final regulation. In the alternative, the commenters requested that the Department permit those investments that have been made on or preceding such effective date not to become subject to the provisions of any final rule for a period of one year following such effective date. Other commenters suggested that this period of transition and grandfathering be generous. Other commenters suggested that the Department allow plan fiduciaries adequate time to prepare the documentation and analysis required by the proposal to identify, assess, and consider alternative investment options in accordance with the proposal. These commenters believed the proposal greatly underestimated the time required for plan fiduciaries to consider and implement the new framework. As a result, they suggested that plan fiduciaries should be afforded at least 12 months before the rule becomes effective to mitigate hastened decision-making and potential financial losses resulting from modifying investment strategies that may inadvertently harm plan participants in the current volatile and uncertain market environment. Finally, a commenter suggested that due to COVID–19 and its financial fallout, the effective date should be delayed by at least a year to allow time for compliance.

The same principles of prudence and loyalty under section 404(a)(1)(A) and (B) of ERISA are on display in the proposal and final rule as have been applied in all the previous guidance on ESG investing and investing in general by the Department since the investment duties regulation was published in 1979. Indeed, since the 1980s the Department has stated that a fiduciary in its decision-making, regarding investments or otherwise, cannot subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to unrelated objectives. Following consideration of the public comments, the Department is not persuaded that there is sound reason to delay the anticipated benefits and protections to plan participants and beneficiaries of this rule. As the Department has previously stated, the final rule, including changes from the proposal, primarily explains existing statutory requirements and regulations with respect to the investment duties of plan fiduciaries and is not a major departure from its previous guidance on the basic investment duties of fiduciaries. Thus, the Department does not believe an overall delay in the applicability of the final rule is necessary to allow additional time for plans to prepare for the significantly scaled-back investment documentation requirements of the final rule.

However, the Department acknowledges that some plans may have to make adjustments to their investment policies and practices in light of the final rule. As a result, paragraph (g)(1) of the final rule provides that the effective date of the new regulatory text in the final rule will be 60 days following the date of publication in the **Federal Register** and shall apply

[55] *See* Field Assistance Bulletin 2018–01 (Apr. 23, 2018).

prospectively in its entirety to investments made and investment courses of action taken after such date. Plan fiduciaries are not required to divest or cease any existing investment, investment course of action, or designated investment alternative, even if originally selected using non-pecuniary factors in a manner prohibited by the final rule; however, after the effective date, all decisions regarding such investments, investment courses of action, or designated investment alternatives, including decisions that are part of a fiduciary's ongoing monitoring requirements, must comply with the final rule.[56] Also, although the Department believes that much of the final rule explains pre-existing duties under the statute, the Department of course will not pursue enforcement, and does not believe any private action would be viable, pertaining to any action taken or decision made with respect to an investment or investment course of action by a plan fiduciary prior to the effective date of the final rule to the extent that any such enforcement action would necessarily rely on citation to this final rule. Of course, nothing in this regulation forecloses the Department from taking enforcement action based on prior conduct that violated ERISA's provisions, including the statutory duties of prudence and loyalty, based on the statutory and regulatory standards in effect at the time of the violation.

The final rule does include one extended compliance date; new paragraph (g)(2) provides that plans shall have until April 30, 2022 to make any changes to qualified default investment alternatives described in 29 CFR 2550.404c–5, where necessary to comply with the requirements of paragraph (d)(2). Unlike other provisions of the final rule, which apply only to prospective investment decisions, paragraph (d)(2) prohibits certain designated investment alternatives from being used as a QDIA where the investment objectives or goals or the principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors. Although the Department believes the paragraph (d)(2), as modified from the proposal, will only affect a very small number of plans,[57] the Department recognizes that those plans will need appropriate time to modify their QDIA selections. Therefore, in response to a commenter's requests for at least a 12 month transition period, the Department is providing a QDIA compliance date of April 30, 2022.

Moreover, EBSA confirms that until January 12, 2021, the prior 404a–1 regulation under the Act (as it appeared in the July 1, 2020, edition of 29 CFR part 2550) applies.

The final rule also includes, in paragraph (h), a severability provision, which provides that if any provision in the final rule is found to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, such provision shall be severable and the remaining portions of the rule would remain operative and available to plan administrators. Thus, if a Federal court were to find a specific provision to be legally insufficient, then the remaining requirements would remain applicable and in place.

8. Miscellaneous Issues and Public Comments

a. Religious Freedom Restoration Act

One commenter argued that the proposal violates the Religious Freedom Restoration Act (RFRA). The commenter averred that the proposal is a burden on religion and is contrary to RFRA because, in the commenter's view, it prohibits the inclusion of investment options in defined contribution plans for retirement savers whose beliefs and values dictate that they take material environmental and societal effects of corporate activities into consideration in stewardship of their worldly riches. As a result, many people of faith would be forced to support economic activity that violates their beliefs. By singling out ESG investment options as raising ''heightened concerns under ERISA'' whenever an option ambiguously might involve ''one or more environmental, social, and corporate governance-oriented assessments or judgments,'' despite the availability of numerous prudently managed and outperforming ESG investment options for ERISA pension plans, the proposal would have the practical effect of unnecessarily limiting access by people of faith to prudent pension investment options aligned with their religious beliefs, according to this commenter. The commenter asserted that RFRA provides an exception only if two conditions are met, that the restriction must be in furtherance of a compelling government interest and the rule must be the least restrictive way in which the government can further its interest, and the proposal does not meet those conditions. Other commenters also suggested that the proposal's interference with the investment preferences of retirement investors potentially would constitute a violation of their First Amendment rights, though they did not explain whether they were referring to the Free Exercise Clause or the Free Speech Clause.

A commenter also explained that some funds, not marketed as ESG funds, exclude ''sin'' stocks, such as alcohol and tobacco. Typically, these restrictions are not part of the investment objectives or strategy and do not impact the fund's ability to find suitable investments, according to the commenter. The commenter suggested that the proposed rule's broad definition of ESG would sweep in many such funds and subject them to heightened fiduciary scrutiny. According to the commenter, such restrictions, dating back to the 1950s, qualitatively differ from those embraced by the emerging universe of ESG funds. Faith-based organizations operating under Title I (*e.g.,* ERISA-electing church plans) use such funds and use faith-based filters to eliminate certain categories. According to the commenter, these are founded on the concern of discouraging plan participation if the only investment options available to participants with strong religious convictions permitted investments relating to alcohol or tobacco. These restrictions may also fairly be viewed by some as relevant to an analysis about the likely long-term value of an issuer deriving the majority of revenue from products whose continued use could be impacted by societal changes, according to this commenter.

The Department is committed to fulfilling its obligations under RFRA and respecting religious liberty. The Department is confident that the RFRA concerns raised by the commenter can be reviewed and resolved as needed on an individual basis. While broader discussion and resolution of RFRA-

[56] *Tibble* v. *Edison Int'l,* 135 S. Ct. 1823, 1828–29 (2015), confirmed that ERISA fiduciaries have a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments. How that monitoring obligation would be applied in the context of the final rule's application to individual investments would depend on the facts and circumstances. When and what kind of review would depend on the facts and circumstances. ERISA fiduciaries must discharge their fiduciary responsibilities ''with the care, skill, prudence, and diligence'' that a prudent person ''acting in a like capacity and familiar with such matters'' would use. ERISA section 404(a)(1). The Department notes that it may be that a fiduciary could prudently determine that the expected return balanced against the costs and risks of loss associated with divesting an investment made before the effective date of the rule are such that continuing to hold that investment would be appropriate even if the fiduciary as part of its monitoring process determined that the investment, or aspects of the decision-making process, does not comply with the final rule.

[57] In the Regulatory Impact Analysis, the Department estimates that only 0.1 percent of plans may have an affected QDIA.

related issues can be appropriate in rulemaking, especially when they are a prominent aspect of the rulemaking, *see Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2383–84 (2020), the Department believes that it need not conduct a broadly applicable RFRA analysis in this particular rule, which does not have religious concerns as a central focus. If RFRA's interaction with this final rule reveals over time that a broader project is warranted, the Department will consider doing so.

Moreover, the Department believes that changes made in the final rule, including significant changes to specific conditions related to use of ESG considerations, may provide enough flexibility to sufficiently address the commenters' concerns, even without invocation of RFRA. Further, paragraph (d)(2) of the final rule permits a prudently selected ESG-themed investment alternative, which complies with paragraphs (a) and (c) of the final rule, to be added to the available investment options on a participant-directed individual account plan platform without requiring the plan to forego adding other non-ESG-themed investment options to the platform. Paragraph (d)(2) applies equally to an investment fund, product, or model portfolio that promotes, seeks, or supports participant preferences regarding religion. In addition, paragraph (d)(2)(ii) of the final rule does not prevent a negatively screened fund from being selected as a QDIA if no non-pecuniary factors are reflected in its investment objectives or principal strategies.

b. Coordination With Other Federal Laws and Policies

A number of commenters suggested that the Department's action is untimely, and might redirect or stall the continuing development of ESG practice at a time when the SEC continues to monitor and evaluate ESG developments, with a clear focus on disclosure and accuracy. For example, several commenters noted that the proposal appeared to reflect concerns with the marketing of investment strategies that use ESG criteria. These concerns, commenters suggested, may be addressed by the SEC, which recently solicited public comment on a number of issues (including use of the term ''ESG'' in a fund name) under the ''Names Rule'' under the Investment Company Act of 1940.[58] Other commenters believed that the proposal's characterization of the materiality of ESG criteria was potentially out of step with the SEC, which has noted the importance of disclosing ESG factors to the extent that they are material. A commenter indicated that risk disclosure is fundamental to protecting investors. The commenter criticized the proposal for cautioning fiduciaries to scrutinize fund risk disclosures when evaluating the impact of ESG considerations, and suggested that any additional risk added by ESG considerations is unacceptable regardless of the reason for the risk or the effect on returns. The commenter explained that ESG considerations are used in a variety of ways in fund portfolios—some pecuniary in nature and others solely as an incidental component of the fund's investment strategy. Further, the comment indicated that when funds take ESG considerations into account, they are pursuing an investment strategy. Each strategy is different, and will perform differently with different risks. In the commenter's opinion, if the ESG consideration is used to enhance the overall value of the investment, and the risk and return are appropriately balanced, then the fact that the risks are ''different'' should not be the focus of the analysis. The commenter concluded that the Department's focus instead should be on risk disclosures that suggest the fund is sacrificing investment returns or assuming greater investment risk as a means to promote collateral social policy goals.

Another commenter indicated that some ESG issues pose systemic risks to financial markets, which the US financial regulatory community is beginning to examine. A commenter also suggested that the proposal might have the unintended consequence of concentrating investment in securities and products that may or may not bear less risk and greater return in the future, relying on mechanical use of financial data from one reporting source rather than employing human judgment and prudence. The commenter cautioned that this concentration will pose systemic financial risk and is something the Office of Financial Research (OFR) is tracking and seeking to minimize. The commenter suggested that the OFR should be consulted on any sweeping new ERISA rule that might cause herding and market concentration.

