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# Contents

Federal Register

Vol. 85, No. 221

Monday, November 16, 2020

## Agricultural Marketing Service

### RULES

Marketing Order:

Tomatoes Grown in Florida, 72914–72916

## Agriculture Department

See Agricultural Marketing Service

See Forest Service

See National Institute of Food and Agriculture

See Rural Utilities Service

### RULES

Regulations for Grants and Agreements; Update of Citations, 72912–72913

### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 73017

## Alcohol, Tobacco, Firearms, and Explosives Bureau

### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Report of Multiple Sale or Other Disposition of Certain Rifles, 73069–73070

## Antitrust Division

### NOTICES

Proposed Final Judgment and Competitive Impact Statement:

United States v. Liberty Latin America Ltd., et al., 73070–73086

## Centers for Disease Control and Prevention

### NOTICES

Organization, Functions, and Delegations of Authority, 73054–73056

## Centers for Medicare & Medicaid Services

### RULES

Regulatory Clean Up Initiative, 72899–72912

## Children and Families Administration

### RULES

Regulatory Clean Up Initiative, 72899–72912

## Civil Rights Commission

### NOTICES

Meetings:

Washington Advisory Committee, 73018

## Commerce Department

See Foreign-Trade Zones Board

See International Trade Administration

See National Oceanic and Atmospheric Administration

## Defense Department

### RULES

Federal Acquisition Regulation:

Removal of FAR Appendix; Correction, 72971

## Employee Benefits Security Administration

### RULES

Registration Requirements for Pooled Plan Providers, 72934–72956

## Energy Department

See Federal Energy Regulatory Commission

## Environmental Protection Agency

### RULES

Air Quality State Implementation Plans; Approvals and Promulgations:

Failure To Submit Revisions in Response to 2016 Oil and Natural Gas Industry Control Techniques Guidelines for the 2008 Ozone National Ambient Air Quality Standards and for States in the Ozone Transport Region, 72963–72966

Missouri; Removal of Control of Emission From Solvent Cleanup Operations, 72961–72963

Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants:

Arkansas, New Mexico, and Albuquerque-Bernalillo County, New Mexico; Control of Emissions From Existing Commercial and Industrial Solid Waste Incineration Units, 72967–72968

Pesticide Tolerances:

Indoxacarb, 72968–72971

### PROPOSED RULES

Significant New Use Rules on Certain Chemical Substances, 73007–73012

### NOTICES

Proposed De Minimis Administrative Order:

Consent for the Lane Street Ground Water Site in Elkhart, IN, 73036

## Federal Aviation Administration

### RULES

Airspace Designations and Reporting Points:

Paris, ID, 72917–72918

Vicinity of New Hope, KY, 72918

### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Advanced Qualification Program, 73124–73125

## Federal Energy Regulatory Commission

### NOTICES

Application:

Premium Energy Holdings, LLC, 73035

Combined Filings, 73031–73032, 73035

Environmental Impact Statements; Availability, etc.:

Spire Storage West, LLC; Proposed Clear Creek Expansion Project, 73032–73034

Initial Market-Based Rate Filings Including Requests for Blanket Section 204 Authorizations:

DDP Specialty Electronic Materials US, Inc., 73036

Specialty Products US, LLC, 73031

## Federal Highway Administration

### RULES

Indefinite Delivery and Indefinite Quantity Contracts for Federal-Aid Construction, 72919–72934

### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 73125–73126

**Federal Railroad Administration****RULES**

Metrics and Minimum Standards for Intercity Passenger Rail Service, 72971–73002

**NOTICES**

Petition for Waiver of Compliance, 73126

**Federal Reserve System****NOTICES**

2021 Private Sector Adjustment Factor and 2021 Fee Schedules of Federal Reserve Priced Services and Electronic Access, 73037–73054

**Federal Retirement Thrift Investment Board****RULES**

Simplification of Catch-Up Contribution Process, 72913–72914

**Financial Crimes Enforcement Network****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Renewal Without Change of Reports of Foreign Financial Accounts Regulations and FinCEN Report 114, Report of Foreign Bank and Financial Accounts, 73129–73131

**Fish and Wildlife Service****PROPOSED RULES**

Endangered and Threatened Species:  
Reclassification of the Red-Cockaded Woodpecker, 73012–73013  
Review of Domestic Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 73164–73179

**Food and Drug Administration****RULES**

Regulatory Clean Up Initiative, 72899–72912

**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Application for Food and Drug Administration Approval to Market a New Drug, 73057–73060  
Guidance:  
Certificates of Confidentiality, 73056–73057

**Foreign Assets Control Office****NOTICES**

Blocking or Unblocking of Persons and Properties, 73131–73132

**Foreign-Trade Zones Board****NOTICES**

Authorization of Production Activity:  
Ricoh Electronics, Inc., Foreign-Trade Zone 26, Atlanta, GA, 73019  
Proposed Production Activity:  
Deepwater Riser Services, Foreign-Trade Zone 279, Houma, LA, 73018–73019

**Forest Service****NOTICES**

Forest Service Manual 3800, Zero Code:  
State and Private Forestry Landscape Scale Restoration Program, 73017–73018

**General Services Administration****RULES**

Federal Acquisition Regulation:  
Removal of FAR Appendix; Correction, 72971

**Health and Human Services Department**

*See* Centers for Disease Control and Prevention  
*See* Centers for Medicare & Medicaid Services  
*See* Children and Families Administration  
*See* Food and Drug Administration  
*See* Health Resources and Services Administration  
*See* Inspector General Office, Health and Human Services Department

*See* National Institutes of Health

**RULES**

Regulatory Clean Up Initiative, 72899–72912

**PROPOSED RULES**

Securing Updated and Necessary Statutory Evaluations Timely, 73007

**NOTICES**

Meetings:  
National Vaccine Advisory Committee, 73061–73062

**Health Resources and Services Administration****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Coronavirus 2019 Data Report; Extension, 73060–73061

**Homeland Security Department****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Acquisition Regulation, 73065–73067

**Inspector General Office, Health and Human Services Department****RULES**

Regulatory Clean Up Initiative, 72899–72912

**Institute of Museum and Library Services****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 73087–73088

**Interior Department**

*See* Fish and Wildlife Service  
*See* Land Management Bureau  
*See* National Park Service

**Internal Revenue Service****RULES**

Limitation on Deduction for Dividends Received From Certain Foreign Corporations and Amounts Eligible for Section 954 Look-Through Exception; Correction, 72934

**International Trade Administration****NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:  
Utility Scale Wind Towers From India and Malaysia, 73019–73023  
Initiation of Less-Than-Fair-Value Investigations:  
Utility Scale Wind Towers From India, Malaysia, and Spain, 73023–73028

**Justice Department**

*See* Alcohol, Tobacco, Firearms, and Explosives Bureau

See Antitrust Division

### Labor Department

See Employee Benefits Security Administration

### Land Management Bureau

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Mineral Materials Disposal, 73067–73068

### Maritime Administration

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Automated Mutual Assistance Vessel Rescue System, 73127  
Cruise Vessel Security and Safety Training Provider Certification, 73126–73127  
Requests for Administrative Waivers of the Coastwise Trade Laws:  
Vessel RAISING CHAMPIONS (Trawler), 73127–73128

### National Aeronautics and Space Administration

#### RULES

Cooperative Agreements With Commercial Firms, 72919  
Federal Acquisition Regulation:  
Removal of FAR Appendix; Correction, 72971

### National Council on Disability

#### NOTICES

Meetings; Sunshine Act, 73086–73087

### National Foundation on the Arts and the Humanities

See Institute of Museum and Library Services

### National Institute of Food and Agriculture

#### RULES

Regulations for Grants and Agreements; Update of Citations, 72912–72913

### National Institutes of Health

#### NOTICES

Meetings:  
Center for Scientific Review, 73063–73065  
Muscular Dystrophy Coordinating Committee, 73062  
National Institute of Allergy and Infectious Diseases, 73062–73063

### National Oceanic and Atmospheric Administration

#### RULES

Fisheries Off West Coast States:  
Pacific Coast Groundfish Fishery; 2020 Tribal Fishery Allocations for Pacific Whiting; Reapportionment Between Tribal and Non-Tribal Sectors, 73002–73003  
Pacific Island Fisheries:  
Interim Measures for American Samoa Bottomfish, 73003–73006

#### PROPOSED RULES

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:  
Snapper-Grouper Fishery of the South Atlantic Region; Regulatory Amendment 34, 73013–73016

#### NOTICES

Meetings:  
North Pacific Fishery Management Council, 73028–73029  
Western Pacific Fishery Management Council, 73029–73031

### National Park Service

#### RULES

Jurisdiction in Alaska, 72956–72961

#### NOTICES

National Register of Historic Places:  
Pending Nominations and Related Actions, 73068–73069

### National Science Foundation

#### NOTICES

Meetings; Sunshine Act, 73088

### Nuclear Regulatory Commission

#### NOTICES

Draft Regulatory Guide:  
Risk-Informed, Performance-Based Fire Protection for Existing Light-Water Nuclear Power Plants, 73088–73089  
Guidance:  
Fire Protection for Nuclear Power Plants, 73089–73090

### Pension Benefit Guaranty Corporation

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Disclosure of Termination Information, 73090–73091

### Pipeline and Hazardous Materials Safety Administration

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Hazardous Materials, 73128–73129

### Presidential Documents

#### PROCLAMATIONS

Special Observances:  
Veterans Day (Proc. 10118), 73181–73184

### Rural Utilities Service

#### RULES

Regulations for Grants and Agreements; Update of Citations, 72912–72913

### Securities and Exchange Commission

#### NOTICES

Self-Regulatory Organizations; Proposed Rule Changes:  
Cboe BZX Exchange, Inc., 73091–73095, 73109–73113  
Nasdaq BX, Inc., 73095–73099, 73113–73121  
National Securities Clearing Corp., 73099–73109  
New York Stock Exchange, LLC, 73121–73124

### Small Business Administration

#### RULES

Consolidation of Mentor-Protege Programs and Other Government Contracting Amendments; Correction, 72916–72917

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 73124

### Social Security Administration

#### RULES

Hearings Held by Administrative Appeals Judges of the Appeals Council, 73138–73162

### State Department

#### NOTICES

Meetings:  
Foreign Affairs Policy Board, 73124

**Transportation Department**

*See* Federal Aviation Administration  
*See* Federal Highway Administration  
*See* Federal Railroad Administration  
*See* Maritime Administration  
*See* Pipeline and Hazardous Materials Safety Administration

**Treasury Department**

*See* Financial Crimes Enforcement Network  
*See* Foreign Assets Control Office  
*See* Internal Revenue Service

**NOTICES**

## Meetings:

Federal Advisory Committee on Insurance, 73132–73133

**Unified Carrier Registration Plan****NOTICES**

Meetings; Sunshine Act, 73133–73134

**Veterans Affairs Department****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
Request for Change of Program or Place of Training, 73134

## Meetings:

Advisory Committee on Minority Veterans, 73134–73135

---

**Separate Parts In This Issue****Part II**

Social Security Administration, 73138–73162

**Part III**

Interior Department, Fish and Wildlife Service, 73164–73179

**Part IV**

Presidential Documents, 73181–73184

---

**Reader Aids**

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

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

**CFR PARTS AFFECTED IN THIS ISSUE**

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

<b>2 CFR</b>		423.....72899
376.....	72899	426.....72899
415.....	72912	440.....72899
416.....	72912	441.....72899
<b>3 CFR</b>		447.....72899
<b>Proclamations:</b>		482.....72899
10118.....	73183	485.....72899
<b>5 CFR</b>		1004.....72899
1600.....	72913	1008.....72899
1605.....	72913	<b>Proposed Rules:</b>
<b>7 CFR</b>		1.....73007
966.....	72914	404.....73007
1780.....	72912	<b>45 CFR</b>
3430.....	72912	3.....72899
<b>13 CFR</b>		63.....72899
121.....	72916	75.....72899
<b>14 CFR</b>		305.....72899
71 (2 documents).....	72917, 72918	307.....72899
1274.....	72919	1324.....72899
<b>20 CFR</b>		1325.....72899
404.....	73138	1326.....72899
408.....	73138	1328.....72899
411.....	73138	<b>Proposed Rules:</b>
416.....	73138	6.....73007
422.....	73138	<b>48 CFR</b>
<b>21 CFR</b>		30.....72971
1.....	72899	302.....72899
5.....	72899	326.....72899
12.....	72899	<b>49 CFR</b>
14.....	72899	273.....72971
25.....	72899	<b>50 CFR</b>
81.....	72899	660.....73002
133.....	72899	665.....73003
172.....	72899	<b>Proposed Rules:</b>
178.....	72899	17 (2 documents).....
184.....	72899	73012, 73164
201.....	72899	622.....73013
310.....	72899	
369.....	72899	
501.....	72899	
582.....	72899	
<b>Proposed Rules:</b>		
6.....	73007	
<b>23 CFR</b>		
635.....	72919	
<b>26 CFR</b>		
1.....	72934	
<b>29 CFR</b>		
2510.....	72934	
<b>36 CFR</b>		
1.....	72956	
13.....	72956	
<b>40 CFR</b>		
52 (2 documents).....	72961, 72963	
62.....	72967	
180.....	72968	
<b>Proposed Rules:</b>		
721.....	73007	
<b>42 CFR</b>		
23.....	72899	
51c.....	72899	
52i.....	72899	
56.....	72899	
57.....	72899	
63.....	72899	
124.....	72899	
411.....	72899	
412.....	72899	
422.....	72899	

# Rules and Regulations

Federal Register

Vol. 85, No. 221

Monday, November 16, 2020

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

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### 2 CFR Part 376

42 CFR Parts 23, 51c, 52i, 56, 57, 63, and 124

45 CFR Parts 3, 63, and 75

48 CFR Parts 302 and 326

[Docket Number HHS–OS–2020–0015]

RIN 0991–AC19

### Food and Drug Administration

21 CFR Parts 1, 5, 12, 14, 25, 81, 133, 172, 178, 184, 201, 310, 369, 501, and 582

### Centers for Medicare & Medicaid Services

42 CFR Parts 411, 412, 422, 423, 426, 440, 441, 447, 482, and 485

### Office of Inspector General

42 CFR Parts 1004 and 1008

### Administration for Children and Families

45 CFR Parts 305, 307, 1324, 1325, 1326, and 1328

### Regulatory Clean Up Initiative

**AGENCY:** Office of the Assistant Secretary for Administration (ASA), HHS.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Health and Human Services (HHS) is amending its regulations to make miscellaneous corrections, including correcting references to other regulations, misspellings and other typographical errors. This document is necessary to inform the public of these non-

substantive changes to HHS's regulations.

**DATES:** This rule is effective as of December 16, 2020.

**FOR FURTHER INFORMATION CONTACT:** Douglas Cheung, Ph.D., ReImagine Transformation Management Office, Immediate Office of the Secretary, email: [douglas.cheung@hhs.gov](mailto:douglas.cheung@hhs.gov); and [RegCleanUp@hhs.gov](mailto:RegCleanUp@hhs.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

HHS is committed to advancing its mission in part through strong regulatory stewardship, including regularly reviewing and modernizing its regulations, in accordance with the principles, *inter alia*, established in Executive Order 13563 (Jan. 18, 2011). Section 6 of E.O. 13563 (76 FR 3821) guides the process of the retrospective review of existing regulations by agencies. While retrospective regulatory review and reform has until now been a largely manual process, new technologies exist that can support policy subject matter experts (SMEs) in their efforts to review large amounts of regulatory text. As part of HHS's pioneering efforts to pilot the use of Artificial Intelligence (AI) and other advanced analyses, HHS recently applied AI and Natural Language Processing (NLP) technology to support and accelerate SME reviews in cognizant divisions of HHS of unstructured text in the Code of Federal Regulations (CFR), facilitating the identification of opportunities to improve HHS's regulations.

In conjunction with, and following validation by, human SMEs, this AI-augmented analysis indicated that HHS has a number of "incorrect citations," in which a current regulation cites a regulation that may have moved or may no longer exist. In response to these findings, HHS is amending the identified "incorrect citations." The amendments detailed in this rule correct these citations, remove erroneous language, or correct misspellings and other typographical errors.

#### II. Background

HHS is committed to the Administration's vision of reducing regulatory burden and modernizing the CFR. Executive Order 13771 (Jan. 30, 2017) (82 FR 9339) and E.O. 13563 both emphasize the importance of

retrospectively reviewing existing regulations in order to achieve these objectives. In particular, section 6 of E.O. 13563 asks agencies to "consider how best to promote retrospective analyses of rules that may be outmoded . . ." (76 FR 3822). HHS has continued to execute regulatory reform through new and innovative methods. In the past, regulatory analysis and reform has been a largely manual process, limited by each expert's experience with a particular subset of agency regulations, and it has been labor-intensive and time-consuming to find regulatory reform opportunities through this manual review. In addition, unless a portfolio of minor changes can occur through a consolidated regulatory vehicle, it is often administratively impractical to implement many results of retrospective review; this relative infeasibility of implementation may in turn discourage the identification and correction of many small but valuable refinements to existing regulations.

However, HHS has piloted a new method of regulatory analysis, using an AI-driven tool that analyzed HHS's regulations using NLP as applied to the regulatory text in the CFR. This NLP analysis is designed to accelerate and augment expert review, by highlighting "candidate" provisions that could be outmoded, allowing HHS SMEs to focus on these provisions as potential areas of opportunity for modernization. The NLP analysis revealed numerous reform opportunities, including instances where a regulation citation is now incorrect. Combined with the policy expertise of HHS SMEs, this NLP analysis method has yielded promising results towards reforming and modernizing regulations at HHS. The revisions outlined in this rule represent a portion of the results from this effort, and are focused on administrative, non-substantive changes that will clean up HHS's regulations. For efficiency, a consolidated regulatory vehicle is being used to implement these numerous non-substantive changes across multiple HHS regulations. Future uses of these technologies to promote comprehensive and systematic retrospective review will continue to algorithmically refine identification of potentially "outmoded" regulations and will seek algorithmic characterization of other regulatory targets of E.O. 13563—regulations which are "ineffective,



insufficient, or excessively burdensome”, as candidates for SME review and potential reform.

### III. Summary of Changes

#### 2 CFR Part 376

- *Deletion.* In 2 CFR 376.10, this rule removes the incorrect references to 3 CFR 1986 Comp., p. 189 and 3 CFR 1989 Comp., p. 235 as these references no longer exist. Although 3 CFR 1986 and 3 CFR 1989 are referenced as sources for Executive Order 12549 “Debarment and Suspension” (signed February 18, 1986) and Executive Order 12689 “Debarment and Suspension (signed August 18, 1989), removal of these references ensure consistency with 2 CFR 276.10 as currently written.

#### 21 CFR Part 1

- *Correct Reference.* In 21 CFR 1.24(a)(6)(ii) and (8)(ii), this rule removes the incorrect reference 21 CFR 101.105 and replaces it with the correct reference 21 CFR 101.7 as 21 CFR 101.105 was redesignated in 2016 as part of a technical amendment (81 FR 59130).

#### 21 CFR Part 5

- *Correct an Omission.* In 21 CFR 5.1100, a footnote “\*” next to the “Office of Chief Counsel,” that had appeared in earlier editions and was inadvertently omitted, should be inserted to read as it had in prior editions, as follows: “\*The Office of the Chief Counsel (also known as the Food and Drug Division, Office of the General Counsel, Department of Health and Human Services), while administratively within the Office of the Commissioner, is part of the Office of the General Counsel of the Department of Health and Human Services.”

- *Correct an Omission.* In 21 CFR 5.1105, a footnote “\*” next to the “Office of Chief Counsel,” that had appeared in earlier editions and was inadvertently omitted, should be inserted to read as it had in prior editions, as follows: “\*The Office of the Chief Counsel (also known as the Food and Drug Division, Office of the General Counsel, Department of Health and Human Services), while administratively within the Office of the Commissioner, is part of the Office of the General Counsel of the Department of Health and Human Services.”

#### 21 CFR Part 12

- *Deletion.* In 21 CFR 12.21(a)(2), this rule deletes the phrase “514.2 for applications for animal feeds” as 21 CFR 514.2 was removed in 1999 (64 FR 63195) to provide for feed mill licensing

in accordance with the Animal Drug Availability Act (ADAA) of 1996.

#### 21 CFR Part 14

- *Correct Reference.* In 21 CFR 14.7(b), this rule removes the incorrect reference 45 CFR 5.34 and replaces it with the correct reference 45 CFR 5.61—45 CFR 5.64 (subpart F Appeals) as 45 CFR 5.34 was removed when the Freedom of Information regulations were reorganized in 2016 (81 FR 74930).

#### 21 CFR Part 25

- *Deletion.* This rule deletes and reserves 21 CFR 25.33(a)(7), which reads “(7) Approval of a drug for use in animal feeds if such drug has been approved under § 514.2 or 514.9 of this chapter for other uses,” as 21 CFR 514.2 and 21 CFR 514.9 were removed in 1999 (64 FR 63195) to provide for feed mill licensing in accordance with the Animal Drug Availability Act (ADAA) of 1996.

#### 21 CFR Part 81

- *Deletion.* In 21 CFR 81.30(s)(2), this rule deletes the sentence “Ingested drug lip products, however, are regulated for use in 74.1308 and 74.1309” in order to remove the incorrect references to 21 CFR 74.1308 and 21 CFR 74.1309. This language is no longer needed because 21 CFR 74.1308 and 21 CFR 74.1309 were removed in 1988 (53 FR 26766).

- *Deletion.* This rule deletes 21 CFR 81.32. This language is no longer needed because it cross-references a section, 21 CFR 81.25, that was removed in 1988 (53 FR 33110).

#### 21 CFR Part 133

- *Deletion.* This rule deletes 21 CFR 133.116(d), which reads “(d) Low sodium cheddar cheese is subject to § 105.69 of this chapter” as 21 CFR 105.69 was revoked in 1996 (61 FR 27771).

- *Deletion.* This rule deletes 21 CFR 133.121(f) which reads “(f) Low sodium colby cheese is subject to § 105.69 of this chapter” as 21 CFR 105.69 was revoked in 1996 (61 FR 27771).

#### 21 CFR Part 172

- *Deletion.* In 21 CFR 172.840(c)(13), this rule deletes “and 133.131” as this section was revoked in 1996 (61 FR 58991) after FDA determined that lowfat cottage cheese was more appropriately covered by the general standard in 21 CFR 130.10.

#### 21 CFR Part 178

- *Correct Reference.* In 21 CFR 178.3730, this rule removes the incorrect references to 21 CFR 193.390, 21 CFR 561.310, and 21 CFR 561.340 and replaces them with the correct

references 40 CFR 180.127 and 40 CFR 180.128. This change reflects a renumbering of the CFR in 1988 (53 FR 24666) and a consolidation of certain tolerance regulations in 2000 (65 FR 33703).

- *Deletion.* In 21 CFR 178.3730, this rule removes the incorrect reference to 21 CFR 193.60 as this rule was renumbered in 1988 (53 FR 24666) and revoked in 1989 (54 FR 43424).

#### 21 CFR Part 184

- *Correct Reference.* In 21 CFR 184.1097, this rule removes the incorrect reference to 9 CFR 318.7 and replaces it with the correct reference 9 CFR 424.21. This change reflects a renumbering of the CFR in 1999 (64 FR 72168).

- *Correct Reference.* In 21 CFR 184.1143, this rule removes the incorrect reference to 21 CFR 170.1 and replaces it with the correct reference 21 CFR 170.3(n)(22) as the definition for “gelatins and puddings” was moved in 1977 (42 FR 14302).

- *Correct Reference.* In 21 CFR 184.1924(c)(1), this rule removes the incorrect reference to 27 CFR 2.5 and replaces it with the correct reference 27 CFR 1.10 as the definition reference was moved in 1996 (61 FR 26096) and moved again in 1999 (64 FR 49985).

#### 21 CFR Part 201

- *Deletion.* This rule removes a clause in 21 CFR 201.317(c) that cross-references 21 CFR 310.500, which was revoked in 2002 (67 FR 42992, 42997).

#### 21 CFR Part 310

- *Deletion.* This rule removes 21 CFR 310.303 as it concerns procedures to list a drug in 21 CFR 310.304, which was revoked as obsolete or no longer necessary to achieve public health goals in 1996 (61 FR 29476, 29477).

#### 21 CFR Part 369

- *Correct Reference.* In 21 CFR 369.3, this rule removes the incorrect reference to 21 CFR 369.22, which was removed in 2002 (67 FR 4904, 4907).

#### 21 CFR Part 501

- *Deletion.* In 21 CFR 501.105(t), this rule removes the incorrect reference to 21 CFR 564.14(b) as 21 CFR part 564 was removed in 1999 (64 FR 4293) as an unnecessary regulation.

#### 21 CFR Part 582

- *Correct Reference.* In 21 CFR 582.99, this rule removes the incorrect references to 40 CFR 180.1001(c) and (d) and replaces them with the correct references of 40 CFR 180.910 and 40 CFR 180.920 as these references were renumbered in 2004 (69 FR 23113).

*42 CFR Part 23*

- *Correct Reference.* This rule amends § 23.9 to remove the phrase “the most recent ‘CSA Income Poverty Guidelines’ (45 CFR 1060.2) issued by the Community Services Administration;” and replace it with “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”. The Secretary of HHS is required to update the poverty guidelines at least annually, adjusting them based on the Consumer Price Index for All Urban Consumers. 45 CFR 1060.2 no longer exists; rather, updates are published at least annually in the **Federal Register**.

*42 CFR Part 51c*

- *Correct Reference.* Section 51c.107(5) is amended to remove the phrase “the most recent ‘CSA Income Poverty Guidelines’ (45 CFR 1060.2) issued by the Community Services Administration;” and replace it with “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”. The Secretary of HHS is required to update the poverty guidelines at least annually, adjusting them based on the Consumer Price Index for All Urban Consumers. 45 CFR 1060.2 no longer exists; rather, updates are published at least annually in the **Federal Register**.

- *Correct Reference.* Section 51c.303 is amended to remove the phrase “the most recent ‘CSA Income Poverty Guidelines’ (45 CFR 1060.2) issued by the Community Services Administration;” and replace it with “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”. The Secretary of HHS is required to update the poverty guidelines at least annually, adjusting them based on the Consumer Price Index for All Urban Consumers. 45 CFR 1060.2 no longer exists; rather, updates are published at least annually in the **Federal Register**.

*42 CFR Part 52i*

- *Correct Reference.* In § 52i.11b, this rule removes the incorrect reference to 45 CFR 74.53 and replaces it with the correct reference 45 CFR 75.361. This change reflects an update to the referenced citation.

- *Correct Reference.* In § 52i.11c, this rule removes the incorrect reference to 45 CFR 74.53e and replaces it with the correct reference 45 CFR 75.364. This

change reflects an update to the referenced citation.

- *Correct Reference.* In § 52i.11d, this rule removes the incorrect reference to 45 CFR 74.52 and replaces it with the correct reference 45 CFR 75.341. This change reflects an update to the referenced citation.

*42 CFR Part 56*

- *Correct Reference.* Section 56.108 is amended to remove the phrase “the most recent ‘CSA Income Poverty Guidelines’ (45 CFR 1060.2) issued by the Community Services Administration;” and replace it with “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”. The Secretary of HHS is required to update the poverty guidelines at least annually, adjusting them based on the Consumer Price Index for All Urban Consumers. 45 CFR 1060.2 no longer exists; rather, updates are published at least annually in the **Federal Register**.

- *Correct Reference.* Section 56.303 is amended to remove the phrase “the most recent ‘CSA Income Poverty Guidelines’ (45 CFR 1060.2) issued by the Community Services Administration;” and replace it with “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”. The Secretary of HHS is required to update the poverty guidelines at least annually, adjusting them based on the Consumer Price Index for All Urban Consumers. 45 CFR 1060.2 no longer exists; rather, updates are published at least annually in the **Federal Register**.

*42 CFR Part 57*

- *Deletion.* Section 57.1505 is amended to remove the incorrect reference to 57.110 as it no longer exists.

*42 CFR Part 63*

- *Correct Reference.* In § 63.2, this rule removes the incorrect reference to 50.102 and replaces it with the correct reference 42 CFR part 93.103. This rule also amends the language to remove the outdated phrase “misconduct of science” and replaces it with the correct, current terminology “research misconduct”.

- *Revised Nomenclature.* In § 63.9(b), this rule removes the outdated phrase “misconduct of science” and replaces it with the correct, current terminology “research misconduct”.

*42 CFR Part 124*

- *Correct Reference.* In § 124.511, this rule removes the incorrect reference to 42 CFR 125.510 as this regulation no longer exists.

- *Correct Reference.* In § 124.602, this rule removes the incorrect reference to 42 CFR 53.1 as it is no longer necessary. This citation references Title VI of the Public Health Service Act, which was repealed in 1979 and has not received Congressional funding since the late 1980’s.

*42 CFR Part 411*

- *Correct Reference.* In § 411.353(d), this rule removes the incorrect reference to § 1003.101 and replaces it with the correct reference § 1003.110. This change is necessary as HHS OIG re-designated the section referenced in this citation in a December 7, 2016 regulation (81 FR 88334). The December 7, 2016 regulation made no substantive changes to this provision.

*42 CFR Part 412*

- *Correct Reference.* In § 412.42, this rule removes all incorrect references to § 405.310 and replaces them with the correct references § 411.15. These changes are necessary as § 405.310 was renumbered in the early 1980’s, and the reference needs to be updated accordingly.

*42 CFR Part 422*

- *Correct Reference.* In § 422.304(f), this rule removes the incorrect reference to § 495.220 and replaces it with the correct reference § 495.204. The Medicare and Medicaid Programs; Electronic Health Record Incentive Program final rule (75 FR 44314), published July 28, 2010, states that 42 CFR 422.304 would be amended to add a new paragraph (f), which would “act as a cross-reference to MA EHR incentive payment rules in subpart C of part 495 of this chapter” (75 FR 44481). Section 422.304(f), as added by the July 28, 2010 final rule, erroneously references § 495.220. This citation was incorrect at the time final rule was adopted; the regulations subpart C of part 495 do not include a § 495.220. Section 422.304(f) should instead have cross-referenced § 495.204 (“Incentive payments to qualifying MA organizations for MA-EPs and MA-affiliated eligible hospitals”).

- *Correct Reference.* In § 422.322(b), this rule removes the incorrect reference to 413.86(d) and replaces it with the correct reference § 413.76. Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2005 Rates; Final Rule (69 FR 48916), published on August 11,

2004 states that § 413.86(d) would be redesignated into nine separate sections (§ § 413.75, 413.76, 413.77, 413.78, 413.79, 413.80, 413.81, 413.82, and 413.83). Section 422.322 of “The Medicare Program; Establishment of the Medicare Advantage Program; Final Rule (70 FR 4729), published Jan 28, 2005, incorrectly cited § 413.86(d) which existed before the Final Rule 69 FR 48916 split the section into nine separate sections. Section 422.322(b) should have cross-referenced § 413.76 (Direct GME payments: Calculation of payments for GME costs) in place of § 413.86(d).

• *Correct Reference.* In § 422.324(b)(2), this rule removes the incorrect reference to § 413.86(b) and replaces it with the correct reference § 413.75(b). In a final rule published on August 11, 2004, § 413.86 was removed because the size of the section had grown too voluminous. The contents of the section were redesignated into nine individual sections (§ § 413.75 through 413.83). At that time however, the agency failed to update this reference to the section in § 422.324(b)(2).

• *Correct Reference.* In § 422.1094(b)(2), this rule removes the incorrect reference to § 422.858 and replaces it with the correct reference § 422.1088. Subpart T (consisting of § § 422.1000 through 422.1094) was added to part 422 on December 5, 2007 (72 FR 68727). The reference to § 423.858 was a typographical error in that document as that section did not exist at that time and was not otherwise mentioned in the document. The change is necessary to make this technical correction.

#### 42 CFR Part 423

• *Correct Reference.* In § 423.1094(b)(2), this rule removes the incorrect reference to § 423.858 and replaces it with the correct reference § 423.1088. Subpart T (consisting of § § 423.1000 through 423.1094), was added on December 5, 2007 (72 FR 68736). At that time, the reference to § 423.858 in § 423.1094 was a typographical error in that document as that section did not exist at that time and was not otherwise mentioned in the document adding subpart T. The change is necessary to make this technical correction.

• *Correct Reference.* In § 423.2330(c)(3), this rule removes the incorrect reference to § 423.2306(b)(4) and replaces it with the correct reference § 423.2315(b)(4). Subpart W (consisting of 423.2300 through 423.2345) was added to part 423 on April 12, 2012 (71 FR 22172). In that document, the reference to § 423.2306

was a typographical error as that section did not exist at that time and was not included in the subpart being added. The change is necessary to make this technical correction.

#### 42 CFR Part 426

• *Correct Reference.* In § 426.110, paragraph 1 of the definition of “Proprietary data and Privileged information”, this rule removes the incorrect reference to 45 CFR 5.65 and replaces it with the correct reference 45 CFR 5.31(d) and (e). This reference has been included in § 426.110 since it was adopted on November 7, 2003 (68 FR 63716), however, on October 28, 2016 (81 FR 74939), the Department published a final rule revising part 5. That revision moved the substantive text which had been in § 5.65 to 45 CFR 5.31(d) and (e). This change is necessary to make this technical correction.