With respect to the Names Rule, the Department does not believe there is a need to delay a final rule until the SEC decides whether to take action as a result of its solicitation. Although disclosures may be helpful to fiduciaries in evaluating investment funds, the primary goal of the proposed and final rule is to provide, in the form of a final rule, guidance on the scope of fiduciary duties surrounding non-pecuniary issues. However, the Department will continue to monitor SEC activity, and consider providing further guidance as may be appropriate. With respect to the other comments, the Department believes that changes made in the final rule, including a focus on pecuniary factors rather than ESG factors, are sufficient to address the stated concerns. As to the comments regarding ESG disclosure, the Department has clarified that they apply to circumstances where prospectuses or marketing materials discuss non-pecuniary objectives or benefits. We note that the Department's concerns under ERISA, and the policies underlying this final rule, are focused on safeguarding the interests of participants and beneficiaries in their plan benefits. If financial regulators adopt new rules or policies that affect financial market participants, that may create pecuniary or non-pecuniary considerations for plan fiduciaries apart from ERISA.

Commenters noted that the Department of State, Department of the Treasury, Department of Commerce, and Department of Homeland Security have taken positions on risks of supply chain links to entities that engage in human rights abuses, including forced labor, in China. They argued that the Department should not issue a rule that fundamentally undermines policy from four other Departments and should ensure that pension fiduciaries are not discouraged from making the appropriate calculations about supply chain risks. Further, commenters criticized that the proposal conflicts with the Department's own statements regarding the need to divest the Federal Thrift Savings Plan (TSP) from investments in China due to increased risk. The Department believes the concerns expressed by these commenters are beyond the scope of issues being addressed by the final rule, which is limited to the investment duties of fiduciaries under Title I of ERISA. Nonetheless, if a fiduciary prudently determines that an investment is appropriate based solely on pecuniary considerations, including those that may derive from ESG factors, the fiduciary may make the investment without regard to any collateral benefits. Accordingly, the Department does not agree that there is any fundamental conflict between the positions other agencies have articulated on supply chain risk, and this final rule. Nothing in the final rule is intended to or does prevent a fiduciary from appropriately

[58] 85 FR 13221 (Mar. 6, 2020).

considering any material risk with respect to an investment. Moreover, with respect to the TSP, which is not covered by Title I of ERISA, we note that the Department's position with respect to investments in China was informed by consideration of specific matters relating to investment risk, including inadequate investor disclosures and legal protections, that are consistent with ''pecuniary factors'' as used in the final rule. We note that matters relating to investments in China continue to be examined by other Federal agencies.[59] Moreover, other concerns were raised because the Federal Government matches TSP contributions and investments in China might result in the Federal Government funding activities that are opposed to U.S. national security interests.

One commenter claimed that the DOL's failure to consult with the Fish and Wildlife Service and the National Marine Fisheries Service regarding the proposed rule's impacts upon endangered species violates the Endangered Species Act (ESA), and the DOL's failure to assess the proposed rule's environmental impacts violates the National Environmental Policy Act (NEPA). The Department has reviewed the relevant legal provisions of the ESA and NEPA and concludes neither statute is implicated by the rule. In addition, the final rule's operative language does not expressly address ESG investments, but rather centers on the fiduciary duty to focus plan investment decisions on pecuniary factors only, a duty arising from ERISA and confirmed in the case law. The Department believes this change further renders the final rule beyond the scope of either ESA or NEPA, and any accompanying consultation or assessment requirements.

c. Comparison of Proposal to International Standards and Practices

Commenters also asserted that the Department's proposal is against an international trend in the consideration of ESG factors. Other regulators, they argued, are requiring consideration of financially material ESG factors and focusing on the importance of the disclosure of those factors. European regulators have imposed rules, effective March 10, 2021, that require investment managers governed by the regulations to incorporate financially material ESG factors into the investment process. Another commenter contended that across the world's 50 largest economies, there have been more than 730 hard and soft law policy revisions across some 500 policy instruments, which support, encourage, or require investors to consider long-term value drivers, including ESG factors. To the extent that these foreign standards condone sacrificing returns to consider non-pecuniary objectives, they are inconsistent with the fiduciary obligations imposed by ERISA. According to this commenter, of these top 50 economies, 48 have some form of policy designed to help investors consider sustainability risks, opportunities, or outcomes. The Department believes that assertions by these commenters do not fairly characterize the statements the Department made in the proposal. The final rule does not preclude consideration of any factor that is financially material to an investment or investment course of action. In addition, a few comments cited statements supporting non-financial investment considerations, thereby confirming the need for the Department to clarify ERISA fiduciary duties in the face of investment practices that stray from pecuniary considerations. Moreover, the final rule reflects ERISA's requirements, and commenters acknowledged that the duties of prudence and loyalty under ERISA may not be the same investment standards under which international regulation is taking place. Accordingly, international trends in the consideration of ESG factors or the actions of regulators in other countries are not an appropriate gauge for evaluating ERISA's requirements as they apply to investments of ERISA-covered employee benefit plans.

d. Proxy Voting

Commenters expressed concern that the proposal does not directly mention proxy voting or corporate stewardship and argue that any treatment of ESG investment practices should include those topics. Those issues technically are outside of the scope of this rulemaking. On September 4, 2020, the Department published a proposed amendment to the investment duties regulation to address the application of the prudence and exclusive purpose duties to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.[60]

e. ESG Rating Systems and ESG Indices

Some commenters were concerned that the Department's expressed skepticism about ESG rating systems and its assertion that ''[t]here is no consensus about what constitutes a genuine ESG investment, and ESG rating systems are often vague and inconsistent,'' is unfair. They also challenged the Department's observation that ''fiduciaries should also be skeptical of 'ESG rating systems'—or any other rating system that seeks to measure, in whole or in part, the potential of an investment to achieve non-pecuniary goals—as a tool to select designated investment alternatives, or investments more generally.'' Such cautions, the commenters assert, cast a pall on the use of ESG ratings and substitute the judgment of the Department for that of plan fiduciaries who may find one or more of these ratings an appropriate investment tool. However, one commenter submitted materials describing sustainability ratings as ''black boxes'' in which ratings providers publish only a general description of their approaches; to the extent that any more detailed information is available, it is provided only to subscribers.

Another commenter stated that manufacturing companies often face calls from third-party actors (who do not have a stake in the business or any interest in shareholders' long-term returns) to address ESG issues in a one-size-fits-all way that meets only the political needs of outside activists. In recent years, the commenter argued, this pressure has been driven in large part by ESG ratings firms that have a financial interest in ensuring more widespread adoption of non-pecuniary ESG investing criteria. The commenter complained that these firms operate by boiling down a complex issue (or, often, multiple complex issues) into a single numerical score or letter grade with little to no disclosure as to how such score or grade is calculated, nor its impact on shareholder value creation. These one-size-fits-all standards do not take into account the individual circumstances of a given company or provide any context for a company's ESG work outside of the check-the-box approach favored by the ratings firms. Furthermore, the commenter avers, it is often unclear to issuers and investors alike exactly what data went into calculating a given rating. This commenter stated that pension plan managers making investment decisions based on these ratings are staking plan participants' retirement savings on the opinions of unregulated, nontransparent

[59] See, *e.g.,* Statement on SEC Response to the Report of the President's Working Group on Financial Markets (Aug. 10, 2020), *www.sec.gov/news/public-statement/statement-presidents-working-group-financial-markets.*

[60] 85 FR 55219 (Sept. 4, 2020).

entities that have no obligation to make decisions in pensioners' best interests. The commenter has called for the Securities and Exchange Commission to provide effective oversight of ESG raters and strongly supports the DOL's guidance that ERISA fiduciaries should be ''skeptical'' of ESG ratings systems. Similarly, the commenter appreciated that the proposed rule highlights the fact that ESG ratings firms ''typically emphasize tick-the-box policies and disclosure levels, data points unrelated to investment performance, and/or backward-looking negative events with little predictive power.''

In footnote 24 of the proposal, the Department stated that fiduciaries should be skeptical of ESG rating systems—or any other rating system that seeks to measure, in whole or in part, the potential of an investment to achieve non-pecuniary goals—as a tool to select designated investment alternatives, or investments more generally. The Department has not changed its views as to the need for fiduciaries to carefully examine ESG rating systems before relying on them to make investment decisions. The Department notes that an ERISA plan fiduciary should evaluate any rating system with care, skill, prudence, and diligence in order to determine that the rating system appropriately considers only pecuniary factors if such rating system is used to evaluate an investment.

Skepticism of ESG or sustainability rating systems is warranted under ERISA because such ratings systems may involve the evaluation of non-pecuniary factors. While individual 'E', 'S', or 'G' factors evaluated by a ratings provider may be a pecuniary factor for a particular investment or investment course of action it does not follow that all factors under the ESG rubric are pecuniary for all investments. And because ESG factors are so disparate—and often idiosyncratic—a fiduciary may not assume that combining them into a single rating, index, or score creates an amalgamated factor that is itself pecuniary. If ESG or sustainability rating systems are to be used, a fiduciary should conduct appropriate due diligence to understand how the ratings are determined, for example methodology, weighting, data sources, and the underlying assumptions used by such rating systems. Similarly, in selecting an investment fund that follows an ESG index, a fiduciary should also conduct appropriate due diligence and understand the ESG index objective, how the ESG index is constructed and maintained, its performance benchmarks, and how the factors and weightings used by the ESG index are pecuniary. For example, should specific ESG factors become reliably and consistently identified, and widely recognized by qualified investment managers as pecuniary factors that are predictive of financial performance, then nothing in the final rule would prohibit their use by plan fiduciaries.

f. Interpretive Bulletin 2015–1 (IB 2015–1) and Field Assistance Bulletin 2018–01 (FAB 2018–01)

The final rule also withdraws IB 2015–1 and removes it from the Code of Federal Regulations. Accordingly, as of publication of this final rule, IB 2015–1 may no longer be relied upon as reflecting the Department's interpretation of the application of ERISA's fiduciary responsibility provisions to the selection of investments and investment courses of action.

Similarly, FAB 2018–01, which concerned both ''ESG Investment Considerations'' and ''Shareholder Engagement Activities,'' is superseded in part. Accordingly, as of publication of this final rule, the portion of FAB 2018–01 under the heading ''ESG Investment Considerations'' will be null and void and will be disregarded by the Department.

E. Regulatory Impact Analysis

This section analyzes the regulatory impact of a final regulation concerning the legal standard imposed by sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA with respect to investment decisions involving plan assets. In particular, it addresses the selection of a plan investment or, in the case of an ERISA section 404(c) plan or other individual account plan, a designated investment alternative under the plan. This final rule addresses the limitations that section 404(a)(1)(A) and 404(a)(1)(B) of ERISA impose on fiduciaries' consideration of non-pecuniary benefits and goals when making investment decisions, including environmental, social, and corporate governance and other similar factors.

Thus, the rule sets forth standards of prudence and loyalty for selecting and monitoring investments. This rule imposes some costs. For example, some plans will incur costs to review the rule to ensure compliance, document the basis for certain investment decisions, and ensure their QDIA does not contain prohibited characteristics. The research and analysis used to select investments may change, but such a change is unlikely to increase the overall cost. The transfer impacts, benefits, and costs associated with the final rule depend on the number of plan fiduciaries that are currently not following or are misinterpreting the Department's existing sub-regulatory guidance. While the Department does not have sufficient data to estimate the number of such fiduciaries, the Department's educated estimate is small, because most fiduciaries are operating in compliance with the Department's sub-regulatory guidance. The Department acknowledges, however, that some plan fiduciaries may be making investment decisions that do not comply with the requirements of this final rule. Nevertheless, the Department expects that the gains to investors will justify the costs for participants and beneficiaries covered by plans with noncompliant investment fiduciaries. If the Department's educated estimate regarding the number of noncompliant fiduciaries is understated, the final rule's transfer impacts, and costs will be proportionately higher. Even in this instance, however, the Department believes that the rule's benefits and gains to retirement investors justify its costs.

The Department has examined the effects of this rule as required by Executive Order 12866,[61] Executive Order 13563,[62] the Congressional Review Act,[63] Executive Order 13771,[64] the Paperwork Reduction Act of 1995,[65] the Regulatory Flexibility Act,[66] section 202 of the Unfunded Mandates Reform Act of 1995,[67] and Executive Order 13132.[68]

1. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are

[61] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[62] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

[63] 5 U.S.C. 804(2) (1996).

[64] Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (Jan. 30, 2017).

[65] 44 U.S.C. 3506(c)(2)(A) (1995).

[66] 5 U.S.C. 601 *et seq.* (1980).

[67] 2 U.S.C. 1501 *et seq.* (1995).

[68] Federalism, 64 FR 153 (Aug. 4, 1999).

subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting 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) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this rule is economically significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the final rule's potential costs, benefits, and transfers, and OMB has reviewed this final rule pursuant to the Executive Order. Pursuant to the Congressional Review Act, OMB has designated this final rule as a ''major rule,'' as defined by 5 U.S.C. 804(2), because it would be likely to result in an annual effect on the economy of $100 million or more.

1.1. Introduction and Need for Regulation

Recently, there has been an increased emphasis in the marketplace on investments and investment courses of action that further non-pecuniary objectives, particularly what have been termed environmental, social, and corporate governance (ESG) investing.[69] The Department is concerned that the growing emphasis on ESG investing, and other non-pecuniary factors, may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from their responsibility to provide benefits to participants and beneficiaries and defray reasonable plan administration expenses. The Department is also concerned that some investment products may be marketed to ERISA fiduciaries on the basis of purported benefits and goals unrelated to financial performance.

The Department has periodically considered the application of ERISA's fiduciary rules to plan investment decisions that are based, in whole or part, on non-pecuniary factors, and not simply investment risks and expected returns. The Department has made various statements on the subject over the years in sub-regulatory guidance not issued pursuant to the Administrative Procedure Act. Accordingly, this final rule is necessary to interpret ERISA regarding the scope of fiduciary duties surrounding non-pecuniary issues.

Some commenters asserted that ERISA's prudence and loyalty duties do not justify the need for the final rule. The Department disagrees and firmly believes that fiduciaries must evaluate plan investments based solely on pecuniary factors and not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to unrelated objectives or sacrifice investment return or take on additional investment risk to promote goals unrelated to the financial interests of the plan's participants and beneficiaries or the purposes of the plan. The Department believes that providing a final regulation will help safeguard the interests of participants and beneficiaries in their plan benefits.

1.2. Affected Entities

The final rule will affect certain ERISA-covered plans whose fiduciaries consider or will begin considering non-pecuniary factors when selecting investments and the participants in those plans. Indeed, the Department received multiple comments from entities who described their use of non-pecuniary factors when selecting investments and their intention to continue using them in the future. The best data available on the topic of non-pecuniary investing comes from surveys of ESG investing by plans, thus the data used in this analysis is on ESG investing. A challenge in relying on survey data, however, is that one cannot tell how much of the ESG investing described is pecuniary or non-pecuniary.[70] Further complicating matters is that in selecting investments, some plans may use non-pecuniary factors that are not ESG factors, or are not perceived to be ESG factors. If survey respondents do not view them as ESG factors, these plans would not be identified by surveys.

The final rule requires plan fiduciaries to meet a documentation requirement when they are unable to distinguish among alternative investments based on pecuniary factors alone and base their investment decision on non-pecuniary factors. In such circumstances, the fiduciary must document (i) why pecuniary factors were not sufficient to select the investment or investment course of action; (ii) how the investment compares to the alternative investments with regard to the certain factors, and (iii) how the non-pecuniary chosen factor is, or factors are, consistent with interests of the participants and beneficiaries in their retirement income or financial benefits under the plan. According to a 2018 survey by the NEPC, approximately 12 percent of private pension plans have adopted ESG investing.[71] Another survey, conducted by the Callan Institute in 2019, found that about 19 percent of private sector pension plans consider ESG factors in investment decisions.[72] Both of these estimates are calculated from samples that include both defined benefit (DB) and defined contribution (DC) plans. Some DB plans that consider ESG factors will not be affected by the final rule because they focus only on the financial aspects of ESG factors, rather than on non-pecuniary objectives. In order to generate an upper-bound estimate of the costs, however, the Department assumes that 19 percent of DB plans will be affected by the final rule. This represents approximately 8,905 DB plans.[73] The Department also assumes that 19 percent of DC plans with investments that are not participant-directed will be affected; this represents an additional 17,676 plans.[74]

Participant-directed individual account DC plans and their participants will be affected by the final rule if fiduciaries respond to participant demand by examining ESG options for inclusion among their plans' designated investment alternatives. Fiduciaries of

[69] See Jon Hale, *Sustainable Funds U.S. Landscape Report: Record Flows and Strong Fund Performance in 2019* (Feb. 14, 2020), *www.morningstar.com/lp/sustainable-funds-landscape-report.*

[70] See Schanzenbach & Sitkoff, supra note 5, at 389–90 (distinguishing between ''collateral benefits ESG'' investing—defined as ''ESG investing for moral or ethical reasons or to benefit a third party''—which is not permissible under ERISA, and ''risk-return ESG'' investing, which is).

[71] Brad Smith & Kelly Regan, *NEPC ESG Survey: A Profile of Corporate & Healthcare Plan Decisionmakers' Perspectives,* NEPC (Jul. 11, 2018), *https://cdn2.hubspot.net/hubfs/2529352/files/2018%2007%20NEPC%20ESG%20Survey%20Results%20.pdf?t=1532123276859.*

[72] *2019 ESG Survey,* Callan Institute (2019), *www.callan.com/wp-content/uploads/2019/09/2019-ESG-Survey.pdf.*

[73] DOL calculations are based on statistics from *Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,* Employee Benefits Security Administration (forthcoming 2020), (46,869 * 19% = 8,905 DB plans).

[74] Id. (93,033 * 19% = 17,676 plans).

such plans may also select investments using non-pecuniary factors when the fiduciary is unable to distinguish alternative investment options based on pecuniary considerations. A small share of individual account plans offer at least one ESG-themed option among their designated investment alternatives. According to the Plan Sponsor Council of America, about three percent of 401(k) and/or profit sharing plans offered at least one ESG-themed investment option in 2018.[75] Vanguard's 2018 administrative data show that approximately nine percent of DC plans offered one or more ''socially responsible'' domestic equity fund options.[76] In a comment letter, Fidelity Investments reported that 14.5 percent of corporate DC plans with fewer than 50 participants offered an ESG option, and that the figure is higher for large plans with at least 1,000 participants. Considering these sources together, the Department estimates that nine percent of participant-directed individual account plans have at least one ESG-themed designated investment alternative and will be affected by the final rule. This represents 52,378 participant-directed individual account plans.[77] In terms of the actual investment in ESG options, one survey indicates that about 0.1 percent of total DC plan assets are invested in ESG funds.[78]

The rule prevents any investment fund, product, or model portfolio from being added as, or as a component of, a Qualified Default Investment Alternative (QDIA) if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors. To assess the impact of this provision, it is important to determine how many DC plans have a QDIA. According to a 2018 survey conducted by the Plan Sponsor Council of America, about 70 percent of DC plans have a QDIA.[79] This represents approximately 407,382 individual account plans with participant direction.[80] As specified in 29 CFR 2550.404c–5, there are four permitted types of QDIAs: Target-date funds, professionally managed accounts, balanced funds, and capital preservation products for only the first 120 days of participation. The 2018 survey from Plan Sponsor Council of America also found that approximately 75 percent of QDIAs are target-date funds, while 12 percent are balanced funds, 7 percent are professionally managed accounts, 4 percent are stable value funds, and the remaining 2 percent are investments classified as ''other.'' [81]

To better understand how many plans with QDIAs would be affected by the rule, the Department looked at the holdings of target-date fund providers. According to Morningstar, the five largest target-date fund providers account for 79 percent of target-date strategy assets.[82] The Department examined the most recent holdings, as of September 2020, of the target-date funds offered by the five largest target-date fund providers, denoting target-date funds that either had an investment strategy considering non-pecuniary factors or that were invested in a fund with a non-pecuniary investment focus. Within this sample, the Department found only one target-date fund provider that had issued a target-date series with an ESG focus. This series was launched in 2020, and as of September 2020, this series accounted for less than 0.002 percent of assets in the sample. The Department also examined other target-date funds it was aware of that had an ESG focus. When looking at the total net asset value for each of the target date series from Morningstar Direct, the Department found that target-date funds with an ESG focus account for a very small portion of the assets invested in the target-date market. When looking at preliminary data from BrightScope on the holdings of 401(k) and 403(b) plans for 2018, the Department found that target-date funds with an ESG focus account for an even smaller portion of the target-date assets in ERISA plans.

For the purpose of this analysis, the Department assumes that the characteristics of the five largest providers of target-date funds are representative of the investment alternatives offered as QDIAs. As the target-date series noted above is relatively new, and the Department is aware of at least one other target-date series focusing on non-pecuniary factors, the Department assumes that 0.1 percent of plans will need to make changes to their QDIAs. Based on the foregoing, the Department assumes that 407 plans with QDIAs will be affected by the rule.[83]

1.3. Gains to Retirement Investors

The final rule will replace existing guidance on the use of ESG and similar factors in the selection of investments. It will lead to less use of non-pecuniary factors in selecting DB plan investments and participant-directed individual account plan QDIAs. These effects may provide gains to retirement investors in the form of higher returns by preventing fiduciaries from selecting investments by factoring in non-pecuniary ESG considerations and requiring them to base investment decisions on financial factors.

The final rule states that fiduciaries for DB plans must base investment decisions on pecuniary factors unless the plan fiduciary is unable to distinguish alternative investment options on the basis of pecuniary factors and such a conclusion is properly documented. This will lead to a decrease in the use of non-pecuniary factors in selecting DB plan investments. Defined contribution plans that do not have participant direction will be similarly affected with the same results.