#### 42 CFR Part 440

• *Correct Reference.* In § 440.20(b) introductory text, this rule removes the incorrect reference to § 481.1 and replaces it with the correct reference § 491.2. There is no citation § 481.1 in the CFR. § 491.2 defines Nurse Practitioners and Physician Assistants for Rural Health Clinics and is the appropriate reference for § 440.20(b).

#### 42 CFR Part 441

• *Correct Reference.* In § 441.17(a)(1), (a)(4), and (b), this rule removes the incorrect references to § 405.1316, § 405.1128(a), and § 405.1316(f), respectively, and replaces them with the correct reference “part 493 of this chapter”. These citations have been rescinded and updated under Medicare regulations but the corresponding Medicaid regulations that reference them were not updated.

• *Correct Reference.* In § 441.18(c) introductory text, this rule removes the incorrect reference to § 441.169 and replaces it with the correct reference § 440.169. This reference was correct in the October 1, 2008 edition on the CFR, however on June 30, 2009 at 74 FR 31196, CMS revised paragraph (c) and this amendment contained a typographical error that resulted in this reference being incorrectly changed.

#### 42 CFR Part 447

• *Correct Reference.* In § 447.299(c), this rule removes the incorrect reference to § 455.204 and replaces it with the correct reference “§ 455.304 of this chapter”. The current reference is a typographical error and does not exist. This change is necessary to make this technical correction.

#### 42 CFR Part 482

• *Correct Reference.* In 42 CFR 482.27(b)(3)(iii) and 482.27(b)(4)(iii), this rule removes the incorrect references to 21 CFR 610.48 as, effective December 28, 2015, the FDA issued a final rule that removed and reserved 21 CFR 610.48 in its entirety, along with any reference to this requirement in the FDA’s other requirements. This rule also revises the remaining text of our provisions at 42 CFR 482.27(b)(3)(iii) and 482.27(b)(4)(iii), which contained references to 21 CFR 610.48(b)(3) and 610.48(c)(2), respectively.

#### 42 CFR Part 485

• *Correct Reference.* In § 485.639(c)(1)(vii), this rule removes the incorrect reference to 42 CFR 413.86 as it no longer exists and adds in its place, a reference to § 413.76 through 413.83. In a previous group of technical amendments (FY 2005 IPPS final rule) (69 FR 49234), CMS redesignated the contents of § 413.86 as § § 413.75 through 413.83. They also updated cross-references to § 413.86 that were located in various sections under 42 CFR parts 400 through 499. They inadvertently did not capture all of the needed cross-reference changes.

#### 42 CFR Part 1004

• *Correct Reference.* In § 1004.40, this rule removes the incorrect reference to 476.139 and replaces it with the correct reference 480.139. This non-substantive technical change is necessary to reference the correct regulation section that was moved.

#### 42 CFR Part 1008

• *Correct Reference.* In § 1008.36, this rule removes the incorrect reference to 45 CFR 5.65 and replaces it with the correct reference 45 CFR 5.41. This non-substantive technical change is necessary to reference the correct regulation section that was moved.

#### 45 CFR Part 3

• *Correct Reference.* In § 3.1, this rule removes the incorrect reference to 40 United States Code section 318 or 318d and replaces it with the correct reference U.S. Public Law 107–296, Homeland Security Act of 2002. This amendment reflects a change in the referenced statutory authority.

• *Correct Reference.* In § 3.2(f), this rule removes the incorrect reference to Article 27, Sec. 36 in row 5 the table and replaces it with the correct reference Criminal Law, Sec. 4–202; removes the incorrect reference to Article 27, Sec. 36B in row 6 of the table and replaces it with the correct reference Sec. 4–202; removes the

incorrect reference to Article 27, Sec. 36B in row 7 of the table and replaces it with the correct reference Criminal Law, Sec. 4–204; removed the incorrect reference to Article 27, Sec. 122 in row 8 of the table and replaces it with the correct reference Criminal Law, Sec. 6–409; removes the incorrect reference to Article 27, Secs. 240, 245 in row 9 of the table and replaces it with the correct reference Criminal Law, Sec. 12–102. These changes update the citations in the referenced Maryland codes.

- *Correct Reference.* In § 3.5, this rule removes the incorrect reference to 41 CFR 101–45.304 and replaces it with the correct reference 41 CFR part 102–41; removes the incorrect reference to 41 CFR part 101–48 and replaces it with the correct reference 41 CFR 102; removed the incorrect reference to 41 CFR 101–48.305 and replaces it with the correct reference 41 CFR 102–41. These changes reflect updates to the referenced General Services Administration regulations.

- *Correct Reference.* In § 3.61, this rule removes the incorrect reference to 40 United States Code section 318 or 318d and replaces it with the correct reference U.S. Public Law 107–296, Homeland Security Act of 2002. This amendment reflects a change in the referenced statutory authority.

#### 45 CFR Part 63

- *Correct Reference.* In § 63.1, this rule removes the incorrect reference to 41 CFR 3–1.53 (which was not implemented into a final rule and is obsolete) and replaces it with the correct reference 45 CFR 75.201(a), and removes the incorrect reference to 41 CFR Chapters 1 and 3 (which is obsolete and has been replaced by the Federal Acquisition Regulations System (FAR) at 48 CFR) and replaces it with the correct reference 48 CFR Chapter 3.

#### 45 CFR Part 75

- *Correct Reference.* In § 75.372, this rule removes the incorrect reference to 45 CFR 75.390 and replaces it with the correct reference 45 CFR 75.386, so that the sentence now reads “the requirements of 75.381 and 75.386”. The current citation of “the requirements of 75.381 through 75.390” is no longer accurate as §§ 75.382 through 75.485 and §§ 75.387 through 75.390 are now reserved.

#### 45 CFR Part 305

- *Correct Reference.* Section 305.0 is amended in the beginning of the last sentence by replacing “Sections 305.40 through 305.42 . . .” with “Sections 305.40, 305.42 . . .” which removes the first instance of “through” in the

sentence and replaces with a comma. This change is not substantive and clarifies the sentence.

#### 45 CFR Part 307

- *Correct Reference.* In § 307.5(d)(3), this rule removes the incorrect reference to 45 CFR 305.99 and replaces it with the correct reference 45 CFR 305.66. This change is not substantive and is necessary to make this technical correction.

#### 45 CFR Part 1324

- *Correct Reference.* In § 1324.11, this rule removes the incorrect reference to 45 CFR 1327.13(e) and replaces it with the correct reference 45 CFR 1324.13(e); removes two incorrect references to 45 CFR 1327.19(b)(5) and replaces them with the correct reference 1324.19(b)(5) through (8); removes the incorrect reference to 45 CFR 1327.21 and replaces it with the correct reference 45 CFR 1324.21. 45 CFR 1327 was moved to 45 CFR 1324 in 2016 by 81 FR 35644 reflecting the Administration for Community Living’s 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1324.15, this rule removes the incorrect reference to 45 CFR 1327.13(e) and replaces it with the correct reference 1324.13(e); removes the incorrect reference to 45 CFR 1327.13(g) and replaces it with the correct reference 45 CFR 1324.13(g); removes the incorrect reference to 45 CFR 1327.13(c)(2) and replaces it with the correct reference 1324.13(c)(2). 45 CFR 1327 was moved to 45 CFR 1324 in 2016 by 81 FR 35644 reflecting the Administration for Community Living’s 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1324.19(b)(6), this rule removes the incorrect reference to 45 CFR 1327.11(e)(3) and replaces it with the correct reference 45 CFR 1324.11(e)(3). 45 CFR 1327 was moved to 45 CFR 1324 in 2016 by 81 FR 35644 reflecting the Administration for Community Living’s 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1324.19(b)(7), this rule removes the incorrect reference to 45 CFR 1327.11(e)(3) and replaces it with the correct reference 45 CFR 1324.11(e)(3). 45 CFR 1327 was moved to 45 CFR 1324 in 2016 by 81 FR 35644 reflecting the Administration for Community Living’s

2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1324.19(b)(8), this rule removes the incorrect reference to 45 CFR 1327.11(e)(3) and replaces it with the correct reference 45 CFR 1324.11(e)(3). 45 CFR 1327 was moved to 45 CFR 1324 in 2016 by 81 FR 35644 reflecting the Administration for Community Living’s 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Deletion.* In § 1324.21(b)(3), this rule amends the language “(3) Where a State agency is unable to adequately remove or remedy a conflict, it shall carry out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act. The State agency may not enter into a contract or other arrangement to carry out the Ombudsman program if the other entity, and may not operate the Office directly if it” to remove the erroneous phrase “if the other entity.” 45 CFR 1324.21(b)(3) contains a grammatical typo. The earlier version at **Federal Register** Number 2015–01914, July 1, 2016 was referred to identify the correct grammatical language.

#### 45 CFR Part 1325

- *Correct Reference.* In § 1325.4, this rule removes the incorrect reference to 45 CFR 1386.30 and replaces it with the correct reference 45 CFR 1326.30(f). 45 CFR 1386 was moved to 45 CFR 1326 in 2016 by 81 FR 35644 reflecting the Administration for Community Living’s 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

#### 45 CFR Part 1326

- *Correct Heading.* In 45 CFR 1326, this rule removes the incorrect heading of “Formula Grant Program” and replaces it with the correct heading “Developmental Disabilities Formula Grant Programs”. This heading was changed in 2016 by 81 FR 35644 reflecting the Administration for Community Living’s 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1326.103, this rule removes the incorrect reference to 45 CFR 1386.90 and replaces it with the correct reference 45 CFR 1326.90. 45 CFR 1386 was moved to 45 CFR 1326

in 2016 by 81 FR 35644 reflecting the Administration for Community Living's 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1326.112, this rule removes the incorrect reference to 45 CFR 1386.84 and replaces it with the correct reference 45 CFR 1326.84. 45 CFR 1386 was moved to 45 CFR 1326 in 2016 by 81 FR 35644 reflecting the Administration for Community Living's 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1326.93, this rule removes the incorrect reference to 45 CFR 1386.94 and replaces it with the correct reference 45 CFR 1326.94. 45 CFR 1386 was moved to 45 CFR 1326 in 2016 by 81 FR 35644 reflecting the Administration for Community Living's 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

#### 45 CFR Part 1328

- *Correct Reference.* In § 1328.2, this rule removes the incorrect reference to 45 CFR 1385.3 and replaces it with the correct reference 45 CFR 1325.3; removes the incorrect reference to 45 CFR 1388.3 and replaces it with the correct reference 45 CFR 1328.3; and removes the incorrect reference to 45 CFR 1388.4 and replaces it with the correct reference to 45 CFR 1328.4. 45 CFR 1385 was moved to 45 CFR 1325 and 45 CFR 1388 was moved to 45 CFR 1328 in 2016 by 81 FR 35644 reflecting the Administration for Community Living's 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1328.3, this rule removes the incorrect reference to 45 CFR 1388.2 and replaces it with the correct reference 45 CFR 1328.2. 45 CFR 1388 was moved to 45 CFR 1386 in 2016 by 81 FR 35644 reflecting the Administration for Community Living's 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

- *Correct Reference.* In § 1328.5, this rule removes the incorrect reference to 45 CFR 1385.3 and replaces it with the correct reference 45 CFR 1325.3; removes the incorrect reference to 45 CFR 1388.2 and replaces it with the correct reference 45 CFR 1328.2; removes the incorrect reference to 45 CFR 1388.3 and replaces it with the correct reference to 45 CFR 1328.3. 45

CFR 1385 was moved to 45 CFR 1325 and 45 CFR 1388 was moved to 45 CFR 1328 in 2016 by 81 FR 35644 reflecting the Administration for Community Living's 2012 reorganization in a single subchapter of the regulations. The text of statutes was not completely updated to align with this final rule.

#### 48 CFR Part 302

- *Correct Reference.* In § 302.101, this rule removes the incorrect reference to 48 CFR 301.604 and replaces it with the correct reference PGI Part 301.604.

#### 48 CFR Part 326

- *Correct Reference.* In § 326.603(d), this rule removes the incorrect reference to '326.2' and replaces it with '326.6'. This change is not substantive as it only reflects the renumbering of the reference and the content has not been changed.

### IV. Rulemaking Procedure

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive publication in the **Federal Register** of a notice of proposed rulemaking and opportunity for comment requirements if it finds, for good cause, that they are impractical, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), HHS finds good cause to waive notice and opportunity for comment on these amendments, as notice and opportunity for comment are unnecessary. These amendments will have no substantive impact and are of an administrative nature as they deal with correcting incorrect references and misspellings. HHS is exercising its authority under 5 U.S.C. 553(b)(3)(B) to publish these amendments as a final rule. The amendments are effective 30 days after date of publication in the **Federal Register**. These amendments do not require action by any person or entity regulated by HHS, and do not change the substantive responsibilities of any person or entity regulated by HHS.

### V. Executive Orders 12866, 13563, 13771, and 13777

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).

Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as "any regulatory action that is likely to result in a rule that may: (1) Have an

annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety or State, local, or tribal governments or communities; (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 set forth in th[e] Executive Order."

A regulatory impact analysis must be prepared for major rules with economically significant effects (\$100 million or more in any 1 year). HHS submits that this final rule is not economically significant as measured by the \$100 million threshold, and hence not a major rule under the Congressional Review Act. This rule has not been designated as a significant regulatory action as defined by Executive Order 12866. As such, it has not been reviewed by the Office of Management and Budget.

Executive Order 13771, titled "Reducing Regulation and Controlling Regulatory Costs," was issued on January 30, 2017. It has been determined that this rule is not significant and thus is exempt from regulatory or deregulatory action for the purposes of Executive Order 13771.

On February 24, 2017, the President issued Executive Order 13777 titled "Enforcing the Regulatory Reform Agenda". As required by Section 3 of the Executive Order, HHS established a Regulatory Reform Task Force (HHS Task Force) to review existing regulations and make recommendations regarding their repeal, replacement, or modification. It has been determined that this rule is not significant and thus is exempt for the purposes of Executive Order 13777.

### VI. Regulatory Flexibility Act

This action will not have a significant impact on a substantial number of small entities. Therefore, the regulatory flexibility analysis provided for under the Regulatory Flexibility Act is not required.

### VII. Paperwork Reduction Act

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

**VIII. Federalism**

We have analyzed this final rule in accordance with the principles set forth in E.O. 13132. We have determined that the rule does not contain policies that 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. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

**List of Subjects***2 CFR Part 376*

Administrative practice and procedure, Grant programs, Reporting and recordkeeping requirements.

*21 CFR Part 1*

Cosmetics, Drugs, Exports, Food labeling, Imports, Labeling, Reporting and recordkeeping requirements.

*21 CFR Part 5*

Authority delegations (Government agencies), Imports, Organization and functions (Government agencies).

*21 CFR Part 12*

Administrative practice and procedure.

*21 CFR Part 14*

Administrative practice and procedure, Advisory committees, Color additives, Drugs, Radiation protection.

*21 CFR Part 25*

Environmental impact statements, Foreign relations, Reporting and recordkeeping requirements.

*21 CFR Part 81*

Color additives, Cosmetics, Drugs.

*21 CFR Part 133*

Cheese, Food grades and standards, Food labeling.

*21 CFR Part 172*

Food Additives, Reporting and recordkeeping requirements.

*21 CFR Part 178*

Food additives, Food packaging.

*21 CFR Part 184*

Food Additives.

*21 CFR Part 201*

Drugs, Labeling, Reporting and recordkeeping requirements.

*21 CFR Part 310*

Administrative practice and procedure, Drugs, Labeling, Medical devices, Reporting and recordkeeping requirements.

*21 CFR Part 369*

Labeling, Medical devices, Over-the-counter drugs.

*21 CFR Part 501*

Animal foods, Packaging and containers, Reporting and recordkeeping requirements.

*21 CFR Part 582*

Animal feeds, Animal foods, Food additives.

*42 CFR Part 23*

Government employees, Health professions, Loan programs-health, Manpower, Reporting and recordkeeping requirements.

*42 CFR Part 51c*

Grant programs-health, Health care, Health facilities, Reporting and recordkeeping requirements.

*42 CFR Part 52i*

Grant programs-health, Medical research.

*42 CFR Part 56*

Grant programs-health, Health care, Health facilities, Migrant labor, Reporting and recordkeeping requirements.

*42 CFR Part 57*

Aged, Education of disadvantaged, Educational facilities, Educational study programs, Grant programs-education, Grant programs-health, Health facilities, Health professions, Loan programs-health, Medical and dental schools, Reporting and recordkeeping requirements, Scholarships and fellowships, Student aid.