This rule specifically addresses circumstances when participant-directed individual account plan fiduciaries select designated investment alternatives. Such fiduciaries are not automatically prohibited from casting a broad net to consider or include an investment fund, product, or model portfolio merely because the fund, product, or model portfolio promotes, seeks, or supports one or more non-pecuniary goals, so long as fiduciaries meet the final rule's requirement to base final selection decisions on pecuniary factors. If the pecuniary factors lead to situations where plan fiduciaries are unable to distinguish alternative investment options on the basis of pecuniary factors, the plan fiduciary can make a selection based on non-pecuniary factors if they properly document the basis for their decision. It is unclear whether fiduciaries will

[75] *62nd Annual Survey of Profit Sharing and 401(k) Plans,* Plan Sponsor Council of America (2019).

[76] *How America Saves 2019,* Vanguard (June 2019), *https://institutional.vanguard.com/iam/pdf/HAS2019.pdf.*

[77] DOL calculations based on statistics from *Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,* Employee Benefits Security Administration (forthcoming 2020), (581,974 * 9% = 52,378 individual account plans with participant direction).

[78] *62nd Annual Survey of Profit Sharing and 401(k) Plans,* Plan Sponsor Council of America (2019).

[79] Id.

[80] DOL calculations based on statistics from *Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,* Employee Benefits Security Administration (forthcoming 2020), (581,974 * 70% = 407,382 individual account plans with participant direction).

[81] *62nd Annual Survey of Profit Sharing and 401(k) Plans,* Plan Sponsor Council of America (2019).

[82] Morningstar, *2020 Target-Date Strategy Landscape, How Target-Date Shareholders Fared in the Coronavirus Bear Market and the Trends Shaping the Future of Investing for Retirement* (2020).

[83] 407,383 * 0.001 = 407.

increase selection of non-pecuniary funds as designated investment alternatives, and consequently, how returns may be affected.

Furthermore, the rule prohibits plan fiduciaries from adding any investment fund, product, or model portfolio as, or as a component of, a QDIA if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors. The Department expects that requiring a fiduciary's selection of a QDIA to be based solely on pecuniary factors will lead to higher returns for the reasons discussed above.

Some commenters objected to the Department's characterization in the proposal of the empirical research assessing ESG investing. Indeed, the research studies have a wide range of findings. Some studies have shown that ESG investing outperforms conventional investing. Verheyden, Eccles, and Feiner's research analyzes stock portfolios that used negative screening [84] to exclude operating companies with poor ESG records from the portfolios.[85] The study finds that negative screening tends to increase a stock portfolio's annual performance by 0.16 percent. Similarly, Kempf and Osthoff's research, which examines stocks in the S&P 500 and the Domini 400 Social Index (renamed as the MSCI KLD 400 Social Index in 2010), finds that it is financially beneficial for investors to positively screen their portfolios.[86] Additionally, Ito, Managi, and Matsuda's research finds that socially responsible funds outperformed conventional funds in the European Union and United States.[87]

In contrast, other studies have found that ESG investing has resulted in lower returns than conventional investing. For example, Winegarden shows that over ten years, a portfolio of ESG funds has a return that is 43.9 percent lower than if it had been invested in an S&P 500 index fund.[88] Trinks and Scholten's research, which examines socially responsible investment funds, finds that a screened market portfolio significantly underperforms an unscreened market portfolio.[89] Ferruz, Muñoz, and Vicente's research, which examines U.S. mutual funds, finds that a portfolio of mutual funds that implements negative screening underperforms a portfolio of conventionally matched pairs.[90] Likewise, Ciciretti, Dalò, and Dam's research, which analyzes a global sample of operating companies, finds that companies that score poorly in terms of ESG indicators have higher expected returns.[91] Marsat and Williams' research has very similar findings.[92] Operating companies with better ESG scores according to MSCI had lower market valuation.

Furthermore, there are many studies with inconclusive results. Goldreyer and Diltz's research, which examines 49 socially responsible mutual funds, finds that employing positive social screens does not affect the investment performance of mutual funds.[93] Similarly, Renneboog, Ter Horst, and Zhang's research, which analyzes global socially responsible mutual funds, finds that the risk-adjusted returns of socially responsible mutual funds are not statistically different from conventional funds.[94] Bello's research, which examines 126 mutual funds, finds that the long-run investment performance is not statistically different between conventional and socially responsible funds.[95] Likewise, Ferruz, Muñoz, and Vicente's research finds that a portfolio of mutual funds that implement positive screening [96] performs equally well as a portfolio of conventionally matched-pairs.[97] Finally, Humphrey and Tan's research, which examines socially responsible investment funds, finds no evidence of negative screening affecting the risks or returns of portfolios.[98]

The final rule emphasizes the importance of plan fiduciaries focusing on pecuniary factors when selecting investments. This emphasis may encourage fiduciaries to pay greater attention to fees. If, as a result of the final rule, assets are invested in funds with lower fees on average, the reduced fees, minus potential upfront transition costs, will represent gains to retirement investors.

To the extent that ESG and other investing decisions sacrifice return to achieve non-pecuniary goals, it reduces participant and beneficiaries' retirement investment returns, thereby compromising a central purpose of ERISA. Given the increase in ESG investing, the Department is concerned that, without this rulemaking, non-pecuniary ESG investing will present a growing threat to ERISA fiduciary standards and, ultimately, to investment returns and retirement income security for plan participants and beneficiaries. The gains to investors derived from higher investment returns compounded over many years could be considerable for plans and participants that would be impacted by plan fiduciaries' increased reliance on pecuniary factors as required by the final rule.

If some portion of the increased returns realized by the rule are associated with ESG investments generating lower pre-fee returns than non-ESG investments (as regards economic impacts that can be internalized by parties conducting market transactions), then the new returns qualify as gains to investors from the rule. It would, however, be important to track externalities, public goods, or other market failures that might lead to economic effects of the non-ESG activities being potentially less fully internalized than ESG activities' effects would, and thus generating costs to society on an ongoing basis. Finally, if some portion of the increased returns would be associated with transactions in which the opposite party experiences decreased returns of equal magnitude, then this portion of the rule's impact would, from a society-wide perspective, be appropriately categorized as a transfer (though it should be noted that, if there is evidence of wealth differing

[84] Negative screening refers to the exclusion of certain sectors, companies, or practices from a fund or portfolio based on ESG criteria.

[85] Tim Verheyden, Robert G. Eccles, and Andreas Feiner, *ESG for all? The Impact of ESG Screening on Return, Risk, and Diversification.* 28 *Journal of Applied Corporate Finance* 2 (2016).

[86] Alexander Kempf and Peer Osthoff, *The Effect of Socially Responsible Investing on Portfolio Performance,* 13 *European Financial Management* 5 (2007).

[87] Yutaka Ito, Shunsuke Managi, and Akimi Matsuda, *Performances of Socially Responsible Investment and Environmentally Friendly Funds,* 64 *Journal of the Operational Research Society* 11 (2013).

[88] Wayne Winegarden, *Environmental, Social, and Governance (ESG) Investing: An Evaluation of the Evidence.* Pacific Research Institute (2019).

[89] Pieter Jan Trinks and Bert Scholtens, *The Opportunity Cost of Negative Screening in Socially Responsible Investing,* 140 *Journal of Business Ethics* 2 (2014).

[90] Luis Ferruz, Fernando Muñoz, and Ruth Vicente, *Effect of Positive Screens on Financial Performance: Evidence from Ethical Mutual Fund Industry* (2012).

[91] Rocco Ciciretti, Ambrogio Dalò, and Lammertjan Dam, *The Contributions of Betas versus Characteristics to the ESG Premium* (2019).

[92] Sylvain Marsat and Benjamin Williams, *CSR and Market Valuation: International Evidence. Bankers, Markets & Investors: An Academic & Professional Review,* Groupe Banque (2013).

[93] Elizabeth Goldreyer and David Diltz, *The Performance of Socially Responsible Mutual Funds: Incorporating Sociopolitical Information in Portfolio Selection,* 25 *Managerial Finance* 1 (1999).

[94] Luc Renneboog, Jenke Ter Horst, and Chendi Zhang, *The Price of Ethics and Stakeholder Governance: The Performance of Socially Responsible Mutual Funds,* 14 *Journal of Corporate Finance* 3 (2008).

[95] Zakri Bello, *Socially responsible investing and portfolio diversification,* 28 Journal of Financial Research 1 (2005).

[96] Positive screening refers to including certain sectors and companies that meets the criteria of non-financial objectives.

[97] Ferruz, Muñoz, and Vicente, *Effect of Positive Screens on Financial Performance* (2012).

[98] Jacquelyn Humphrey and David Tan, *Does It Really Hurt to be Responsible?,* 122 *Journal of Business Ethics* 3 (2014).

across the transaction parties, it would have implications for marginal utility of the assets).

1.4. Costs

This final rule provides guidance on the investment duties of a plan fiduciary. Under this final rule, plan fiduciaries who consider ESG and similar factors when choosing investments will be reminded that they may evaluate only the investments' relevant economic pecuniary factors to determine the risk and return profiles of the alternatives. It is the Department's view that many plan fiduciaries already undertake such evaluations, though many that consider ESG and similar factors may not be treating those as pecuniary factors within the risk-return evaluation. This final rule will not impair fiduciaries' appropriate consideration of ESG factors in circumstances where such consideration is material to the risk-return analysis and, as a result, advances participants' interests in their retirement benefits. The Department does not intend to increase fiduciaries' burden of care attendant to such consideration; therefore, no additional costs are estimated for this requirement. While fiduciaries may modify the research approach they use to select investments as a consequence of the final rule, the Department assumes this modification will not impose significant additional cost.

The Department solicited comments on its cost analysis in the regulatory impact analysis for the proposed rule. While some commenters provided insights the Department could use to improve its analysis, few commenters provided additional data or data sources to help the Department quantify the cost impacts of the rule.

Commenters suggested that the analysis did not account for the movement from ESG assets to non-ESG assets due to the rule and the related costs of this movement. Commenters provided several reasons for this movement including, the proposed rule favors non-ESG investments; additional costs are required to document decisions to invest in ESG investments in certain circumstances; and increased litigation risk. Commenters suggested that this movement from ESG to non-ESG investments would create a cost due to lost returns, suggesting that ESG investments outperform non-ESG investments.

The Department disagrees with most of these comments; changes made in the final rule strengthen the Department's view that commenters' concerns are overstated. For example, the final rule reaffirms that plan investments and investment alternatives are to be chosen based on pecuniary factors. If an investment, including an ESG investment, is expected to outperform other similar investments, fills a plan's needs, and meets other relevant requirements under ERISA, it can be selected and the plan and plan participants will benefit from its inclusion. If an investment, including an ESG investment, is expected to underperform other similar investments, it does not satisfy the final rule's requirements and should not be selected. Plan investments or investment alternatives that previously followed this requirement will not experience a change in economic performance. If plan investments or investment alternatives were selected based on non-pecuniary factors and they are not maximizing the economic benefits of the plan, they should be replaced, which would increase the returns to the plan. Thus, the requirement to consider only pecuniary factors only serves to benefit the plan, and additional losses are less likely to be incurred as suggested by commenters.