*42 CFR Part 63*

Grant programs-health, Health professions, Libraries, Manpower training programs, Student aid.

*42 CFR Part 124*

Grant programs-health, Health facilities, Reporting and recordkeeping requirements.

*42 CFR Part 411*

Diseases, Medicare, Reporting and recordkeeping requirements.

*42 CFR Part 412*

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

*42 CFR Part 422*

Administrative practice and procedure, Health facilities, Health maintenance organizations (HMO), Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

*42 CFR Part 423*

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

*42 CFR Part 426*

Administrative practice and procedure, Medicare, Reporting and recordkeeping requirements.

*42 CFR Part 440*

Grant programs-health, Medicaid.

*42 CFR Part 441*

Aged, Family planning, Grant programs-health, Infants and children, Medicaid, Penalties, Reporting and recordkeeping requirements.

*42 CFR Part 447*

Accounting, Administrative practice and procedure, Drugs, Grant programs-health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

*42 CFR Part 482*

Grant programs-health, Hospitals, Medicaid, Medicare, Reporting and recordkeeping requirement.

*42 CFR Part 485*

Grant programs-health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

*42 CFR Part 1004*

Administrative practice and procedure, Health facilities, Health professions, Medicare, Peer Review Organization (PRO), Penalties, Reporting and recordkeeping requirements.

*42 CFR Part 1008*

Administrative practice and procedure, Medicaid, Medicare, Reporting and recordkeeping requirements.

*45 CFR Part 3*

Federal buildings and facilities, Penalties, Traffic regulations.

*45 CFR Part 63*

Grant programs-communications, Grant programs-education, Grant

programs-health, Grant programs-social programs, Research, Telecommunications.

#### 45 CFR Part 75

Accounting, Administrative practice and procedure, Adult education, Aged, Agriculture, American Samoa, Bilingual education, Blind, Business and industry, Civil rights, Colleges and universities, Communications, Community development, Community facilities, Copyright, Credit, Cultural exchange programs, Educational facilities, Educational research, Education, Education of disadvantaged, Education of individuals with disabilities, Educational study programs, Electric power, Electric power rates, Electric utilities, Elementary and secondary education, Energy conservation, Equal educational opportunity, Federally affected areas, Government contracts, Grant programs, Grant programs-agriculture, Grant programs-business, Grant programs-communications, Grant programs-education, Grant programs-energy, Grant programs-health, Grant programs-housing and community development, Grant programs-social programs, Grants administration, Guam, Home improvement, Homeless, Hospitals, Housing, Human research subjects, Indians, Indians-education, Infants and children, Insurance, Intergovernmental relations, International organizations, Inventions and patents, Loan programs, Loan programs social programs, Loan programs-agriculture, Loan programs-business, Loan programs-communications, Loan programs-energy, Loan programs-health, Loan programs-housing and community development, Manpower training programs, Migrant labor, Mortgage insurance, Nonprofit organizations, Northern Mariana Islands, Pacific Islands Trust Territories, Privacy, Renewable Energy, Reporting and recordkeeping requirements, Rural areas, Scholarships and fellowships, School construction, Schools, Science and technology, Securities, Small businesses, State and local governments, Student aid, Teachers, Telecommunications, Telephone, Urban areas, Veterans, Virgin Islands, Vocational education, Vocational rehabilitation, Waste treatment and disposal, Water pollution control, Water resources, Water supply, Watersheds, Women.

#### 45 CFR Part 305

Accounting, Child support, Grant programs-social programs, Reporting and recordkeeping requirements.

#### 45 CFR Part 307

Child support, Computer technology, Grant programs-social programs, Reporting and recordkeeping requirements.

#### 45 CFR Parts 1324, 1325, 1326, and 1328

Administrative practice and procedure, Aged, Colleges and universities, Grant programs-Education, Grant programs-Indians, Grant programs-social programs, Indians, Individuals with disabilities, Legal services, Long term care, Nutrition, Research, Reporting and recordkeeping requirements.

#### 48 CFR Parts 302 and 326

Government procurement.

For reasons described in the preamble, the Department of Health and Human Services amends 2 CFR part 376; 21 CFR parts 1, 5, 12, 14, 25, 81, 133, 172, 178, 184, 201, 310, 369, 501, and 582; 42 CFR parts 23, 51c, 52i, 56, 57, 63, 124, 411, 412, 422, 423, 426, 440, 441, 447, 482, 485, 1004, and 1008; 45 CFR parts 3, 63, 75, 305, 307, 1324, 1325, 1326, and 1328; and 48 CFR parts 302 and 326 as follows:

#### Title 2—Grants and Agreements

##### PART 376—NONPROCUREMENT DEBARMENT AND SUSPENSION

■ 1. The authority citation for part 376 continues to read as follows:

**Authority:** 5 U.S.C. 301; 31 U.S.C. 6101 (note); E.O. 12689, 3 CFR, 1989 Comp., p. 235; E.O. 12549, 3 CFR, 1986 Comp., p. 198; E.O. 11738, 3 CFR, 1973 Comp., p. 799.

##### § 376.10 [Amended]

■ 2. Amend § 376.10 as follows:

■ a. Remove the reference “(3 CFR 1986 Comp., p. 189)”; and

■ b. Remove the reference “(3 CFR 1989 Comp., p. 235)”.

#### Title 21—Food and Drugs

##### PART 1—GENERAL ENFORCEMENT REGULATIONS

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

**Authority:** 15 U.S.C. 1333, 1453, 1454, 1455, 4402; 19 U.S.C. 1490, 1491; 21 U.S.C. 321, 331, 332, 333, 334, 335a, 342, 343, 350c, 350d, 350e, 350j, 350k, 352, 355, 360b, 360ccc, 360ccc-1, 360ccc-2, 362, 371, 373, 374, 379j-31, 381, 382, 384a, 384b, 384d, 387, 387a, 387c, 393; 42 U.S.C. 216, 241, 243, 262, 264, 271; Pub. L. 107-188, 116 Stat. 594, 668-69; Pub. L. 111-353, 124 Stat. 3885, 3889.

#### § 1.24 [Amended]

■ 4. Amend § 1.24(a)(6)(ii) and (8)(ii) by removing the reference “§ 101.105(j)” and adding in its place the reference “§ 101.7”.

#### PART 5—ORGANIZATION

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

**Authority:** 5 U.S.C. 552; 21 U.S.C. 301-397.

##### § 5.1100 [Amended]

■ 6. Amend § 5.1100 by

##### § 5.1105 [Amended]

■ 7. Revise § 5.1105 to read as follows:

##### § 5.1105 Chief Counsel, Food and Drug Administration.

The Office of the Chief Counsel’s mailing address is White Oak Bldg. 1, 10903 New Hampshire Ave., Silver Spring, MD 20993.<sup>1</sup>

#### PART 12—FORMAL EVIDENTIARY PUBLIC HEARING

■ 8. The authority citation for part 12 continues to read as follows:

**Authority:** 21 U.S.C. 141-149, 321-393, 467f, 679, 821, 1034; 42 U.S.C. 201, 262, 263b-263n, 264; 15 U.S.C. 1451-1461; 5 U.S.C. 551-558, 701-721; 28 U.S.C. 2112.

##### § 12.21 [Amended]

■ 9. Amend § 12.21(a)(2) by removing the phrase “514.2 for applications for animal feeds”.

#### PART 14—PUBLIC HEARING BEFORE A PUBLIC ADVISORY COMMITTEE

■ 10. The authority citation for part 14 continues to read as follows:

**Authority:** 5 U.S.C. App. 2; 15 U.S.C. 1451-1461, 21 U.S.C. 41-50, 141-149, 321-394, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201, 262, 263b, 264; Pub. L. 107-109; Pub. L. 108-155; Pub. L. 113-54.

##### § 14.7 [Amended]

■ 11. Amend § 14.7(b) by removing “45 CFR 5.34” and add in its place “45 CFR 5.61—and 45 CFR 5.64”.

#### PART 25—ENVIRONMENTAL IMPACT CONSIDERATIONS

■ 12. The authority citation for part 25 continues to read as follows:

**Authority:** 21 U.S.C. 321-393; 42 U.S.C. 262, 263b-264; 42 U.S.C. 4321, 4332; 40 CFR

<sup>1</sup> The Office of the Chief Counsel (also known as the Food and Drug Division, Office of the General Counsel, Department of Health and Human Services), while administratively within the Office of the Commissioner, is part of the Office of the General Counsel of the Department of Health and Human Services.

1500–1508; E.O. 11514, 35 FR 4247, 3 CFR, 1971 Comp., p. 531–533 as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1978 Comp., p. 123–124; E.O. 12114, 44 FR 1957, 3 CFR, 1980 Comp., p. 356–360.

**§ 25.33 [Amended]**

- 13. Amend § 25.33 by removing paragraph (a)(7).
- 14. Amend § 25.33 by revising paragraph (a)(5) and (6) to read as follows:

**§ 25.33 Animal drugs.**

\* \* \* \* \*

(a) \* \* \*

- (5) A change of sponsor; or
- (6) A previously approved animal drug to be contained in medicated feed blocks under § 510.455 of this chapter or as a liquid feed supplement under § 558.5 of this chapter.

\* \* \* \* \*

**PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS**

- 15. The authority citation for part 81 continues to read as follows:  
*Authority:* 21 U.S.C. 371, 379e, 379e note.

**§ 81.30 [Amended]**

- 16. Amend § 81.30(s)(2) by removing the last sentence.

**§ 81.32 [Removed]**

- 17. Remove § 81.32.

**PART 133—CHEESES AND RELATED CHEESE PRODUCTS**

- 18. The authority citation for part 133 continues to read as follows:  
*Authority:* 21 U.S.C. 321, 341, 343, 348, 371, 379e.

**§ 133.116 [Amended]**

- 19. Remove § 133.116(d).

**§ 133.121 Amended]**

- 20. Remove § 133.121(f).

**PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION**

- 21. The authority citation for part 172 continues to read as follows:  
*Authority:* 21 U.S.C. 321, 341, 342, 348, 371, 379e.
- 22. Revise § 172.840(c)(13) to read as follows:

**§ 172.840 Polysorbate 80.**

\* \* \* \* \*

(c) \* \* \*

(13) As a defoaming agent in the preparation of the creaming mixture for cottage cheese as identified in § 133.128 of this chapter, whereby the amount of the additive does not exceed .008 percent by weight of the finished product.

\* \* \* \* \*

**PART 178—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION**

- 23. The authority citation for part 178 continues to read as follows:

*Authority:* 21 U.S.C. 321, 342, 348, 379e.

- 24. Revise § 178.3730 to read as follows:

**§ 178.3730 Piperonyl butoxide and pyrethrins as components of bags.**

Piperonyl butoxide in combination with pyrethrins may be safely used for insect control on bags that are intended for use in contact with dried feed or dried food in compliance with 40 CFR 180.127 and 40 CFR 180.128.

**PART 184—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE**

- 25. The authority citation for part 184 continues to read as follows:

*Authority:* 21 U.S.C. 321, 342, 348, 371.

- 26. Revise § 184.1097(c)(2) to read as follows:

**§ 184.1097 Tannic acid.**

\* \* \* \* \*

(c) \* \* \*

(2) Tannic acid may be used in rendered animal fat in accordance with 9 CFR 424.21.

\* \* \* \* \*

- 27. Revise § 184.1143(d) to read as follows:

**§ 184.1143 Ammonium sulfate.**

\* \* \* \* \*

(d) The ingredient is used in food at levels not to exceed good manufacturing practice in accordance with § 184.1(b)(1). Current good manufacturing practice results in a maximum level, as served, of 0.15 percent for baked goods as defined in § 170.3(n)(1) of this chapter and 0.1 percent for gelatins and puddings as defined in § 170.3(n)(22) of this chapter.

\* \* \* \* \*

- 28. Revise § 184.1924(c)(1) to read as follows:

**§ 184.1924 Urease enzyme preparation from Lactobacillus fermentum.**

\* \* \* \* \*

(c) \* \* \*

(1) The ingredient is used in wine, as defined in 27 CFR 1.10 and 4.10, as an enzyme as defined in § 170.3(o)(9) of this chapter to convert urea to ammonia and carbon dioxide.

\* \* \* \* \*

**PART 201—LABELING**

- 29. The authority citation for part 201 continues to read as follows:

*Authority:* 21 U.S.C. 321, 331, 351, 352, 353, 355, 358, 360, 360b, 360gg–360ss, 371, 374, 379e; 42 U.S.C. 216, 241, 262, 264.

- 30. Revise § 201.317(c) to read as follows:

**§ 201.317 Digitalis and related cardiotonic drugs for human use in oral dosage forms; required warning.**

\* \* \* \* \*

(c) This section does not apply to digoxin products for oral use.

**PART 310—NEW DRUGS**

- 31. The authority citation for part 310 continues to read as follows:

*Authority:* 21 U.S.C. 321, 331, 351, 352, 353, 355, 360b–360f, 360hh–360ss, 361(a), 371, 374, 375, 379e, 379k–l; 42 U.S.C. 216, 241, 242(a), 262.

**§ 310.303 [Removed]**

- 32. Remove § 310.303.

**PART 369—INTERPETATIVE STATEMENT RE WARNINGS ON DRUGS AND DEVICES FOR OVER-THE-COUNTER SALE**

- 33. The authority citation for part 369 continues to read as follows:

*Authority:* 21 U.S.C. 321, 331, 351, 352, 353, 355, 371.

- 34. Revise § 369.3 to read as follows:

**§ 369.3 Warnings required on drugs exempted from prescription-dispensing requirements of section 503(b)(1)(C).**

Drugs exempted from prescription-dispensing requirements under section 503(b)(1)(C) of the act are subject to the labeling requirements prescribed in § 310.201(a) of this chapter. Although, for convenience, warning and caution statements for a number of the drugs named in § 310.201 of this chapter (cross-referenced in the text of this part) are included in subpart B of this part, the inclusion of such drugs in §§ 369.20 or 369.21 in no way affects the requirements for compliance with § 310.201(a) of this chapter, or the provisions of an effective application pursuant to section 505(b) of the act.



**PART 501—ANIMAL FOOD LABELING**

■ 35. The authority citation for part 501 continues to read as follows:

**Authority:** 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371.

■ 36. Amend § 501.105, by revising the introductory text of paragraph (t) to read as follows:

**§ 501.105 Declaration of net quantity of contents when exempt.**

\* \* \* \* \*

(t) Where the declaration of net quantity of contents is in terms of net weight and/or drained weight or volume and does not accurately reflect the actual quantity of the contents or the product falls below the applicable standard of fill of container because of equipment malfunction or otherwise unintentional product variation, and the label conforms in all other respects to the requirements of this chapter, the mislabeled food product may be sold by the manufacturer or processor directly to institutions operated by Federal, State or local governments: *Provided*, That:

\* \* \* \* \*

**PART 582—SUBSTANCES GENERALLY RECOGNIZED AS SAFE**

■ 37. The authority citation for part 582 continues to read as follows:

**Authority:** 21 U.S.C. 321, 342, 348, 371.

■ 38. Revise § 582.99 to read as follows:

**§ 582.99 Adjuvants for pesticide chemicals.**

Adjuvants, identified and used in accordance with 40 CFR 180.910 and 180.920, which are added to pesticide use dilutions by a grower or applicator prior to application to the raw agricultural commodity, are exempt from the requirement of tolerances under section 409 of the act.

**Title 42—Public Health****PART 23—NATIONAL HEALTH SERVICE CORPS**

■ 39. The authority citation for part 23 currently reads as follows:

**Authority:** 42 U.S.C. 254f, 254f–1, 254g, 254h, 254h–1, 254p(c), and 254n(e)(1).

**§ 23.9 [Amended]**

■ 40. Revise § 23.9(c)(1) to read as follows:

**§ 23.9 What must an entity to which National Health Service Corps personnel are assigned (i.e., a National Health Service Corps site) charge for the provision of health services by assigned personnel?**

\* \* \* \* \*

(c)(1) No charge or a nominal charge will be made for health services provided by assigned National Health Service Corps personnel to individuals within the health manpower shortage area with annual incomes at or below the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2). However, no individual will be denied health services based upon inability to pay for the services. Any individual who has an annual income above the poverty guidelines but whose income does not exceed 200 percent of the poverty guidelines, will receive health services at a nominal charge. However, charges will be made for services to the extent that payment will be made by a third party which is authorized or under legal obligation to pay the charges.

\* \* \* \* \*

**PART 51c—GRANTS FOR COMMUNITY HEALTH SERVICES**

■ 41. The authority citation for part 51c continues to read as follows:

**Authority:** 42 U.S.C. 216, 254c.

**§ 51c.107 [Amended]**

■ 42. Amend § 51c.107(b)(5) by removing ‘the most recent CSA Income Poverty Guidelines’ (45 CFR 1060.2) issued by the Community Services Administration;” and adding in its place “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”.

**§ 51c.303 [Amended]**

■ 43. Amend § 51c.303(f) by removing the phrase “the most recent ‘CSA Poverty Income Guidelines’ (45 CFR 1060.2)” and adding in its place “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”.

**PART 52i—NATIONAL INSTITUTE ON MINORITY HEALTH AND HEALTH DISPARITIES RESEARCH ENDOWMENT PROGRAMS**

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

**Authority:** 42 U.S.C. 216, 285t–285t–1.

**§ 52i.11 [Amended]**

■ 45. Amend § 52i.11 by:

■ a. In paragraph (b), removing the reference “74.53” and adding in its place the reference “75.361”.

■ b. In paragraph(c), removing the reference “74.53e” and adding in its place the reference “75.364”.

■ c. In paragraph (d), removing the reference “74.52” and adding in its place the reference “75.341”.

**PART 56—GRANTS FOR MIGRANT HEALTH SERVICES**

■ 46. The authority citation for part 56 continues to read as follows:

**Authority:** U.S.C. 216, 247d.

**§ 56.108 [Amended]**

■ 47. Amend § 56.108 by removing the phrase “the most recent ‘CSA Income Poverty Guidelines’ (45 CFR 1060.2) issued by the Community Services Administration;” and replacing it with “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”.

**§ 56.303 [Amended]**

■ 48. Amend § 56.303(f) by removing the phrase “the most recent ‘CSA Poverty Income Guidelines’ (45 CFR 1060.2)” and adding in its place “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”.

**§ 56.603 [Amended]**

■ 49. Amend § 56.603 by removing the phrase “the most recent ‘CSA Poverty Income Guidelines’ (45 CFR 1060.2)” and adding in its place “the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2);”.

**PART 57—GRANTS FOR CONSTRUCTION OF TEACHING FACILITIES, EDUCATIONAL IMPROVEMENTS, SCHOLARSHIPS AND STUDENT LOANS**

■ 50. The authority citation for part 57 continues to read as follows:

**Authority:** 42 U.S.C. 293g.

**§ 57.1505 [Amended]**

■ 51. Amend § 57.1505(a)(1) by removing the reference “57.110”.

**PART 63—TRAINEESHIPS**

■ 52. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 216, 282(b)(13), 284(b)(1)(C), 285a–2(b)(3), 286b–3, 287c–21(a).

**§ 63.2 [Amended]**

■ 53. Amend § 63.2 by removing the reference “50.102” and adding in its place the reference “93.103”.

**§ 63.2 [Amended]**

■ 54. Amend § 63.2 by removing the phrase “Misconduct in science” and adding in its place “research misconduct”.

**§ 63.9 [Amended]**

■ 55. Amend § 63.9(b) by removing the phrase “misconduct in science” and add in its place “research misconduct”.

**PART 124—MEDICAL FACILITY CONSTRUCTION AND MODERNIZATION**

■ 56. The authority citation for part 124 continues to read as follows:

**Authority:** 42 U.S.C. 216, 300o–1, 300r, unless otherwise noted.

**§ 124.511 [Amended]**

■ 57. Amend § 124.511 by removing the reference “125.510”.

**§ 124.602 [Amended]**

■ 58. Amend § 124.602 by removing the reference “42 CFR 53.1(d)”.

**PART 411—EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT**

■ 59. The authority citation for part 411 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1395w–101 through 1395w–152, 1395hh, and 1395nn.

**§ 411.353 [Amended]**

■ 60. Amend § 411.353(d) by removing the reference “§ 1003.101 of this title” and adding in its place the reference “§ 1003.110”.

**PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES**

■ 61. The authority citation for part 412 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1395hh.

**§ 412.42 [Amended]**

■ 62. Amend § 412.42 as follows:

■ a. In paragraph (b)(2)(i), remove the reference “§ 405.310(g)” and add in its place “§ 411.15(g)”;

■ b. In paragraph (b)(2)(ii), remove the reference “§ 405.310(k)” and add in its place “§ 411.15(k)”;

■ c. In paragraph (b)(2)(iii), remove the reference “§ 405.310(m)” and add in its place “§ 411.15(m)”.

**PART 422—MEDICARE ADVANTAGE PROGRAM**

■ 63. The authority citation for part 422 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1395hh.

**§ 422.304 [Amended]**

■ 64. Amend § 422.304(f) by removing the reference “§ 495.220” and adding in its place “§ 495.204”.

**§ 422.322 [Amended]**

■ 65. Amend § 422.322(b) by removing the reference “413.86(d)” and adding in its place “413.76”.

**§ 422.324 [Amended]**

■ 66. Amend § 422.324(b)(2) by removing the reference “§ 413.86(b)” and adding in its place “§ 413.75(b)”.

**§ 422.1094 [Amended]**

■ 67. Amend § 422.1094(b)(2) by removing the reference “422.858” and adding in its place the reference “§ 423.1088 of this chapter”.

**PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT**

■ 68. The authority citation for part 423 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1395w–101 through 1395w–152, 1395hh.

**§ 423.1094 [Amended]**

■ 69. Amend § 423.1094(b)(2) by removing the reference “423.858” and adding in its place the reference “§ 423.1088”.

**§ 423.2330 [Amended]**

■ 70. Amend § 423.2330(c)(3) by removing the reference “§ 423.2306(b)(4) of this subpart” and adding in its place the reference “§ 423.2315(b)(4)”.

**PART 426—REVIEW OF NATIONAL COVERAGE DETERMINATIONS AND LOCAL COVERAGE DETERMINATIONS**

■ 71. The authority citation for part 426 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1395hh.

**§ 426.110 [Amended]**

■ 72. Amend § 426.110 in paragraph 1 of the definition of “Proprietary data and Privileged information” by removing the reference “45 CFR 5.65” and adding in its place “45 CFR 5.31(d) and (e)”.

**PART 440—SERVICES: GENERAL PROVISIONS**

■ 73. The authority citation for part 440 continues to read as follows:

**Authority:** 42 U.S.C. 1302.

**§ 440.20 [Amended]**

■ 74. Amend § 440.20(b) introductory text by removing the reference “§ 481.1” and adding in its place “§ 491.2”.

**PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES**

■ 75. The authority citation for part 441 continues to read as follows:

**Authority:** 42 U.S.C. 1302.

**§ 441.17 [Amended]**

■ 76. Amend § 441.17 as follows:

■ a. In paragraph (a)(1), remove the reference “§ 405.1316” and add in its place the reference “part 493”;

■ b. In paragraph (a)(4), remove the reference “§ 405.1128(a)” and add in its place the reference “part 493”; and

■ c. In paragraph (b), remove the reference “§ 405.1316(f)(2) and (3)” and add in its place the reference “part 493 of this chapter”.

**§ 441.18 [Amended]**

■ 77. Amend § 441.18(c) introductory text by removing the reference “§ 441.169” and adding in its place “§ 440.169”.

**PART 447—PAYMENTS FOR SERVICES**

■ 78. The authority citation for part 447 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1396r–8.

**§ 447.299 [Amended]**

■ 79. Amend § 447.299(c) introductory text by removing the reference “§ 455.204” and adding in its place “§ 455.304 of this chapter”.

**PART 482—CONDITIONS OF PARTICIPATION FOR HOSPITALS**

■ 80. The authority citation for part 482 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1395hh, 1395rr, 1395lll, unless otherwise noted.

**§ 482.27 [Amended]**

■ 81. Amend § 482.27 as follows:

■ a. In paragraph (b)(3)(iii), remove the phrase “, as set forth at 21 CFR 610.48(b)(3)”;

■ b. In paragraph (b)(4)(iii), remove the reference “21 CFR 610.46(b)(2), 610.47(b)(2), and 610.48(c)(2)” and add in its place the reference “21 CFR 610.46(b)(2) and 610.47(b)(2)”.

**PART 485—CONDITIONS OF PARTICIPATION: SPECIALIZED PROVIDERS**

■ 82. The authority citation for part 485 continues to read as follows:

Authority: 42 U.S.C. 1302, 1395(hh).

**§ 485.639 [Amended]**

■ 83. Amend § 485.639(c)(1)(vii) by removing the reference “§ 413.86” and adding in its place the reference “§§ 413.76 through 413.83”.

**PART 1004—IMPOSITION OF SANCTIONS ON HEALTH CARE PRACTITIONERS AND PROVIDERS OF HEALTH CARE SERVICES BY A QUALITY IMPROVEMENT ORGANIZATION**

■ 84. The authority citation for part 1004 continues to read as follows:

Authority: 42 U.S.C. 1302, 1320c–5.

**§ 1004.40 [Amended]**

■ 85. Amend § 1004.40 by removing the reference “476.139” and adding in its place “480.139”.

**PART 1008—ADVISORY OPINIONS BY THE OIG**

■ 86. The authority citation for part 1008 continues to read as follows:

Authority: 42 U.S.C. 1320a–7d(b).

**§ 1008.36 [Amended]**

■ 87. Amend § 1008.36 by removing the reference “45 CFR 5.65” and adding in its place “45 CFR 5.41”.

**Title 45—Public Welfare**

**PART 3—CONDUCT OF PERSONS AND TRAFFIC ON THE NATIONAL INSTITUTES OF HEALTH FEDERAL ENCLAVE**

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

Authority: 40 U.S.C. 318–318d. 486; Delegation of Authority, 33 FR 604.

**§ 3.1 [Amended]**

■ 89. In § 3.1, in the definition of “Police officer”, remove the reference “40 United States Code section 318 or 318d” and add in its place “U.S. Public Law 107–296, Homeland Security Act of 2002”.

**§ 3.2 [Amended]**

■ 90. In § 3.2, revise the table in paragraph (f) to read as follows:

**§ 3.2 Applicability.**

\* \* \* \* \*

(f) \* \* \*

Subject	Maryland code annotated	Provides generally	Maximum penalty
1. Pedestrian right-of-way .....	Transportation, Sec. 21–502 ..  Sec. 21–511 .....	Pedestrians have the right-of-way in crosswalks and certain other areas. Subject to certain limitations.  Blind, partially blind, or hearing impaired pedestrians have the right-of-way at any crossing or intersection. Subject to certain limitations.	Imprisonment 2 months and/or \$500 fine.  \$500 fine.
2. Drivers to exercise due care	Transportation, Sec. 21–504 ..	Drivers shall exercise due care to avoid colliding with pedestrians, children and incapacitated individuals.	\$500 fine.
3. Driving while intoxicated, under the influence of alcohol and/or a drug or controlled substance.	Transportation, Sec. 21–902 ..	Prohibits .....	Sec. 21–902(a) (driving while intoxicated, first offense): Imprisonment 1 year and/or \$1,000 fine. Sec. 21–902 (b), (c), (d) (driving under the influence): Imprisonment 2 months and/or \$500 fine.
4. Unattended motor vehicles ..	Transportation, Sec. 21–1101	Prohibits leaving motor vehicles unattended unless certain precautions are taken.	\$500 fine.
5. Carrying or wearing certain concealed weapons (other than handguns) or openly with intent to injure.	Sec. 4–202 .....	Prohibits, except for law enforcement personnel or as a reasonable precaution against apprehended danger.	Imprisonment 3 years or \$1,000 fine.
6. Unlawful wearing, carrying, or transporting a handgun, whether concealed or openly.	Sec. 4–202 .....	Prohibits except by law enforcement personnel or with permit.	First offense and no prior related offense: Imprisonment 3 years and/or \$2,500 fine.
7. Use of handgun or concealable antique firearm in commission of felony or crime of violence.	Sec. 4–204 .....	Prohibits .....	Imprisonment 20 years.
8. Disturbance of the peace .....	Sec. 6–409 .....	Prohibits acting in a disorderly manner in public places.	Imprisonment 30 days and/or \$500 fine.
9. Gambling .....	Sec. 12–102 .....	Prohibits betting, wagering and gambling, and certain games of chance (does not apply to vending or purchasing lottery tickets authorized under State law in accordance with approved procedures).	Sec. 240: Imprisonment one year and/or \$1,000 fine. Sec. 245: Imprisonment 2 years and/or \$100 fine.

**§ 3.5 [Amended]**

■ 91. In § 3.5:

■ a. Removing the reference “41 CFR part 101–48” and adding in its place “41 CFR 102”.

■ b. Removing the “41 CFR 101–45.304” and 101–48.305” and add in their place “41 CFR part “102–41”.

**§ 3.61 [Amended]**

■ 92. Amend § 3.61 by removing the reference “40 U.S.C. 318c” and adding in its place the reference “U.S. Public

Law 107–296, Homeland Security Act of 2002”.

**PART 63—GRANT PROGRAMS ADMINISTERED BY THE OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION**

■ 93. The authority citation for part 63 continues to read as follows:

**Authority:** Sec. 602, Community Services Act (42 U.S.C. 2942); sec. 1110, Social Security Act (42 U.S.C. 1310).

**§ 63.1 [Amended]**

■ 94. Amend § 63.1 by:

- a. Removing “41 CFR 3–1.53” and adding in its place “45 CFR 75.201(a)”.
- b. Removing “41 CFR Chapters 1 and 3” and adding in its place “CFR Title 48, Chapter 3”.

**PART 75—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR HHS AWARDS**

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

**Authority:** 5 U.S.C. 301.

**§ 75.372 [Amended]**

■ 96. Amend § 75.372 by removing “through 75.390” and adding in its place “and 75.386”.

**PART 305—PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL INCENTIVES, AND PENALTIES**

■ 97. The authority citation for part 305 continues to read as follows:

**Authority:** 42 U.S.C. 609(a)(8), 652(a)(4), 652(g), 658a, 1302.

**§ 305.0 [Amended]**

■ 98. Amend § 305.0 by removing “Sections 305.40 through 305.42” with “Sections 305.40, 305.42”.

**PART 307—COMPUTERIZED SUPPORT ENFORCEMENT SYSTEMS**

■ 99. The authority citation for part 307 continues to read as follows:

**Authority:** 42 U.S.C. 652–658, 664, 666–669A, 1302.

**§ 307.5 [Amended]**

■ 100. Amend § 307.5(d)(3) by removing the reference “305.99” and adding in its place “305.66”.

**PART 1324—ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES**

■ 101. The authority citation for part 1324 continues to read as follows:

**Authority:** 42 U.S.C. 3001 *et seq.*

**§ 1324.11 [Amended]**

■ 102. Amend § 1324.11 by:

- a. Removing the reference “1327.13(e)” and adding in its place “1324.13(e)”.
- b. Removing all references “1327.19(b)(5) through (8)” and adding in their places “1324.19(b)(5) through (8)”.
- c.
- d. Removing the reference “1327.21” and adding in its place “1324.21”.

**§ 1324.15 [Amended]**

■ 103. Amend § 1324.15 by:

- a. Removing the reference “1327.13(e)” and adding in its place “1324.13(e)”.
- b. Removing the reference “1327.13(g)” and adding in its place “1324.13(g)”.
- c. Removing the reference “1327.13(c)(2)” and adding in its place “1324.13(c)(2)”.

**§ 1324.19 [Amended]**

■ 104. Amend § 1324.19 by removing the reference “1327.11(e)(3)” wherever it appears and adding in its place “1324.11(e)(3)”.

**§ 1324.21 [Amended]**

■ 105. Amend § 1324.21(b)(3) by removing the phrase “if the other entity”.

**PART 1325—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAM**

■ 106. The authority citation for part 1325 continues to read as follows:

**Authority:** 42 U.S.C. 15001 *et seq.*

**§ 1325.4 [Amended]**

■ 107. Amend § 1325.4 by removing the reference “45 CFR 1386.30(f)” and adding in its place “45 CFR 1326.30(f)”.

**PART 1326—DEVELOPMENTAL DISABILITIES FORMULA GRANT PROGRAMS**

■ 108. The authority citation for part 1326 continues to read as follows:

**Authority:** 42 U.S.C. 15001 *et seq.*

■ 109. Revise the part heading to read as set forth above.

**§ 1326.103 [Amended]**

■ 110. Amend § 1326.103 by removing the reference “1386.90” and adding in its place “1326.90”.

**§ 1326.93 [Amended]**

■ 111. Amend § 1326.93 by removing the reference “1386.94” and adding in its place “1326.94”.

**§ 1326.112 [Amended]**

■ 112. Amend § 1326.112 by removing the reference “1386.84” and adding in its place “1326.84”.