Commenters also suggested that the requirement to document the decision when fiduciaries use non-pecuniary factors to choose between alternative investment options that cannot be distinguished based on pecuniary factors could drive up costs. Commenters said that these costs would lead plans to avoid selecting ESG assets due to the added cost, even when they are beneficial. The final rule significantly reduces the documentation requirements from the proposal. In the final rule, the Department explicitly requires plan fiduciaries to document three elements identified in the final rule only in the discrete (and likely rare) situations in which a fiduciary cannot distinguish between alternatives based on pecuniary factors. Stating precisely what is required to be documented in the final rule should help both lower compliance costs and address concerns about liability exposure, because fiduciaries will have clear expectations of what is expected. While the Department does include a requirement to document the decision, it continues to believe that a prudent process would already require plan fiduciaries to have considered responses to these questions, so the only added costs would be to document their reasoning and many plan fiduciaries already are doing this as part of a prudent selection process.

Further, commenters suggested that the requirement to document the use of non-pecuniary factors would subject ESG factors to a different standard of analysis that would diminish a fiduciary's ability to act in the best interest of plan participants. In response to comments, the Department has removed the proposed requirement to document the selection and monitoring of designated investment alternatives that include ESG assessments. A different standard is not being created in this final rule. Fiduciaries should use a prudent process for selecting all investments. In exchange for using a non-pecuniary factor to select between or among investment alternatives that the fiduciary prudently determines would serve equivalent roles in the plan's portfolio, the rule requires fiduciaries to prepare a justification to help ensure that the decision is consistent with interests of participants and beneficiaries in their retirement income or financial benefits under the plan and not based on any other consideration.

Some commenters also expressed concern that the regulation would limit diversification and a fiduciary's ability to consider all material factors in an investment decision. The regulation specifies that compliance with section 404(a)(1)(B) of ERISA requires a fiduciary of an employee benefit plan to evaluate investments and investment courses of action based solely on pecuniary factors that have had a material effect on the return and risk. The regulation does not restrict consideration of any asset classes or sectors of investment so long as investment decisions are made solely in the interest of the plan's financial objective of providing retirement income for plan participants and beneficiaries.

Commenters suggested that the Department did not appropriately consider an investment's time horizon at all or focused only on a short-time horizon. The Department disagrees. The rule requires plan fiduciaries to ''evaluate investments and investment courses of action based solely on pecuniary factors that have a material effect on the return and risk of an investment based on appropriate investment horizons.'' The appropriate time horizon to consider for an investment or investment alternative can be plan specific, and the rule allows the plan fiduciary to make that determination for their plan.

Some commenters expressed concern regarding how the regulation will affect the behavior of plan participants (participation rates, elective deferrals, and investment choices) and plan sponsors (offering of ESG options in plan investment menus). A change to

the final rule makes it clear that participant-directed individual account plan fiduciaries are not automatically prohibited from considering or including an investment fund, product, or model portfolio merely because the fund, product, or model portfolio promotes, seeks, or supports one or more non-pecuniary goals, provided that certain requirements are met. As discussed above, this could lead to increased participation or inflows of assets into plans.

Several of the commenters note that the rule would require plan fiduciaries to read the rule and review investment policy statements to ensure they are in compliance. The Department estimates that 78,959 plans have exposure to investments with non-pecuniary objectives, consisting of 8,905 DB plans,[99] 52,378 participant-directed individual account plans,[100] and 17,676 DC plans with ESG investments that are not participant directed.[101] In the proposal, the Department estimated that the incremental costs would be ''minimal.'' The Department agrees with commenters that fiduciaries of each of these types of plans will need to spend time reviewing the final rule, evaluating how it affects their investment practices, and implementing any necessary changes. The Department now estimates that this review process will require a lawyer to spend approximately four hours to complete, resulting in a cost burden of approximately $44 million.[102] The Department believes that these processes will likely be performed by a service provider for most plans that likely oversee multiple plans. Therefore, the Department's estimate likely is an upper bound, because it is based on the number of affected plans. The Department does not have data that would allow it to estimate the number of service providers acting in such a capacity for these plans.

Some fiduciaries will select investments that are different from what they would have selected pre-rule. As part of a routine evaluation of the plan's investments or investment alternatives, fiduciaries may replace an investment or investment alternative. This could lead to some disruption, particularly for participant-directed DC plans. If a plan fiduciary removes an ESG fund as a designated investment alternative and does not replace it with a more appropriate ESG fund as a result of this final rule, participants invested in the ESG fund will have to pick a new fund that may not be comparable from their perspective. This could be disruptive.

Paragraph (c)(1) of the final rule provides that a fiduciary's evaluation of an investment must be focused on pecuniary factors. Paragraph (c)(2) addresses investment alternatives that the fiduciary prudently determines would serve equivalent roles in the plan's portfolio and that which the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone. In such cases, a fiduciary may choose between such alternatives based on non-pecuniary factors provided the fiduciary documents (1) why the pecuniary factors were not sufficient to select the investment; (2) why the fiduciary believes diversification among the investments under consideration would not be prudent; and (3) how the chosen non-pecuniary factors are consistent with the interests of the plan. The Department continues to believe that the likelihood that a plan fiduciary will be unable to distinguish between two investment options based on pecuniary factors is rare; therefore, the need to document such circumstances also will be rare.[103] In those rare instances, the documentation requirement could be burdensome if fiduciaries are not currently documenting decisions. The Department estimates that this requirement will not result in a substantial cost burden, because it concludes that situations where plan fiduciaries are unable to distinguish between alternative investment options based on pecuniary factors are rare. The cost for the documentation requirement is estimated to be $122,000 annually. The estimation of this cost is discussed in the Paperwork Reduction Act (PRA) section.

The final rule provides that under no circumstances may any investment fund, product, or model portfolio be added as, or as a component of, a QDIA if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors. The final rule provides a transition provision requiring plans to bring their QDIAs into compliance with the final rule by April 30, 2022. This transition provision is intended to provide sufficient time for plans to review and make any necessary changes to their QDIAs to bring them into compliance. The Department believes as plans familiarize themselves with the rule, they are likely to make necessary changes. Accordingly, the Department assumes that associated costs will be incurred during the first year. The Department estimates that it will take on average 20 hours (in addition to any time fiduciaries customarily spend reviewing and changing their QDIAs) for fiduciaries of a plan offering QDIAs with exposure to non-pecuniary investment objectives to review and change their QDIAs resulting in a cost of $1.1 million.[104]

The use of ESG investment alternatives in participant-directed plans has potential as a marketing tool that may increase retirement savings contributions for some investors. To the extent the rule reduces access to ESG investment alternatives retirement investors may reduce their future contributions. The Department is not aware of any empirical evidence assessing whether ESG investing is associated with increased rates of retirement savings.

[99] DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, ''Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,'' (forthcoming 2020), (46,869 DB plans * 19% = 8,905 DB plans; 93,033 DC Plans * 19% = 17,676 DC plans; 581,974 * 6% = 34,918 individual account plans with participant direction).

[100] DOL calculations based on statistics from *Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,* Employee Benefits Security Administration (forthcoming 2020), (581,974 * 9% = 52,378 individual account plans with participant direction).

[101] DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, ''Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,'' (forthcoming 2020), (46,869 DB plans * 19% = 8,905 DB plans; 93,033 DC Plans * 19% = 17,676 DC plans; 581,974 * 6% = 34,918 individual account plans with participant direction).

[102] The Department estimated that there are 78,959 plans that will need to ensure compliance with the final rule. The burden is estimated as follows: (78,959 plans * 4 hours) = 315,836 hours. A labor rate of $138.41 is used for a lawyer. The cost burden is estimated as follows: (78,959 plans * 4 hours * $138.41) = $43,714,860.76. Labor rates are based on DOL estimates from *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation,* Employee Benefits Security Administration (June 2019), *www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[103] See Schanzenbach & Sitkoff, supra note 5, at 410 (describing a hypothetical pair of truly identical investments as a ''unicorn'').

[104] The Department estimated that there are 407,383 DC plans with QDIAs and that 0.1 percent, or 407 plans, will need to reconsider their QDIAs as a result of the rule. The burden is estimated as follows: (407,383 plans * 0.001 * 20 hours) = 814 hours. A labor rate of $134.21 is used for a plan fiduciary. The cost burden is estimated as follows: (407,383 plans * 0.001 * 20 hours * $134.21) = $1,092,469.40. Labor rates are based on DOL estimates from *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation,* Employee Benefits Security Administration (June 2019), *www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

1.5. Uncertainty

It is unclear how many plan fiduciaries use non-pecuniary factors when selecting investments and the total asset value of investments that are selected in this manner, particularly for DB plans. While there is some survey evidence on how many DB plans factor in ESG considerations, the surveys were based on small samples and yielded varying results. It is also not clear whether survey information about ESG investing accurately represents the prevalence of investing that incorporates non-pecuniary factors. For instance, some non-pecuniary investing concentrates on issues that are not thought of as ESG-related. At the same time, some investment policies take account of environmental factors and corporate governance in a manner that focuses exclusively on the financial aspects of those considerations.

The final rule will replace the Department's existing sub-regulatory guidance on using non-pecuniary factors while selecting plan investments. It is very difficult to estimate how many plans have fiduciaries that are currently using non-pecuniary factors improperly while selecting investments. Such plans will experience significant effects from the final rule. It is also difficult to estimate the degree to which the use of non-pecuniary factors by ERISA fiduciaries, ESG or otherwise, would expand in the future absent this rulemaking, though trends in other countries suggest that pressure for such expansion will continue only to increase.[105] However, based on current trends the Department believes that the use of non-pecuniary factors by ERISA plan fiduciaries would likely increase moderately in the future without this rulemaking.

1.6. Alternatives

The Department considered several alternatives to the final regulation. One alternative would prohibit plan fiduciaries from ever considering ESG factors. This would address the Department's concerns that some plan fiduciaries may sacrifice return or increase investment risk to promote goals that are unrelated to the financial interests of the plan or its participants. However, the Department rejected this alternative, because it would prohibit fiduciaries from considering such factors even when the fiduciaries are focused on the financial aspects rather than the non-pecuniary aspects of the investments.

The Department also considered prohibiting plan fiduciaries from basing investment decisions on non-pecuniary factors and prohibiting the use of non-pecuniary factors even where the alternative investment options cannot be distinguished based on pecuniary factors (the so-called ''tie-breaker'' provision). However, if the alternative investment options cannot be distinguished on the basis of pecuniary factors, it is not clear what factors would be available to a plan fiduciary to base its decision on other than a non-pecuniary factor. Regardless, the Department believes that investment options that cannot be distinguished on the basis of pecuniary factors occur very rarely in practice, if at all. Accordingly, this final rule provides that when choosing between investment alternatives that the fiduciary prudently determines would serve equivalent roles in the plan's portfolio or the portion of the portfolio over which the fiduciary has responsibility and which the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone, the fiduciary may base the investment decision non-pecuniary factors provided the fiduciary documents the following: (1) Why the pecuniary factors were not sufficient to select the investment; (2) how the investment compares to alternative investments with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of the final rule; and (3) how the chosen non-pecuniary factors are consistent with the interests of the plan.

The Department notes that the proposal did not expressly incorporate the tie-breaker provision into the regulatory provision on selection of investment options for individual account plans. The Department explained in the proposal its perspective that the concept of ''ties'' may have little relevance in the context of fiduciaries' selection of menu options for individual account plans as such investment options are often chosen precisely for their varied characteristics and the range of choices they offer plan participants. Further, the Department explained that because the proposal did not restrict the addition of prudently selected, well managed investment options for individual account plans that include non-pecuniary factors if they can be justified solely on the basis of pecuniary factors, there would be little need for a tie-breaker between selected investment funds. Nonetheless, some commenters expressed uncertainty regarding the interaction of paragraph (c)(2) and the provisions of the proposal on selecting investment options for individual account plans. Some commenters asked the Department to expressly make the tie-breaker available for such investment decisions.

Although the Department continues to doubt the relevance of a ''tie'' concept when adding investment alternatives to a platform of investments that allow participants and beneficiaries to choose from a broad range of investment alternatives as defined in 29 CFR 2550.404c–1(b)(3), the final rule makes the tie-breaker provisions in paragraph (c) generally available for use in selecting investment options for individual account plans in the event the fiduciaries of the plan believe that it gives them some added flexibility and fiduciary protection when adding an investment fund, product, or model portfolio that promotes, seeks, or supports one or more non-pecuniary goals.

Paragraph (d) of the final rule contains standards applicable to participant-directed individual account plans. The predecessor standards for participant-directed individual account plans were set forth in paragraph (c)(3) of the proposal. Paragraph (c)(3)(ii) of the proposal would have required plan fiduciaries to document their compliance with the requirement to use only objective risk-return criteria in the selection and monitoring of investment platforms or menu alternatives. The Department included the cost plan fiduciaries would incur to comply with this documentation requirement in its cost estimates for the proposal.

The Department considered including this documentation requirement in the final rule; however, it determined not to include such requirement in paragraph (d)(2) of the final rule. The Department was persuaded by some commenters' concerns that this requirement would have applied more stringent requirements to ESG investment alternatives than other types of investment alternatives. These commenters argued that it is inappropriate to impose separate documentation requirements that vary by investment strategy. Other commenters objected to this requirement on the grounds that it would increase costs to plans and potentially provide grounds for unwarranted class action lawsuits. The Department believes that the approach reflected in the final rule best reflects ERISA's statutory obligations of prudence and loyalty, appropriately ensures that small and large plan fiduciaries' decisions will be guided by the financial interests of the plans and

[105] See generally Government Accountability Office Report No. 18–398, *Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful* (May 2018), at 25–27; Principles for Responsible Investment, *Fiduciary Duty in the 21st Century,* supra note 12, at 21–22, 50–51.

participants to whom they owe duties of prudence and loyalty, and is the most efficient alternative to apply and enforce.

1.7. Conclusion

The final rule describes when and how fiduciaries can fulfill their responsibilities by factoring in only pecuniary considerations when selecting and monitoring investments. Some plans and their service providers will incur costs to (1) review the rule and if necessary, modify their processes for selecting and monitoring investments, (2) make changes to their QDIA if it does not align with the final rule's requirements, and (3) document selections where alternative investment options cannot be distinguished on the basis of pecuniary factors. The Department does not expect these requirements to impose a significant cost increase. The final rule mitigates some costs by allowing plans to make any required changes to QDIAs when necessary to comply with the requirements of paragraph (d)(2) by April 30, 2022. The Department also believes cost will be mitigated, because circumstances where alternative investment options that cannot be distinguished based on pecuniary factors should occur very rarely in practice.

Although the final rule will replace its prior sub-regulatory guidance, the Department believes that there is significant overlap in the content of each. Overall, the final rule will assist fiduciaries in carrying out their responsibilities by avoiding making investment decisions based on non-pecuniary factors, while protecting the financial interests of participants and beneficiaries in their retirement benefits under their plans.

The Department estimates that the final rule would impose incremental costs of approximately $44.9 million in the first year and $122,000 in subsequent years. Over 10 years, the associated costs would be approximately $42.7 million with an annualized cost of $6.1 million, using a seven percent discount rate.[106] Using a perpetual time horizon (to allow the comparisons required under Executive Order 13771), the annualized costs in 2016 dollars are $2.9 million at a seven percent discount rate.[107]

[106] The costs would be $44.5 million over 10-year period with an annualized cost of $5.2 million, applying a three percent discount rate.

[107] The annualized costs in 2016 dollars would be $1.4 million applying a three percent discount rate.

1. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection request (ICR) included in the Financial Factors in Selecting Plan Investments ICR (85 FR 39113). At the same time, the Department also submitted an information collection request (ICR) to the Office of Management and Budget (OMB), in accordance with 44 U.S.C. 3507(d). OMB filed a comment on the proposed rule with the Department on August 25, 2020, requesting the Department to provide a summary of comments received on the ICR and identify changes to the ICR made in response to the comments. OMB did not approve the ICR, and requested the Department to file future submissions of the ICR under OMB control number 1210–0162.

The Department received several comments that specifically addressed the paperwork burden analysis of the information collection requirement contained in the proposed rule. The Department took into account such public comments in developing the revised paperwork burden analysis discussed below.

In connection with publication of this final rule, the Department is submitting an ICR to OMB requesting approval of a new collection of information under OMB Control Number 1210–0162. The Department will notify the public when OMB approves the ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *www.RegInfo.gov.* PRA ADDRESSEE: G. Christopher Cosby, Office of Regulations and Interpretations, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210; *cosby.chris@dol.gov.* Telephone: 202–693–8410; Fax: 202–219–4745. These are not toll-free numbers.

In prior guidance, the Department has encouraged plan fiduciaries to appropriately document their investment activities, and the Department believes it is common practice. The final rule expressly requires only that, where a plan fiduciary or its service provider determines that alternative investments are unable to be distinguished on the basis of pecuniary factors alone, the fiduciary or the plan's service provider further documents the basis for concluding that a distinguishing factor could not be found and the reason that the investment was selected based on non-pecuniary factors. Nevertheless, the Department believes that the likelihood of two investment options that cannot be distinguished based on pecuniary factors is very rare.

While the incremental burden of the final regulation is small, the full burden of the requirements will be included below as required by the PRA to allow for evaluation of the requirements in the entire information collection.

According to the most recent Form 5500 data and other assumptions discussed in the affected entities section above, there are 8,905 DB plans and 17,676 DC plans with ESG investments that are not participant directed, and 52,378 participant-directed individual account plans.[108] These plans and their service providers could be affected by the final rule. While the Department does not have data regarding the frequency of the rare event of alternatives being not distinguished on the basis of pecuniary factors and requiring documentation, the Department models the burden using one percent of plans with ESG investments as needing to comply with the documentation requirement.

While DB plans may change investments at least annually, DC plans may do so less frequently. For this analysis, DC plans are assumed to review their service providers and investments about every three years. Therefore, the Department estimates that in a year, 89 DB plans and 59 DC plans with ESG investments that are not participant directed, and 175 participant-directed DC plans with ESG alternatives will encounter alternative investment options that cannot be distinguished on the basis of pecuniary factors.

2.1. Maintain Documentation

The final rule requires ESG plan fiduciaries to maintain documentation when choosing between or among investment alternatives that the fiduciary prudently determines would serve equivalent roles in the plan's portfolio based on appropriate consideration of the investment and that the plan fiduciary is unable to distinguish on the basis of pecuniary factors and the fiduciary bases the investment decision on non-pecuniary factors. While much of the

[108] DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, ''Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,'' (forthcoming 2020), (46,869 DB plans * 19% = 8,905 DB plans; 93,033 DC Plans * 19% = 17,676 DC plans; 581,974 * 9% = 52,378 individual account plans with participant direction).

documentation needed to fulfill this requirement is generated in the normal course of business, plans may need additional time to ensure records are properly maintained and are up to the standard required by the Department.

Some commenters suggested that the Department underestimated the cost associated with documenting the required information. Specifically, they asserted that the Department underestimated the labor rates for attorneys and the time required to document the required information. The Department disagrees with both of these comments. Instead of using an attorney labor rate, the Department based its estimate on a plan fiduciary's labor rate, because this task could be performed by attorneys or other types of professionals including financial professionals. The labor rate estimates were based on estimates from the Bureau of Labor Statistics (BLS). While the Department understands that hiring outside services can come at a higher cost, the Department believes that using the BLS estimate is appropriate for purposes of this analysis.

Commenters claimed that the two hours estimated to document when alternative investments cannot be distinguished based on pecuniary factors underestimated the burden. The Department continues to believe that a prudent process required by ERISA should already include the burden of research and consideration. The burden associated with this ICR is for plan fiduciaries to meet the final rule's specific documentation requirement. In the final rule, the Department explicitly set forth the three items that must be documented. Stating precisely what is required to be documented should help lower the cost of compliance, because fiduciaries know the specific information that must be documented. In response to the comments, and to avoid underestimating the final rule's potential costs, the Department has not reduced the total estimated quantified costs although the research burden of the rule has been reduced.

The Department estimates that plan fiduciaries and clerical staff will each expend, on average, two hours of labor to maintain the needed documentation. This results in an annual burden estimate of 1,290 hours annually, with an equivalent cost of $122,115 for DB plans and DC plans with ESG investments.[109] Plans that rely on service providers may incur a lower cost due to economies of scale. However, the Department does not know exactly how many plans use a service provider; therefore, it estimated such costs on a per-plan basis.

The Department's paperwork burden estimate associated with the final rule is summarized as follows:

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Financial Factors in Selecting Plan Investments.

OMB Control Number: 1210–0162.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 323.

Estimated Number of Annual Responses: 323.

Frequency of Response: Occasionally.

Estimated Total Annual Burden Hours: 1,290.

Estimated Total Annual Burden Cost: $0.

2. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[110] imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act[111] and that are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency determines that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present a final regulatory flexibility analysis of the final rule.

For purposes of analysis under the RFA, the Employee Benefits Security Administration (EBSA) continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.[112] The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued—at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10—certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans. Such plans include unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements. Further, while some large employers may have small plans, in general small employers maintain small plans. Thus, EBSA believes that assessing the impact of this final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA)[113] pursuant to the Small Business Act.[114] In its initial regulatory flexibility analysis for the proposal, the Department requested, but did not receive, comments on the appropriateness of the size standard used in evaluating the impact of the proposed rule on small entities.

The Department has determined that this final rule could have a significant impact on a substantial number of small entities. Therefore, the Department has prepared a Final Regulatory Flexibility Analysis that is presented below.

3.1. Need for and Objectives of the Rule

The final rule confirms that ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action. This will help ensure that fiduciaries are protecting the financial interests of participants and beneficiaries.

3.2. Affected Small Entities

The final rule has documentation provisions that will affect small ERISA-covered plans with fewer than 100 participants. It also contains provisions about the improper use of non-pecuniary factors when plan fiduciaries select and monitor investments. These provisions will affect only small plans that are improperly incorporating non-

[109] The burden is estimated as follows: (8,905 DB plans * 0.01 * 2 hours) + (17,676 DC plans * 0.01 * 2 hours * 0.33) + (52,378 DC plans with participant direction * 0.01 * 2 hours * 0.33) = 645 hours for both a plan fiduciary and clerical staff for a total of 1,290. A labor rate of $134.21 is used for a plan fiduciary and a labor rate of $55.14 for clerical staff ((8,905 DB plans * 0.01 * 2 * $134.21) + (17,676 DC plans * 0.01 * 2 hours* 0.33 * $134.21)) + (52,378 DC plans with participant direction * 0.01 * 2 hours * 0.33 * $134.21) + (8,905 DB plans * 0.01 * 2 * $55.14) + (17,676 DC plans * 0.01 * 2 hours* 0.33 * $55.14)) + (52,378 DC plans with participant direction * 0.01 * 2 hours * 0.33 * $55.14) = $122,115).