**PART 1328—THE NATIONAL NETWORK OF UNIVERSITY CENTERS FOR EXCELLENCE IN DEVELOPMENTAL DISABILITIES, EDUCATION, RESEARCH, AND SERVICE**

■ 113. The authority citation for part 1328 continues to read as follows:

**Authority:** 42 U.S.C. 15001 *et seq.*

**§ 1328.2 [Amended]**

■ 114. Amend § 1328.2 by:

- a. Removing the reference “1385.3” and adding in its place “1325.3”.
- b. Removing the reference “1388.3” and adding in its place “1328.3”.
- c. Removing the reference “1388.4” and adding in its place “1328.4”.

**§ 1328.3 [Amended]**

■ 115. Amend § 1328.3 by removing the reference “1388.2” and adding in its place “1328.2”.

**§ 1328.5 [Amended]**

■ 116. Amend § 1328.5 by:

- a. Removing the reference “1385.3” and adding in its place “1325.3”.
- b. Removing the reference “1388.2” and adding in its place “45 CFR 1328.2”.
- c. Removing the reference “1388.2(a)(1) and (2)” and adding in its place “1328.2(a)(1) and (2)”.
- d. Removing the reference “1388.3” and adding in its place “1328.3”.

**Title 48—Federal Acquisition Regulations System**

**PART 302—DEFINITIONS OF WORDS AND TERMS**

■ 117. The authority citation for part 302 continues to read as follows:

**Authority:** 5 U.S.C. 301; 40 U.S.C. 121 (c)(2).

**§ 302.101 [Amended]**

■ 118. Amend § 302.101 by removing the reference “301.604” and adding in its place “PGI Part 301.604”

**PART 326—OTHER SOCIOECONOMIC PROGRAMS**

■ 119. The authority for part 326 continues to read as follows:

**Authority:** 5 U.S.C. 301, 40 U.S.C. 121(c)(2).

**§ 326.603 [Amended]**

■ 120. Amend § 326.603(d) by removing the reference “326.2” and adding in its place “326.6”.

Dated: September 25, 2020.

Alex M. Azar II,  
Secretary.

[FR Doc. 2020–21774 Filed 11–13–20; 8:45 am]

BILLING CODE 4151–17–P

## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### 2 CFR Parts 415 and 416

#### Rural Utilities Service

#### 7 CFR Part 1780

#### National Institute of Food and Agriculture

#### 7 CFR Part 3430

#### Department of Agriculture Regulations for Grants and Agreements; Update of Citations

**AGENCY:** Office of the Secretary, Rural Utilities Service, National Institute of Food and Agriculture, and Office of the Chief Financial Officer, Department of Agriculture.

**ACTION:** Final rule.

**SUMMARY:** The Office of Management and Budget (OMB) revised sections of its Guidance for Grants and Agreements in August 2020. This final rule amends the regulations of several United States Department of Agriculture agencies to reflect the revised OMB guidance and make technical corrections to the Department's grants and agreements regulations.

**DATES:** Effective November 16, 2020.

**FOR FURTHER INFORMATION CONTACT:** Tyson Whitney, Office of the Chief Financial Officer, Director, Transparency and Accountability Reporting Division, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250–9011, 202–720–8978, [tyson.whitney@usda.gov](mailto:tyson.whitney@usda.gov).

**SUPPLEMENTARY INFORMATION:** The regulations in 2 CFR chapter IV set forth the United States Department of Agriculture's (USDA) regulations for grants and agreements. In a final rule published December 19, 2014 (79 FR 75982), USDA's Office of the Chief Financial Officer adopted 2 CFR part 200, along with an agency-specific addendum in a new 2 CFR part 400. The regulations in 2 CFR parts 415, 416, 418, and 422 were established. The regulations in 2 CFR chapter IV updated and replaced provisions that had previously been found in 7 CFR parts 3015, 3016, 3018, 3019, 3022, and 3052.

The regulations of several USDA agencies in title 7 refer to and cite the grants and agreements regulations. Following the publication of the various final rules establishing the regulations in 2 CFR chapter IV, those agencies updated their regulations so that they referred to the new grants and agreements regulations in title 2 rather than the predecessor regulations in title 7. As a result of the August 13, 2020, publication of the Office of Management and Budget's "Guidance for Grants and Agreements" (85 FR 49506), we have identified a number of instances where technical corrections are necessary. This final rule makes those technical corrections where needed.

#### Effective Date

This rule relates to internal agency management and makes various nonsubstantive changes to the regulations in titles 2 and 7 of the Code of Federal Regulations to make technical corrections to the Department's grants and agreements regulations. Accordingly, notice and other public procedure on this rule are unnecessary and contrary to the public interest. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity to comment are not required and this rule may be made effective less than 30 days after publication in the **Federal Register**. Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Orders 12866, 12988, and 13771. Finally, this action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 501) and, thus, is exempt from the provisions of that Act.

#### Paperwork Reduction Act

This final rule contains no new reporting, recordkeeping, or third-party disclosure requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### List of Subjects

##### 2 CFR Parts 415 and 416

Accounting, Administrative practice and procedure, Agriculture, Auditing, Business and industry, Colleges and universities, Community development, Cost principles, Economic development, Government contracts, Grants administration, Grant programs, Grant programs—housing and community development, Hospitals, Indians, Loan programs—agriculture, Nonprofit organizations, Reporting and recordkeeping requirements, Rural areas, State and local governments.

#### 7 CFR Part 1780

Community development, Community facilities, Grant programs—housing and community development, Loan programs—housing and community development, Reporting and recordkeeping requirements, Rural areas, Waste treatment and disposal, Water supply, Watersheds.

#### 7 CFR Part 3430

Administrative practice and procedure, Agriculture research, Education, Federal assistance.

Accordingly, 2 CFR parts 415 and 416 and 7 CFR parts 1780 and 3430 are amended as follows:

#### Title 2—[Amended]

#### PART 415—GENERAL PROGRAM ADMINISTRATIVE REGULATIONS

- 1. The authority citation for part 415 is revised to read as follows:

**Authority:** 5 U.S.C. 301; 31 U.S.C. 901–903; 7 CFR 2.28.

- 2. In § 415.1, paragraphs (a)(1) and (b)(10) are revised to read as follows:

#### § 415.1 Competition in the awarding of discretionary grants and cooperative agreements.

(a) \* \* \*

(1) Potential applicants must be invited to submit proposals through publications such as the **Federal Register**, OMB-designated governmentwide website as described in 2 CFR 200.204, professional trade journals, agency or program handbooks, the Assistance Listings, or any other appropriate means of solicitation. In so doing, awarding agencies should consider the broadest dissemination of project solicitations in order to reach the highest number of potential applicants.

\* \* \* \* \*

(b) \* \* \*

(10) The Assistance Listings number and title.

\* \* \* \* \*

#### PART 416—GENERAL PROGRAM ADMINISTRATIVE REGULATIONS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

- 3. The authority citation for part 416 is revised to read as follows:

**Authority:** 5 U.S.C. 301; 31 U.S.C. 901–903; 7 CFR 2.28.

#### § 416.1 [Amended]

- 4. Section 416.1 is amended as follows:

- a. In paragraph (a), by removing the citation “2 CFR 200.101(e)(4) through

(6)” both times it appears and adding the citation “2 CFR 200.101(f)(4) through (6)” in its place.

■ b. In paragraph (b), by removing the citations “2 CFR 200.101(e)(4) through (6)” and “2 CFR 200.319(b)” and adding the citations “2 CFR 200.101(f)(4) through (6)” and “2 CFR 200.319(c)” in their places, respectively.

#### Title 7—[Amended]

### PART 1780—WATER AND WASTE LOANS AND GRANTS

■ 6. The authority citation for part 1780 continues to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989; 16 U.S.C. 1005.

#### § 1780.3 [Amended]

■ 7. In § 1780.3(a), the definition of *Simplified acquisition threshold* is amended by removing the citation “2 CFR 200.88” and adding the citation “2 CFR 200.1” in its place.

### PART 3430—COMPETITIVE AND NONCOMPETITIVE NON-FORMULA FEDERAL ASSISTANCE PROGRAMS—GENERAL AWARD ADMINISTRATIVE PROVISIONS

■ 8. The authority citation for part 3430 continues to read as follows:

**Authority:** 7 U.S.C. 3316; Pub. L. 106–107 (31 U.S.C. 6101 note).

#### § 3430.41 [Amended]

■ 9. In § 3430.41, paragraph (b) is amended by removing the citation “section 210 of 2 CFR Part 200” and adding the citation “2 CFR 200.211” in its place.

**Stephen Censky,**

*Deputy Secretary, U.S. Department of Agriculture.*

[FR Doc. 2020–24502 Filed 11–13–20; 8:45 am]

**BILLING CODE 3410–90–P**

### FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

#### 5 CFR Parts 1600 and 1605

#### Simplification of Catch-Up Contribution Process

**AGENCY:** Federal Retirement Thrift Investment Board.

**ACTION:** Final rule.

**SUMMARY:** The Federal Retirement Thrift Investment Board (“FRTIB”) is reducing paperwork burdens on participants who are eligible to make catch-up contributions by removing the regulation that requires them to submit

two different contribution election forms.

**DATES:** This rule is effective January 1, 2021.

**FOR FURTHER INFORMATION CONTACT:** Austen Townsend, (202) 864–8647.

**SUPPLEMENTARY INFORMATION:** The FRTIB administers the Thrift Savings Plan (TSP), which was established by the Federal Employees’ Retirement System Act of 1986 (FERSA), Public Law 99–335, 100 Stat. 514. The TSP provisions of FERSA are codified, as amended, largely at 5 U.S.C. 8351 and 8401–79. The TSP is a tax-deferred retirement savings plan for federal civilian employees and members of the uniformed services. The TSP is similar to cash or deferred arrangements established for private-sector employees under section 401(k) of the Internal Revenue Code (IRC)(26 U.S.C. 401(k)).

Normally, a TSP participant’s contributions to his or her account cannot exceed the statutory limits set forth in IRC section 402(g) (limiting the amount of traditional and Roth contributions to \$19,500 for calendar year 2021) and IRC section 415(c) (limiting the total amount of traditional, Roth, tax-exempt, matching, and automatic 1% contributions to the lesser of 100% of the participant’s compensation or \$58,000 for calendar year 2021). However, a TSP participant who is age 50 or older is permitted to make catch-up contributions to his or her TSP account beyond these statutory limits up to the dollar limit in IRC section 414(v), which is \$6,500 for calendar year 2021.

On January 23, 2020, the FRTIB published a proposed rule with request for comments in the **Federal Register** (85 FR 3857) to simplify the catch-up contribution process by no longer requiring participants to submit separate catch-up contribution election forms. The FRTIB received five comments on the proposed rule. Three comments expressed strong support for reducing the burden on participants by eliminating the separate catch-up contribution election forms. Two of the comments did not address the substance of the regulations. Therefore the FRTIB, is publishing the proposed rule as final without change.

Although the regulatory text is being published without change, in order to avoid confusion, the FRTIB wishes to clarify the effect of the simplified catch-up contribution process on the rules set forth at 5 CFR 1605.13 regarding back pay awards and other retroactive pay adjustments. If a TSP participant was age 50 or older during the year(s) to which a back pay award or other

retroactive pay adjustment is attributable and the corrective contributions or make-up contributions exceed the IRC section 402(g) or 415(c) limit, then corrective contributions or make-up contributions will spill over toward the catch-up limit for those years, even if the contributions are attributable to years before 2021. However, catch-up contributions attributable to years before 2021 are not eligible for matching.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities. This regulation will affect federal employees, members of the uniformed services who participate in the Thrift Savings Plan, and their beneficiaries. The TSP is a federal defined contribution retirement savings plan created by FERSA and is administered by the FRTIB.

#### Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the Paperwork Reduction Act.

#### Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 602, 632, 653, 1501–1571, the effects of this regulation on state, local, and tribal governments and the private sector have been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector. Therefore, a statement under 1532 is not required.

#### List of Subjects

##### 5 CFR Part 1600

Taxes, Claims, Government employees, Pensions, Retirement.

##### 5 CFR Part 1605

Claims, Government employees, Pensions, Retirement.

#### Ravindra Deo,

*Executive Director, Federal Retirement Thrift Investment Board.*

For the reasons stated in the preamble, the FRTIB amends 5 CFR chapter VI as follows:

### PART 1600—EMPLOYEE CONTRIBUTION ELECTIONS, CONTRIBUTION ALLOCATIONS, AND AUTOMATIC ENROLLMENT PROGRAM

■ 1. The authority citation for part 1600 continues to read as follows:

**Authority:** 5 U.S.C. 8351, 8432(a), 8432(b), 8432(c), 8432(j), 8432d, 8474(b)(5) and (c)(1), and 8440e.

**§ 1600.23 [Amended]**

■ 2. Amend § 1600.23 by removing and reserving paragraphs (b) and (h).

**PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS**

■ 3. The authority citation for part 1605 continues to read as follows:

**Authority:** 5 U.S.C. 8351, 8432a, 8432d, 8474(b)(5)(5) and (c)(1). Subpart B also issued under section 1043(b) of Public Law 104–106, 110 Stat. 186 and sec. 7202(m)(2) of Public Law 101–508, 104 Stat. 1388.

■ 4. Amend § 1605.13 by revising paragraph (c)(2) to read as follows:

**§ 1605.13 Back pay awards and other retroactive pay adjustments.**

\* \* \* \* \*

(c) \* \* \*

(2) Must not cause the participant to exceed the annual contribution limit(s) contained in sections 402(g), 415(c), or 414(v) of the I.R.C. (26 U.S.C. 402(g), 415(c), 414(v)) for the year(s) with respect to which the contributions are being made, taking into consideration the TSP contributions already made in (or with respect to) that year; and

\* \* \* \* \*

[FR Doc. 2020–24203 Filed 11–13–20; 8:45 am]

BILLING CODE 6760–01–P

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 966**

[Doc. No.: AMS–SC–19–0068; SC19–966–3]

**Tomatoes Grown in Florida; Amendments to the Marketing Order No. 966**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Marketing Order No. 966, which regulates the handling of Florida Tomatoes. The amendments will change the Florida Tomato Committee’s (Committee) size, length of the terms of office, and quorum requirements.

**DATES:** This rule is effective December 16, 2020.

**FOR FURTHER INFORMATION CONTACT:**

Geronimo Quinones, Marketing Specialist, Rulemaking Services Branch, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence

Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: [Geronimo.Quinones@usda.gov](mailto:Geronimo.Quinones@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, finalizes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 966, as amended (7 CFR part 966), regulating the handling of tomatoes grown in Florida. Part 966 (referred to as the “Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.” The Committee locally administers the Order and is comprised of tomato producers operating within the area of production. The applicable rules of practice and procedure governing the formulation of Marketing Agreements and Orders (7 CFR part 900) authorize amendment of the Order through this informal rulemaking action.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB’s Memorandum titled “Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled ‘Reducing Regulation and Controlling Regulatory Costs’” (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule shall not be deemed to preclude, preempt, or supersede any State program covering tomatoes grown in Florida.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act (7 U.S.C. 608 (15)(A)), any handler subject to an order may file with USDA a petition stating that the order, any provision of

the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA’s ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110–246) amended section 8c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 8c(17) of the Act and the supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders depending upon the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

The Agricultural Marketing Service (USDA–AMS) considered the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and other relevant matters, and determined that amending the Order as proposed by the Committee could appropriately be accomplished through informal rulemaking.

The Committee unanimously recommended the amendments following deliberations at two public meetings held on November 1, 2018, and February 27, 2019. This final rule will amend the Order by changing the Committee’s size, the length of term of office, and quorum requirements.

A proposed rule and referendum order was issued on February 14, 2020, and published in the **Federal Register** on February 21, 2020 (85 FR 10096). That document also directed that a referendum among Florida tomato growers be conducted May 11, 2020, through June 1, 2020, to determine whether they favored the proposals. To become effective, the amendments had to be approved by either two-thirds of the growers voting in the referendum or by those representing at least two-thirds of the volume of tomatoes produced by those voting in the referendum.

The results of the referendum show that 78 percent of the eligible producers who voted and 91 percent of the volume voted favored amendment number 1. Also, 89 percent of the eligible producers who voted and 98 percent of the volume voted favored amendments number 2 and 3. The producer vote met the requirement of being favored by two-thirds of the producers voting, or by two-thirds of the volume voted in the referendum for all three amendments. Consequently, all three amendments passed and will change the Committee's size, the length of term of office, and quorum requirements.

### Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 75 producers of Florida tomatoes in the production area and 37 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$1,000,000, and small agricultural service firms are defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to industry and Committee data, the average annual price for fresh Florida tomatoes during the 2017–18 season was approximately \$12.56 per 25-pound container, and total fresh shipments were 25.9 million containers. Using the average price and shipment information, the number of handlers, and assuming a normal distribution, the majority of handlers have average annual receipts of less than \$30,000,000 (\$12.56 times 25.9 million containers equals \$325,304,000 divided by 37 handlers equals \$8,792,000 per handler).

With an estimated producer price of \$6.00 per 25-pound container, the number of Florida tomato producers, and assuming a normal distribution, the average annual producer revenue is above \$1,000,000 (\$6.00 times 25.9 million containers equals \$155,400,000

divided by 75 producers equals \$2,072,000 per producer). Thus, the majority of producers of Florida tomatoes may be classified as large entities.

The Committee unanimously recommended the proposed amendments at public meetings on November 1, 2018, and February 27, 2019.

Since 1995, the number of producers and handlers operating in the industry has decreased, which makes it difficult to find enough members to fill positions on the Committee. Decreasing the Committee's size will make it more reflective of today's industry. No economic impact is expected from these amendments because they will not establish any new regulatory requirements on handlers, nor will they have any assessment or funding implications. There will be no change in financial costs, reporting, or recordkeeping requirements because of this action.

Alternatives to this proposal, including making no changes at this time, were considered by the Committee. Due to changes in the industry, AMS believes the proposals are justified and necessary to ensure the Committee's ability to locally administer the program. Reducing the size of the Committee will enable it to satisfy membership and quorum requirements fully, thereby ensuring a more efficient and orderly flow of business.

### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178 (Vegetable and Specialty Crops). No changes in those requirements are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This action will not impose any additional reporting or recordkeeping requirements on either small or large Florida tomato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public-sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this action.

The Committee's meetings were widely publicized throughout the Florida tomato production area. All interested persons were invited to attend the meetings and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the November 1, 2018, and February 27, 2019, meetings were public, and all entities, both large and small, were encouraged to express their views on the proposals.

A proposed rule concerning this action was published in the **Federal Register** on October 1, 2019 (84 FR 52042). Copies of the rule were mailed or sent via facsimile to all Committee members and Florida tomato handlers. The proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending December 2, 2019, was provided to allow interested persons to respond to the proposal. No comments were received, so no changes were made to the proposed amendments.

A proposed rule and referendum order was then issued on February 14, 2020, and published in the **Federal Register** on February 21, 2020 (85 FR 10096). That document directed that a referendum among Florida tomato growers be conducted during the period of May 11, 2020, through June 1, 2020, to determine whether they favored the proposed amendments to the Order. To become effective, the amendments had to be approved by at least two-thirds of the growers voting, or two-thirds of the volume of Florida tomatoes represented by voters in the referendum. The results show that 78 percent of the eligible producers who voted and 91 percent of the volume voted favored amendment number 1. Also, 89 percent of the eligible producers who voted and 98 percent of the volume voted favored amendments number 2 and 3.

The producer vote met the requirement of being favored by two-thirds of the producers voting, or by two-thirds of the volume voted in the referendum for all three amendments. All three amendments passed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.



**Order Amending the Order Regulating the Handling of Tomatoes Grown in Florida**<sup>1</sup>

*Findings and Determinations*

(a) *Findings and Determinations Upon the Basis of the Rulemaking Record.*

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the Order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The Order, as amended, and as hereby further amended, and all the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

2. The Order, as amended, and as hereby further amended, regulates the handling of tomatoes grown in Florida in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the Order;

3. The Order, as amended, and as hereby further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The Order, as amended, and as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of onions produced in the production area; and

5. All handling of tomatoes produced or packed in the production area as defined in the Order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Determinations.*

It is hereby determined that:

1. The issuance of this amendatory Order, amending the aforesaid Order, is favored or approved by producers representing at least two-thirds of the volume of tomatoes produced by those voting in a referendum on the question of approval and who, during the period of October 1, 2018, through September 31, 2019, have been engaged within the

<sup>1</sup> This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

production area in the production of such tomatoes.

2. The issuance of this amendatory Order advances the interests of growers of tomatoes in the production area pursuant to the declared policy of the Act.

*Order Relative To Handling*

*It is therefore ordered*, that on and after the effective date hereof, all handling of tomatoes grown in Florida shall be in conformity to, and in compliance with, the terms and conditions of the said Order as hereby proposed to be amended as follows:

The provisions amending the Order contained in the proposed rule issued by the Administrator on September 23, 2019, and published in the **Federal Register** (84 FR 52042) on October 1, 2019, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

**List of Subjects in 7 CFR Part 966**

Tomatoes, Marketing agreements, Reporting and recordkeeping requirements.

**Bruce Summers,**

*Administrator, Agricultural Marketing Service.*

For the reasons set forth in the preamble, 7 CFR part 966 is amended as follows:

**PART 966—TOMATOES GROWN IN FLORIDA**

■ 1. The authority citation for 7 CFR part 966 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Revise § 966.22(a) to read as follows:

**§ 966.22 Establishment and membership.**

(a) The Florida Tomato Committee, consisting of 10 producer members, is hereby established. For each member of the committee there shall be an alternate who shall have the same qualifications as the member.

\* \* \* \* \*

■ 3. Revise § 966.23(a) to read as follows:

**§ 966.23 Term of office.**

(a) The term of office of committee members, and their respective alternates, shall be for 2 years and shall begin as of August 1 and end as of July 31.

\* \* \* \* \*

■ 4. Revise § 966.32(a) to read as follows:

**§ 966.32 Procedure.**

(a) Six members of the committee shall be necessary to constitute a quorum and the same number of concurring votes shall be required to pass any motion or approve any committee action.

\* \* \* \* \*

[FR Doc. 2020–23590 Filed 11–13–20; 8:45 am]

**BILLING CODE P**

**SMALL BUSINESS ADMINISTRATION**

**13 CFR Part 121**

**RIN 3245–AG94**

**Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments; Correction**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule; correction.

**SUMMARY:** The U.S. Small Business Administration (SBA) is correcting a final rule that appeared in the **Federal Register** on October 16, 2020. This rule merged the 8(a) Business Development (BD) Mentor-Protégé Program and the All Small Mentor-Protégé Program to eliminate confusion and remove unnecessary duplication of functions within SBA. This rule also eliminated the requirement that 8(a) Participants seeking to be awarded an 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award, revised several 8(a) BD program regulations to reduce unnecessary or excessive burdens on 8(a) Participants, and clarified other related regulatory provisions to eliminate confusion among small businesses and procuring activities. In addition, in response to public comment, the rule required a business concern to recertify its size and/or socioeconomic status for all set-aside orders under unrestricted multiple award contracts, unless the contract authorized limited pools of concerns for which size and/or status was required. This document is making three technical corrections to the final rule.

**DATES:** Effective November 16, 2020.

**FOR FURTHER INFORMATION CONTACT:** Mark Hagedorn, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–7625; [mark.hagedorn@sba.gov](mailto:mark.hagedorn@sba.gov).

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2020–19428, appearing on page 66146 in the **Federal Register** of Friday, October 16, 2020, the following corrections are made:

**§ 121.103 [Corrected]**

1. On page 66180, in the third column, in § 121.103, in paragraph (h)(1)(ii), “Except for sole source 8(a) awards, the joint venture must meet the requirements of § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate, at the time it submits its initial offer including price. For a sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of § 124.513(c) and (d) prior to the award of the contract.” is corrected to read, “Except for sole source 8(a) awards, the joint venture must meet the requirements of § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate, as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding. For a sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of § 124.513(c) and (d) prior to the award of the contract.”

**§ 121.404 [Corrected]**

2. On page 66180, in the third column, in § 121.404, in amendment 4, instruction (a) “i. Revising paragraphs (a) introductory text and (a)(1); and ii. Adding a paragraph heading to paragraph (a)(2);” is corrected to read, “i. Adding a paragraph heading to paragraphs (a) and (a)(2); and ii. Revising paragraph (a)(1);”.

3. On page 66180, in the third column, in § 121.404, in paragraph (a), “*Time of size—*” is corrected to read “*Time of size \* \* \**”.

4. On page 66181, in the third column, in § 121.404, in paragraph (d), “*Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Size status is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding for the following purposes: compliance with the nonmanufacturer rule set forth in § 121.406(b)(1), the ostensible subcontractor rule set forth in § 121.103(h)(4), and the joint venture agreement requirements in § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.” is corrected to read, “*Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Compliance with the nonmanufacturer rule set forth in § 121.406(b)(1), the ostensible subcontractor rule set forth in

§ 121.103(h)(4), and the joint venture agreement requirements in § 124.513(c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate, is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding for the following purposes.”

**Francis C. Spampinato,**

*Associate Administrator, Government Contracting and Business Development.*

[FR Doc. 2020–25177 Filed 11–13–20; 8:45 am]

**BILLING CODE 8026–03–P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 71**

**[Docket No. FAA–2020–0751; Airspace Docket No. 20–ANM–42]**

**RIN 2120–AA66**

**Proposed Amendment of Class E Airspace; Paris, ID**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action modifies the Class E airspace extending upward from 700 feet above the surface at Bear Lake County Airport, Paris, ID, to accommodate new Area Navigation (RNAV) procedures at the airport. This action will ensure the safety and management of instrument flight rules (IFR) operations within the National Airspace System.

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

**ADDRESSES:** FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at [https://www.faa.gov/air\\_traffic/publications/](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](mailto:fedreg.legal@nara.gov) or go to [https://](https://www.archives.gov/federal-register/cfr/ibr-locations.html)

[www.archives.gov/federal-register/cfr/ibr-locations.html](https://www.archives.gov/federal-register/cfr/ibr-locations.html).

**FOR FURTHER INFORMATION CONTACT:**

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

**SUPPLEMENTARY INFORMATION:****Authority for This Rulemaking**

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code (U.S.C.). Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the Class E airspace extending upward from 700 feet AGL at Bear Lake County Airport, Paris, ID in support of IFR operations.

**History**

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 53308; August 28, 2020) for Docket No. FAA–2020–0751 to modify the Class E airspace extending upward from 700 feet above the earth at Bear Lake County Airport, Paris, ID, in support of IFR operations. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No substantive comments were received.

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

**Availability and Summary of Documents for Incorporation by Reference**

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

air traffic service routes, and reporting points.

### The Rule

The FAA is amending 14 CFR part 71 by modifying Class E airspace extending upward from 700 feet above the surface at Bear Lake County Airport, Paris, ID. The area east of the airport is being reduced from 15.3 miles wide (from east to west), and 28.1 miles tall (from north to south) to 2 miles each side of the 115° bearing from the airport from the 6.6-mile radius to 11 miles southeast from the airport, and the trapezoidal area west of the airport extending approximately 10.5 miles wide (from east to west) and 33.8 miles tall (from north to south) is being reduced to 2 miles each side of the airport 315° bearing extending from the 6.6-mile radius to 17 miles northwest from the airport, as the additional airspace is no longer required for operations.

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

### Regulatory Notices and Analyses

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

### Environmental Review

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

### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### Adoption of the Amendment

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

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

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

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

#### § 71.1 [Amended]

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

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

\* \* \* \* \*

#### ANM ID E5 Paris, ID

Bear Lake County Airport, ID  
(Lat. 42°14'59" N, long. 111°20'30" W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of the Bear Lake County Airport and that airspace 2 miles each side of the airport 315° bearing extending from the 6.6-mile radius to 17 miles northwest from the airport, and that airspace 2 miles each side of the 115° bearing from the 6.6-mile radius to 11 miles southeast from the airport.

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

#### Byron Chew,

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

[FR Doc. 2020–25162 Filed 11–13–20; 8:45 am]

**BILLING CODE 4910–13–P**

### DEPARTMENT OF TRANSPORTATION

#### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2020–0497; Airspace Docket No. 20–ASO–1]

RIN 2120–AA66

#### Amendment of V–5 and V–178, and Revocation of V–513 in the Vicinity of New Hope, KY

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; withdrawal.

**SUMMARY:** This action withdraws the final rule published in the **Federal Register** on October 26, 2020. In that action, the FAA amends VHF Omnidirectional Range (VOR) Federal airways V–5 and V–178 in the vicinity of New Hope, KY, and removes V–513 in its entirety due to the planned decommissioning of the VOR portion of the New Hope, KY, VOR/Distance Measuring Equipment (VOR/DME) navigation aid. The FAA has determined that withdrawal of the final rule is warranted since there has been a change in the date for the decommissioning of the New Hope, KY, VOR.

**DATES:** Effective date 0901 UTC, November 16, 2020, the final rule published October 26, 2020 (85 FR 67649), is withdrawn.

**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:

#### History

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2020–0497 (85 FR 67649, October 26, 2020) amending Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying VOR Federal airways V–5 and V–178 in the vicinity of New Hope, KY, and removing V–513 in its entirety due to the planned decommissioning of the New Hope, KY, VOR. Subsequent to publication, the FAA determined that the New Hope, KY, VOR navigation aid will not be decommissioned at this time. As a result, the final rule is being withdrawn.

#### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### The Withdrawal

- Accordingly, pursuant to the authority delegated to me, the final rule published in the **Federal Register** on October 26, 2020 (85 FR 67649), FR Doc. 2020–23377, is hereby withdrawn.

**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.

Issued in Washington, DC, on November 9, 2020.

#### George Gonzalez,

*Acting Manager, Airspace and Rules Group.*

[FR Doc. 2020–25164 Filed 11–13–20; 8:45 am]

**BILLING CODE 4910–13–P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 14 CFR Part 1274

[Document Number NASA–20–092; Docket Number NASA–2020–0007]

RIN 2700–AE58

### Cooperative Agreements With Commercial Firms

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Direct final rule.

**SUMMARY:** This direct final rule removes information on NASA's Cooperative Agreements with Commercial Firms because this information is already available in another section of the Code of Federal Regulations and in NASA's Grant and Cooperative Agreements Manual (GCAM).

**DATES:** This direct final rule is effective on January 15, 2021 without further action, unless adverse comment is received by December 16, 2020. If adverse comment is received, NASA will publish a timely withdrawal of the rule in the **Federal Register**.

**ADDRESSES:** Comments must be identified with RINs 2700–AE58 and may be sent to NASA via the *Federal E-Rulemaking Portal*: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Please note that NASA will post all comments on the internet without changes, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Antanese Crank, 202–358–4683, [Antanese.n.crank@nasa.gov](mailto:Antanese.n.crank@nasa.gov).

#### SUPPLEMENTARY INFORMATION:

#### Direct Final Rule and Significant Adverse Comments

NASA has determined this rulemaking meets the criteria for a direct final rule because it makes nonsubstantive changes to remove information on NASA's Cooperative Agreements with Commercial Firms codified in 14 CFR part 1274 because this information is already available in 2 CFR part 1800 and in NASA's GCAM. NASA's GCAM is accessible at [https://prod.nais.nasa.gov/pub/pub\\_library/srba/documents/Grant\\_and\\_CooperativeAgreementManual.pdf](https://prod.nais.nasa.gov/pub/pub_library/srba/documents/Grant_and_CooperativeAgreementManual.pdf). No opposition to the changes and no significant adverse comments are expected. However, if NASA receives any significant adverse comments, it will withdraw this direct final rule by publishing a document in the **Federal Register**. A significant adverse comment is one that explains: (1) Why the direct

final rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a comment necessitates withdrawal of this direct final rule, NASA will consider whether such comment warrants a substantive response through a notice and comment process.

#### Background

Title 14 CFR part 1274, last amended June 3, 2016 [81 FR 35584], sets forth policy guidelines to establish uniform requirements for NASA cooperative agreements awarded to commercial firms. It is amended to remove information on NASA's Cooperative Agreements with Commercial Firms because this information is already available in other documents.

#### Regulatory Analysis

*Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improvement Regulation and Regulation Review*

Executive Orders (E.O.) 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as “not significant” under section 3(f) of E.O. 12866.

#### *Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to prepare an initial regulatory flexibility analysis to be published at the time the proposed rule is published. This requirement does not apply if the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities” (5 U.S.C. 603). This rule removes 14 CFR part 1274, therefore, does not have a significant economic impact on a substantial number of small entities.

#### *Review Under the Paperwork Reduction Act*

This direct final rule does not contain any information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### *Review Under E.O. 13132*

E.O. 13132, “Federalism,” 64 FR 43255 (August 4, 1999) requires regulations be reviewed for federalism effects on the institutional interest of states and local governments, and if the effects are sufficiently substantial, preparation of the Federal assessment is required to assist senior policy makers. Removal of 14 CFR part 1274 will not have any substantial direct effects on state and local governments within the meaning of the E.O. Therefore, no federalism assessment is required.

#### *Executive Order 13771—Reducing Regulations and Controlling Regulatory Costs*

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

#### *Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

#### List of Subjects in 14 CFR Part 1274

Federal financial assistance.