[110] 5 U.S.C. 601 *et seq.* (1980).

[111] 5 U.S.C. 551 *et seq.* (1946).

[112] The Department consulted with the Small Business Administration's Office of Advocacy before making this determination, as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c).

[113] 13 CFR 121.201.

[114] 15 U.S.C. 631 *et seq.*

pecuniary factors into their investment decisions.

As discussed in the affected entities section above, surveys suggest that 19 percent of DB plans and DC plans with investments that are not participant directed and 9 percent of DC plans with participant directed individual accounts have ESG or ESG-themed investments. Plans with ESG or ESG-themed investments are used as a proxy of the number of plans that could be affected by the final rule. This represents approximately 8,905 DB plans and 70,054 DC plans. Additionally, surveys suggest 70 percent of DC plans with participant-directed individual accounts offer a QDIA. Of the 70 percent, the Department estimates that 0.1 percent have exposure to ESG investments, representing approximately 407 plans.

The distribution across plan size is not available in the surveys. It should be noted that 84 percent of all DB plans and 87 percent of all DC plans are small plans.[115] Applying these proportions uniformly, 7,480 small DB plans and 60,947 small DC plans are estimated to be affected by the rule. Particularly for DB plans, it is likely that most plans with ESG investments are large. In terms of the actual utilization of ESG options, about 0.1 percent of total DC plan assets are invested in ESG funds.[116] In addition, one survey found that among 401(k) plans with fewer than 50 participants, approximately 1.7 percent offered an ESG investment option.[117] Therefore, a large majority of small plan participants do not have an ESG fund in their portfolio.

One commenter suggested that the Department underestimated the percent of small DC plans that offer an ESG investment option. The commenter asserted that their data analysis indicates that 14.5 percent of corporate DC plans with fewer than 50 participants have an ESG option. The experience of one service provider is insightful, but may not be representative of the industry as a whole. While the Department appreciates the input, the commenter did not provide the data source for their statistic. Thus, the Department could not access the validity of the data and general applicability of the statistic. The Department did consider the statistic when reevaluating its estimates, and when combined with other data points, raised its estimate from six percent to nine percent of DC plans with individual accounts where a plan fiduciary could not distinguish investment alternatives based on pecuniary factors and such fiduciary is required to document its use of a non-pecuniary factor.

One commenter was concerned that the Department did not survey plan participants and fiduciaries in order to estimate the cost incurred by the plan. While the Department acknowledges this concern, the Department used survey data from the Plan Sponsor Council of America to estimate the percent of small DC plans that offer an ESG investment option. The Department believes that the impact of the rule has been accurately assessed.

Other general comments about the final rule and its impacts are discussed elsewhere in the preamble.

3.3. Impact of the Rule

While the rule is expected to affect small pension plans, it is unlikely there will be a significant economic impact on many of these plans. The final regulation provides guidance on how fiduciaries can comply with section 404(a)(1)(B) of ERISA when investing plan assets. The Department believes most plans are already fulfilling the requirement in the course of following the Department's prior sub-regulatory guidance.

The Department expects some small plans to experience rising costs from three potential sources. The first cost is associated with the time required for plan fiduciaries to review the rule and amending investment policy statements to reflect it. The second cost is associated with the requirement for plan fiduciaries to document selections of investments based on non-pecuniary factors where the alternative investment options are unable to be distinguished on the basis of pecuniary factors alone. The third cost is associated with the final rule's provision prohibiting plan fiduciaries from adding any investment fund, product, or model portfolio as, or as a component of, a QDIA if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors. The final rule allows for a transition period for plans to review and make necessary changes to pre-existing QDIAs; however, as discussed in the regulatory impact analysis, the Department assumes that associated costs will be incurred during the first year.

As illustrated in Table 1 below, the Department estimates a cost of $3,599.74 per affected plan in year 1 and $379 per affected plan in year two for plan fiduciaries and clerical professionals to become familiar with the final rule, fulfill the documentation requirement, and review their QDIA holdings. These costs reflect an instance in which (1) a plan has exposure to investments with non-pecuniary investment objectives, (2) a plan fiduciary uses a non-pecuniary factor to make an investment decision between investments that cannot be distinguished on the basis of pecuniary factors, and (3) a plan offers a QDIA in which the QDIA, or component of the QDIA, considers, or indicates the use of, one or more non-pecuniary factors in its investment objectives or goals or its principal investment strategies. As discussed throughout the regulatory impact analysis, most plans will only incur the rule familiarization costs, while few plans will incur both costs (2) and (3). Plans needing to provide documentation will be rare, because tie-breakers rarely occur, and only an estimated 0.1 percent of plans need to update their QDIA holdings, because the QDIA or a component thereof, includes, considers, or indicates the use of, one or more non-pecuniary factors in its investment objectives or goals or its principal investment strategies.

TABLE 1—COSTS FOR PLANS TO COMPLY WITH REQUIREMENTS

Affected entity	Labor rate	Hours	Year 1 cost	Year 2 cost
Documentation: Plan Fiduciary	$134.21	2	$268.42	$268.42
Documentation: Clerical workers	55.14	2	110.28	110.28
Rule Familiarization: Plan Fiduciary	134.21	4	536.84	0
Update QDIA Holdings: Plan Fiduciary	134.21	20	2,684.20	0

[115] DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, ''Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports,'' (forthcoming 2020).

[116] *62nd Annual Survey of Profit Sharing and 401(k) Plans,* Plan Sponsor Council of America (2019).

[117] *Id.*

TABLE 1—COSTS FOR PLANS TO COMPLY WITH REQUIREMENTS—Continued

Affected entity	Labor rate	Hours	Year 1 cost	Year 2 cost
Total: Plans Needing Familiarization Only			536.84	0
Total: Plans Needing to Update QDIA and Provide Documentation			3,599.74	$378.70

Source: DOL calculations based on statistics from *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation,* Employee Benefits Security Administration (June 2019), *www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-oprria-and-pra-burden-calculations-june-2019.pdf.*

Small plans affected by the rule—those with exposure to investments considering non-pecuniary factors—would incur a cost associated with the time to review the rule and amend relevant investment policy statements. The Department estimates that nine percent of plans would fall into this category. Additionally, the Department believes small plans are likely to rely on service providers to monitor regulatory changes and make necessary changes to the plan. Overall, the Department expects the costs associated with the familiarization of the rule to be small on a per-plan basis.

As stated above, the final rule also prohibits plan fiduciaries from adding any investment fund, product, or model portfolio as, or as a component of, a QDIA if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors. While the cost in the table above reflects a cost for participant-directed individual account plans with exposure to investments with non-pecuniary objectives, the Department believes this is likely to affect few small plans. The Department estimates that 0.1 percent of all plans would need to reassess their QDIAs; however, as the Department believes small plans are likely to rely on service providers to propose compliant QDIAs, this estimate likely represents an upper bound of the burden on affected small entities. Further, the Department believes service providers should be familiar with the available target-date funds and be able to propose an alternative, compliant QDIA without expending material resources. As discussed above, this restriction will affect small plans; however, the Department expects that a minimal burden will be imposed on a small number of them.

3.4. Regulatory Alternatives

As discussed above in this preamble, the final regulation reiterates and codifies long-established principles of fiduciary standards for selecting and monitoring investments, and thus seeks to provide clarity and certainty regarding the scope of fiduciary duties surrounding non-pecuniary issues. These standards apply to all affected entities, both large and small; therefore, the Department's ability to craft specific alternatives for small plans is limited.

The Department carefully considered the final rule's impact on small entities by analyzing other alternatives for the proposal. One alternative would prohibit plan fiduciaries from ever considering ESG or similar factors. This would address the Department's concerns that some plan fiduciaries may sacrifice return or increase investment risk to promote goals that are unrelated to the financial interests of the plan or its participants. However, the Department rejected this alternative, because it would prohibit fiduciaries from considering such factors even when the fiduciaries are focused on the financial aspects rather than the non-pecuniary aspects of the investments.

The Department also has considered prohibiting plan fiduciaries from basing investment decisions on non-pecuniary factors and prohibiting the use of non-pecuniary factors even where plan fiduciaries cannot distinguish alternative investment options based on pecuniary factors. But if the alternative investment options cannot be distinguished on the basis of pecuniary factors, it is unclear what factors would be available for a plan fiduciary to base its decision on other than non-pecuniary factors. Regardless, the Department believes this circumstance occurs very rarely in practice, if at all. Accordingly, this final rule retains the ''all things being equal'' test from the Department's previous guidance with a specific requirement for plan fiduciaries to document (1) why the pecuniary factors were not sufficient to select the investment; (2) how the investment compares to alternative investments with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of the final rule; and (3) how the chosen non-pecuniary factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan.

The Department notes that the proposal did not expressly incorporate the tie-breaker provision into the regulatory provision on selection of investment options for individual account plans. The Department explained in the proposal its perspective that the concept of ''ties'' may have little relevance in the context of fiduciaries' selection of menu options for individual account plans as such investment options are often chosen precisely for their varied characteristics and the range of choices they offer plan participants. Further, the Department explained that because the proposal did not restrict the addition of prudently selected, well-managed investment options for individual account plans that include non-pecuniary factors if they can be justified solely on the basis of pecuniary factors, there would be little need for a tie-breaker between selected investment funds. Nonetheless, some commenters expressed some uncertainty regarding the interaction of paragraph (c)(2) and the provisions of the proposal on selecting investment options for individual account plans. Some commenters asked the Department to expressly make the tie-breaker available for such investment decisions.

Although the Department continues to doubt the relevance of a ''tie'' concept when adding investment alternatives to a platform of investments that allow participants and beneficiaries to choose from a broad range of investment alternatives as defined in 29 CFR 2550.404c–1(b)(3), the final rule makes the tie-breaker provisions in paragraph (c) generally available for use in selecting investment options for individual account plans in the event the fiduciaries of the plan believe that it gives them some added flexibility and fiduciary protection when adding an investment fund, product, or model portfolio that promotes, seeks, or supports one or more non-pecuniary goals.

Paragraph (d) of the final rule contains standards applicable to participant-directed individual account plans. The predecessor standards for

participant-directed individual account plans were set forth in paragraph (c)(3) of the proposal. Paragraph (c)(3)(ii) of the proposal would have required plan fiduciaries to document their compliance with the requirement to use only objective risk-return criteria in the selection and monitoring of investment platform or menu alternatives. The Department included the cost plan fiduciaries would incur to comply with this documentation requirement in its cost estimates for the proposal.

The Department considered including this document requirement in the final rule; however, it determined not to include such requirement in paragraph (d)(2) of the final rule. The Department was persuaded by some commenters' concerns that this requirement would have applied more stringent requirements to ESG investment alternatives than other types of investment alternatives. These commenters argued that it is inappropriate to impose separate documentation requirements that vary by investment strategy. Other commenters objected to this requirement on the grounds that it would increase costs to plans and potentially provide grounds for unwarranted class action lawsuits.

The Department believes that the approach taken in the final rule best reflects the statutory obligations of prudence, appropriately ensures that large and small plan fiduciaries' decisions would be guided by the financial interests of the plans and participants to whom they owe duties of prudence, and is the most efficient alternative to apply and enforce.

3.5. Duplicate, Overlapping, or Relevant Federal Rules

The Department is issuing this final rule under sections 404(a)(1)(A) and 404(a)(1)(B) of Title I under ERISA. The Department has sole jurisdiction to interpret these provisions as they apply to plan fiduciaries' consideration of non-pecuniary factors in selecting plan investment funds. Therefore, there are no duplicate, overlapping, or relevant Federal rules.

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this final rule does not include any Federal mandate that the Department expects would result in such expenditures by state, local, or tribal governments.

5. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have ''substantial direct effects'' on the states, the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.[118] Federal agencies promulgating regulations that have federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final rule.

In the Department's view, this final regulation does not have federalism implications because it will not have direct effects on the states, the relationship between the National Government and the states, or on the distribution of power and responsibilities among various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the states as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the states or the relationship or distribution of power between the National Government and the states.

Statutory Authority

This regulation is finalized pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

[118] Federalism, 64 FR 153 (Aug. 4, 1999).

List of Subjects in 29 CFR Parts 2509 and 2550

Employee benefit plans, Employee Retirement Income Security Act, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Reporting and Recordkeeping requirements, Securities.

For the reasons set forth in the preamble, the Department amends parts 2509 and 2550 of subchapters A and F of chapter XXV of title 29 of the Code of Federal Regulations as follows:

Subchapter A—General

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780.

§ 2509.2015–01 [Removed]

■ 2. Remove § 2509.2015–01.

Subchapter F—Fiduciary Responsibility under the Employee Retirement Income Security Act of 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 3. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135 and Secretary of Labor's Order No. 12011, 77 FR 1088 (January 9, 2012). Sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–1 also issued under sec. 657, Pub. L. 107–16, 115 Stat 38. Sec. 2550.404a–2 also issued under sec. 657 of Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 4. Revise § 2550.404a–1 to read as follows:

§ 2550.404a–1 Investment duties.

(a) *In general.* Section 404(a)(1)(A) and 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) provide, in part, that a fiduciary shall discharge that person's duties with respect to the plan solely in the interests of the participants and beneficiaries, for the

exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(b) *Investment duties.* (1) With regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary's investment duties, the requirements of section 404(a)(1)(B) of the Act set forth in paragraph (a) of this section are satisfied if the fiduciary:

(i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and

(ii) Has acted accordingly.

(2) For purposes of paragraph (b)(1) of this section, ''appropriate consideration'' shall include, but is not necessarily limited to:

(i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks; and

(ii) Consideration of the following factors as they relate to such portion of the portfolio:

(A) The composition of the portfolio with regard to diversification;

(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

(C) The projected return of the portfolio relative to the funding objectives of the plan.

(3) An investment manager appointed, pursuant to the provisions of section 402(c)(3) of the Act, to manage all or part of the assets of a plan, may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of this section, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if—

(i) Such information is provided for the stated purpose of assisting the manager in the performance of the manager's investment duties; and

(ii) The manager does not know and has no reason to know that the information is incorrect.

(c) *Investments based on pecuniary factors.* (1) A fiduciary's evaluation of an investment or investment course of action must be based only on pecuniary factors, except as provided in paragraph (c)(2) of this section. A fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals. The weight given to any pecuniary factor by a fiduciary should appropriately reflect a prudent assessment of its impact on risk-return.

(2) Notwithstanding the requirements of paragraph (c)(1) of this section, when choosing between or among investment alternatives that the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor in the investment decision provided that the fiduciary documents:

(i) Why pecuniary factors were not sufficient to select the investment or investment course of action;

(ii) How the selected investment compares to the alternative investments with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of this section; and

(iii) How the chosen non-pecuniary factor or factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan.

(d) *Investment alternatives for participant-directed individual account plans.* (1) The standards set forth in paragraphs (a) and (c) of this section apply to a fiduciary's selection or retention of designated investment alternatives available to participants and beneficiaries in an individual account plan.

(2) In the case of selection or retention of investment alternatives for an individual account plan that allows plan participants and beneficiaries to choose from a broad range of investment alternatives as defined in § 2550.404c-1(b)(3), a fiduciary is not prohibited from considering or including an investment fund, product, or model portfolio as a designated investment alternative solely because the fund, product, or model portfolio promotes, seeks, or supports one or more non-pecuniary goals, provided that:

(i) The fiduciary satisfies the requirements of paragraphs (a) and (c) of this section in selecting or retaining any such investment fund, product, or model portfolio; and

(ii) The investment fund, product, or model portfolio is not added or retained as, or as a component of, a qualified default investment alternative described in § 2550.404c-5 if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

(e) [Reserved]

(f) *Definitions.* For purposes of this section:

(1) The term *investment duties* means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in section 3(21)(A)(i) or (ii) of the Act.

(2) The term *investment course of action* means any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated investment alternative under the plan.

(3) The term *pecuniary factor* means a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA.

(4) The term *plan* means an employee benefit plan to which Title I of the Act applies.

(5) The term *designated investment alternative* means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term ''designated investment alternative'' shall not include ''brokerage windows,'' ''self-directed brokerage accounts,'' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

(g) *Effective date.* (1) This section shall be effective on January 12, 2021, and shall apply in its entirety to all investments made and investment courses of action taken after January 12, 2021.

(2) Plans shall have until April 30, 2022 to make any changes to qualified default investment alternatives described in § 2550.404c-5, where necessary to comply with the requirements of paragraph (d)(2) of this section.

(h) *Severability.* If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof.

Signed at Washington, DC, this 30th day of October 2020.

Jeanne Klinefelter Wilson,

Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2020–24515 Filed 11–12–20; 8:45 am]

BILLING CODE 4510–29–P

FEDERAL REGISTER

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Part IV

The President

Memorandum of November 9, 2020—Delegation of Authority for Fiscal Year 2021 Cost Estimates and Annual Reports to the Congress for the Land and Water Conservation Fund

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Presidential Documents

Title 3—

The President

Memorandum of November 9, 2020

Delegation of Authority for Fiscal Year 2021 Cost Estimates and Annual Reports to the Congress for the Land and Water Conservation Fund

Memorandum for the Secretary of the Interior [and] the Secretary of Agriculture

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. The Secretary of the Interior and the Secretary of Agriculture are hereby authorized to submit, for their respective agencies:

(a) the cost estimates to the Congress required by 54 U.S.C. 200303(c)(1)(A), as amended by section 3(a) of the Great American Outdoors Act (Public Law 116–152) (the ''Act''); and

(b) annually, the report to the Congress required by 54 U.S.C. 200303(c)(4), as amended by section 3(a) of the Act.

Sec. 2. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

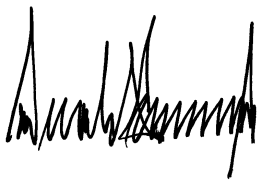
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of the Interior is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, November 9, 2020

[FR Doc. 2020–25295
Filed 11–12–20; 11:15 am]
Billing code 4310–10–P

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Part V

The President

Notice of November 12, 2020—Continuation of the National Emergency With Respect to Burundi
Notice of November 12, 2020—Continuation of the National Emergency With Respect to Iran
Notice of November 12, 2020—Continuation of the National Emergency With Respect to the Proliferation of Weapons of Mass Destruction

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Title 3—

The President

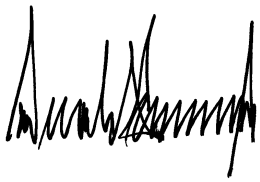
Notice of November 12, 2020

Continuation of the National Emergency With Respect to Burundi

On November 22, 2015, by Executive Order 13712, the President declared a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the situation in Burundi, which has been marked by the killing of and violence against civilians, unrest, the incitement of imminent violence, and significant political repression, and which threatens the peace, security, and stability of Burundi and the region. I commend the new government and the people of Burundi for the recent historic peaceful transfer of power and encourage the new government to continue to engage with the United States and other countries to address the underlying actions and policies of the Government of Burundi that led to the declaration of a national emergency in Executive Order 13712. At this time, however, I have not seen sufficient evidence that the situation is resolved.

As such, the situation in Burundi continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared on November 22, 2015, to deal with that threat must continue in effect beyond November 22, 2020. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to Burundi declared in Executive Order 13712.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
November 12, 2020.

[FR Doc. 2020–25309
Filed 11–12–20; 11:15 am]
Billing code 3295–F1–P

Presidential Documents

Notice of November 12, 2020

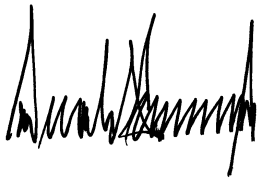
Continuation of the National Emergency With Respect to Iran

On November 14, 1979, by Executive Order 12170, the President declared a national emergency with respect to Iran pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) and took related steps to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the situation in Iran.

Our relations with Iran have not yet normalized, and the process of implementing the agreements with Iran, dated January 19, 1981, is ongoing. For this reason, the national emergency declared on November 14, 1979, and the measures adopted on that date to deal with that emergency, must continue in effect beyond November 14, 2020. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to Iran declared in Executive Order 12170.

The emergency declared in Executive Order 12170 is distinct from the emergency declared in Executive Order 12957 on March 15, 1995. This renewal, therefore, is distinct from the emergency renewal of March 12, 2020.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
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[FR Doc. 2020–25310
Filed 11–12–20; 11:15 am]
Billing code 3295–F1–P

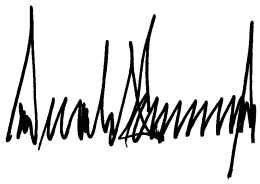
Presidential Documents

Notice of November 12, 2020

Continuation of the National Emergency With Respect to the Proliferation of Weapons of Mass Destruction

On November 14, 1994, by Executive Order 12938, the President declared a national emergency with respect to the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States posed by the proliferation of nuclear, biological, and chemical weapons (weapons of mass destruction) and the means of delivering such weapons. On July 28, 1998, by Executive Order 13094, the President amended Executive Order 12938 to respond more effectively to the worldwide threat of proliferation activities related to weapons of mass destruction. On June 28, 2005, by Executive Order 13382, the President, among other things, further amended Executive Order 12938 to improve our ability to combat proliferation activities related to weapons of mass destruction. The proliferation of weapons of mass destruction and the means of delivering them continues to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For this reason, the national emergency declared in Executive Order 12938 with respect to the proliferation of weapons of mass destruction and the means of delivering such weapons must continue beyond November 14, 2020. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 12938, as amended.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
November 12, 2020.

[FR Doc. 2020–25311
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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

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