#### **PART 1274—[Removed and Reserved]**

■ Accordingly, under 51 U.S.C. 20113(a), 14 CFR chapter V is amended by removing and reserving part 1274.

**Nanette Smith,**

*Team Lead, NASA Directives and Regulations.*

[FR Doc. 2020–24529 Filed 11–13–20; 8:45 am]

**BILLING CODE 7510–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### 23 CFR Part 635

[FHWA Docket No. FHWA–2018–0017]

RIN 2125–AF83

#### Indefinite Delivery and Indefinite Quantity Contracts for Federal-Aid Construction

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Interim Final Rule (IFR); request for comments.

**SUMMARY:** This action allows States to use the Indefinite Delivery and Indefinite Quantity (ID/IQ) method of contracting, including job order

contracting (JOC), on Federal-aid highway projects, under certain circumstances, on a permanent basis.

**DATES:** This interim final rule is effective as of November 16, 2020. Comments must be received on or before January 15, 2021. Late-filed comments will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Mr. James DeSanto, Office of Preconstruction, Construction, and Pavements, (614) 357-8515, or Mr. Patrick Smith, Office of the Chief Counsel, (202) 366-1345, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access and Filing**

This document, as well as the advance notice of proposed rulemaking (ANPRM), supporting materials, and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register> and the Government Publishing Office's web page at: <http://www.gpo.gov/fdsys>.

**Executive Summary**

The FHWA is adding a new subpart F under 23 CFR part 635 to allow States to use the ID/IQ method of contracting, including JOC, on Federal-aid highway projects, under certain circumstances, on a permanent basis. Currently, this contracting technique is only authorized on an experimental basis under FHWA's Special Experimental Project No. 14 (SEP-14). Allowing ID/IQ contracting on a permanent basis provides benefits to State departments of transportation (State DOT) and other contracting agencies, including expediting project delivery, increasing administrative efficiency, reducing project costs, and increasing flexibility for State DOTs to use Federal-aid funds on certain projects.

The FHWA is issuing this IFR pursuant to 5 U.S.C. 553(b)(3)(B) to allow States to realize immediately the benefits and cost savings associated with the ID/IQ method of contracting. The FHWA has conducted a preliminary cost-benefit analysis on this rulemaking and anticipates a cost savings of \$3.4 million per year at a 7 percent discount rate.

**Background**

The ID/IQ method of contracting allows an IQ of supplies or services for a fixed time. The Federal Government uses this method when agencies cannot determine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period. For construction ID/IQ contracts, contractors bid unit prices for estimated quantities of standard work items, and work orders are used to define the location and quantities for specific work. The ID/IQ contracts may be awarded to the lowest responsive bidder based on an invitation for bids or the best-value proposer based on responses to Requests for Proposals. Contracting agencies use other names for these types of contracts, including JOC contracts, master contracts, on-call contracts, area-wide contracts, continuing contracts, design-build push-button contracts, push-button contracts, stand-by contracts, and task order contracts. The JOC method is a form of ID/IQ contracting that uses a unit price book with pre-priced work item descriptions in the solicitation. Contract awards under this method use the bidder's adjustment factors or multipliers to establish contract prices. The contract is awarded to the lowest responsive bidder determined by their rates.

Although ID/IQ contracts are specifically authorized in the Federal procurement process (48 CFR subpart 16.5) and for the contracting of architecture and engineering services in the Federal-aid highway program (FAHP) (23 CFR part 172), FAHP authorization and procurement laws for construction do not address the possible use of ID/IQ contracts. The FAHP construction procurement statute, 23 U.S.C. 112(b)(1), requires contracts to be awarded by a competitive bidding process to the lowest responsive bidder (traditional design-bid-build project delivery method based upon the premise of a 100 percent-complete design and a well-defined scope of work). Typically, ID/IQ contracts are awarded based upon a general, but not completely defined, scope of work for a geographic area and limited time period (but not specific locations, designs, or quantities) and are often awarded based upon specific evaluation criteria.

*A. Experience Under Special Experimental Project Number 14 (SEP-14)*

The FHWA used its authority in 23 U.S.C. 502(b)(1) to test the use of ID/IQ contracts for the construction of FAHP projects through the SEP-14 Program for

innovative contracting techniques under authority of 23 U.S.C. 502(b)(2). Under the SEP-14 Program, contracting agencies interested in testing an innovative contracting technique submit project-specific (or programmatic) work plans to FHWA for implementation. The FHWA Division Office evaluates the work plan, coordinates with FHWA Headquarters, and, if it finds the work plan to be acceptable, FHWA approves the use of the technique on a temporary basis for a project or group of pilot projects. Over time, FHWA Headquarters staff assess the initiative to determine if it is a technique that should be operationalized for the FAHP on a permanent basis without the need for individual requests, work plans, and evaluation reports. More information on SEP-14 can be found at <https://www.fhwa.dot.gov/construction/cqit/sep14.cfm>.

From 2007 to the present, FHWA, State DOTs, and Local Public Agencies (LPA) through the State DOTs, have experimented with the use of ID/IQ and JOC contracts for construction. The FHWA has approved the use of this contracting method under SEP-14 for 19 different State DOTs and 6 LPAs. Evaluation reports indicate that ID/IQ and JOC contracts allow for cost-effective contracting for small value contracts and preventive maintenance programs. Specifically, the reports indicate that these contracts eliminate the need for contracting agencies to advertise and award numerous small contracts and provide contracting agencies with wide flexibility in programming and addressing preventive maintenance needs.

Having evaluated the use of ID/IQ and JOC contracts for construction in the FAHP for over a decade, FHWA determined that they were suitable for operationalization. This is consistent with Senate report language accompanying fiscal years 2017 and 2018 appropriations to operationalize JOC. *See* S. Rept. No. 114-243, 43 (April 21, 2016); S. Rept. No. 115-138, 52 (July 27, 2017). The approach is also consistent with the U.S. Department of Justice Office of Legal Counsel opinion regarding competition and contracting requirements, which found that "FHWA may reasonably conclude, consistent with 23 U.S.C. 112, that certain state or local requirements [that may have the effect of reducing the number of potential bidders for a particular contract still] promote the efficient and effective use of federal funds or protect the integrity of the competitive bidding process." *See* Competitive Bidding Requirements Under the Federal-Aid Highway Program, 23 U.S.C. 112 (Aug.

23, 2013), at 24.<sup>1</sup> As discussed further below, including in relation to provisions on securing competition and selection of contractors, ID/IQ and JOC contracts are consistent with the opinion because they promote “the efficient and effective use of federal funds.”

### *B. Steps for Operationalizing ID/IQ Contracting and JOC for Construction in the FAHP*

The FHWA is proceeding with two phases to operationalize ID/IQ contracting and JOC for construction in the FAHP. The first phase was the issuance of an FHWA Notice<sup>2</sup> on how FHWA will allow ID/IQ and JOC contracts for low-cost construction contracts in the FAHP without the need for project-specific work plans from contracting agencies. The second phase was the initiation of this rulemaking.

Under the first phase, FHWA published a **Federal Register** Notice requesting public comment on allowing contracting agencies to establish ID/IQ contracting and JOC for low-cost construction contracts at 83 FR 19393 on May 2, 2018, and subsequently published FHWA Notice N5060.2, titled “Indefinite Delivery/Indefinite Quantity Contracting for Low-Cost Federal-Aid Construction Contracts,” on January 18, 2019.<sup>3</sup> Notice N5060.2 set forth FHWA’s policy for the use of ID/IQ contracting for low-cost FAHP construction contracts and clarified under what conditions ID/IQ contracts are allowed for Federal-aid construction.

Under Notice N5060.2, an ID/IQ contract not requiring advance approval under the SEP–14 Program should satisfy certain conditions, including that the contract be: Low-cost (the total value of task or work orders may not exceed \$2,000,000 per year on average over the contract term); short-term (a base contract of 1 to 2 years); awarded by competitive bidding to the lowest responsive bidder; a single-award contract; qualified for a National Environmental Policy Act (NEPA) categorical exclusion listed under 23 CFR 771.117; awarded and performed in compliance with applicable Disadvantaged Business Enterprise (DBE) provisions of 49 CFR part 26; and compliant with certain other laws and regulations related to Federal-aid construction. Additional details can be found in FHWA Notice N5060.2. Although Notice N5060.2 allows ID/IQ

contracting without advance SEP–14 Program approval on a project-by-project basis, the contracts continue to be administered under the SEP–14 Program on an experimental basis. The ID/IQ contracts not meeting the conditions of Notice N5060.2, such as multiple-award contracts, continue to require advance approval under the SEP–14 Program.

After the publication of this Interim Final Rule, Notice N5060.2, Indefinite Delivery/Indefinite Quantity Contracting for Low-Cost Federal-aid Construction Contracts, January 18, 2019, will expire effective November 16, 2021.

Under the second phase of operationalizing ID/IQ contracting and JOC for construction in the FAHP, FHWA published the ANPRM titled, “Indefinite Delivery and Indefinite Quantity Contracts for Federal-Aid Construction,” at 83 FR 29713 on June 26, 2018. The ANPRM sought comment on how to expand ID/IQ contracting and allow it on a permanent basis. The FHWA received 11 comments to the docket, 9 of which were responsive to the questions posed in the ANPRM. Comments were provided by six State DOTs, two municipalities, one business, and two individuals who responded to the wrong **Federal Register** notice. The comments are available for examination in the docket (FHWA–2018–0017) at <http://www.regulations.gov>.

### **General Discussion of Comments**

After consideration of the responsive comments, and based on its ongoing experience with ID/IQ contracting under the SEP–14 Program, FHWA is authorizing ID/IQ contracting on Federal-aid highway projects on a permanent basis as set forth in this IFR. The FHWA believes that this approach will benefit State DOTs by expediting project delivery, increasing administrative efficiency, reducing project costs, and increasing flexibility for State DOTs to use Federal-aid funds on certain projects. The FHWA considered responsive comments related to the benefits of ID/IQ contracting and other topics in developing the regulation set forth in this IFR.

#### *A. Expedited Project Delivery/ Administrative Efficiency*

Commenters argued ID/IQ contracting expedites the delivery of highway construction projects and increases administrative efficiency. In making this argument, commenters cited as reasons the reduced time necessary to prepare, advertise, and procure highway construction projects; the ability to

consolidate design assignments; the reduced time and resources necessary to administer highway construction projects; and the reduced administrative burden in working with fewer contractors and on fewer contracts.

For example, one State DOT indicated that, based on its experience under the SEP–14 Program, ID/IQ contracting reduces the time necessary to prepare projects for construction and reduces the administrative burden associated with advertising projects. Another State DOT indicated that ID/IQ contracting allows States to quickly obligate Federal funds for needed work, consolidate design assignments, and reduce their administrative burden in administering projects by working with fewer contractors. This commenter indicated that ID/IQ contracts reduce procurement time for each work order by approximately 8 weeks. Another State DOT argued that ID/IQ contracting reduces the time and resources necessary to administer individual work orders. This commenter also explained that ID/IQ contracts reduce the administrative burden associated with pre-qualification procedures because quality is accounted for in the initial award. Another State DOT noted that certain tasks can be completed more quickly using ID/IQ contracting compared to its traditional reliance on in-house resources.

The FHWA agrees with the commenters and believes that ID/IQ contracting is likely to expedite project delivery of certain highway projects and increase administrative efficiency.

#### *B. Reduced Project Costs*

Commenters also said that ID/IQ contracting reduces the overall costs of certain highway projects and work orders. Commenters cited as reasons reduced costs associated with expedited project delivery; reduced costs associated with gains in administrative efficiency; the reduced time and resources that contactors must spend on bid preparation, which results in reduced costs for States; increased competition for larger contracts, which can reduce overall cost; and reduced costs on emergency maintenance contracts because prices are established in advance.

For example, one State DOT stated that ID/IQ contracting reduces overall construction costs. This commenter said that because ID/IQ contracting reduces the time and resources that contactors must spend on bid preparation, it also reduces contract prices and the overall costs incurred by States. Another State DOT indicated that under the SEP–14 Program it received twice as many bids

<sup>1</sup> See <https://www.justice.gov/file/21816/download>.

<sup>2</sup> 83 FR 19393 (May 2, 2018).

<sup>3</sup> See <https://www.fhwa.dot.gov/legregs/directives/notices/n5060-2.cfm>.

for tasks relative to traditional design-bid-build contracting. The increased competition resulted in lower prices. This commenter also reported that its contractors are highly satisfied with ID/IQ contracting under the SEP-14 Program. Another State DOT stated that it anticipates cost savings on emergency maintenance contracts because predetermined prices will be in place.

The only business that commented provided several examples of the efficiency and effectiveness of JOC contracts used by States, municipalities, and other government agencies, mostly at educational facilities. The examples indicated that JOC can reduce overall project costs by 5 to 10 percent.

The FHWA agrees with the commenters and believes that ID/IQ contracting is likely to reduce the overall cost of certain highway projects.

### C. Increased Flexibility

Commenters also argued that operationalizing ID/IQ contracting will increase flexibility for State DOTs by allowing them to use ID/IQ contracting on a broader range of projects and on a permanent basis. As discussed above, the added flexibility provided to States by operationalizing ID/IQ through rulemaking may also provide associated gains in expedited project delivery, administrative efficiency, and reduced project costs. One State DOT indicated that experimenting with ID/IQ contracts under the SEP-14 Program allowed for competitive bidding on projects that otherwise would have been awarded non-competitively under State emergency procedures.

Considering the comments, FHWA believes that ID/IQ contracting increases flexibility for State DOTs and that expanding ID/IQ contracting and allowing it on a permanent basis provides needed flexibility to the States to manage Federal financial assistance under 23 U.S.C. 145.

### D. Annual Expenditure Cap

A common theme in several comments was that FHWA should raise or eliminate the annual expenditure cap of \$2 million existing under Notice N5060.2.

Commenters in favor of eliminating the cap, including multiple State DOTs, argued that a \$2 million cap would limit their flexibility and reduce the benefits of ID/IQ contracting. For example, one State DOT argued that a \$2 million cap would limit the usability of ID/IQ contracting. Eliminating the cap, it argued, would expand opportunity to use this method and realize its benefits on a broader scale. Another State DOT argued that a \$2 million cap would

quickly limit the ability of State DOTs to use the best contractors, which would create inefficiency and result in awards to less competitive contractors. Another State DOT argued that eliminating the cap or making it significantly higher would maximize flexibility for State DOTs to use and realize the benefits of ID/IQ contracting. Another commenter argued that States should be allowed the flexibility to set their own caps. This commenter also argued that setting a cap in this context would be inconsistent with the practices and regulations of certain other Federal agencies.

No commenters supported retaining the annual expenditure cap of \$2 million existing under Notice N5060.2. The FHWA agrees with the arguments put forth by the commenters opposing a cap and is not establishing an annual expenditure cap for contracts authorized under this regulation. Section G below discusses a 12-month phase-out period for authorizing low-cost ID/IQ contracts under Notice N5060.2, as well as ID/IQ contracts authorized under an approved SEP-14 work plan.

### E. On-Ramp and Off-Ramp Procedures

Commenters also addressed whether “on-ramp” procedures should be used to allow new contractors to be considered for the award pool after the initial award of an ID/IQ and “off-ramp” procedures be used to discontinue the use of contractors who are not performing satisfactorily.

One State DOT agreed that such procedures should be used. It further stated that it already uses on-ramp procedures under the SEP-14 Program. The commenter argued that these procedures give contracting agencies flexibility to expand the pool of contractors when necessary as well as the ability to remove unresponsive, non-competitive contractors. This tool motivates contractors to be and remain competitive. This commenter is in the process of developing off-ramp criteria for its State.

A municipality opposed on-ramp procedures outside of a competitive process and recommends new contractors be added via new procurements. This commenter recommended using termination clauses for convenience or default to remove contractors. Another commenter opposed on-ramp procedures because, it argued, they undermine the initial competitive process. This commenter recommended using existing processes to address non-performing contractors.

Contracting agencies may use appropriate methods to address contractor performance by removing

contractors through State DOT “off-ramp” or contract termination procedures. The FHWA believes that procedures introducing new contractors into an existing ID/IQ contract after the initial solicitation and award could undermine the competitive process required by statute and the regulation. Accordingly, FHWA has not established “on-ramp” procedures in this rulemaking, nor is FHWA establishing additional contract termination procedures.

### F. Clarification of Terms

Two commenters also recommended clarifying some of the language that FHWA uses in referring to ID/IQ contracts in this rulemaking. As discussed above, one commenter suggested that FHWA align its terminology about contract extensions with the industry standard, using “contract extension” or “contract renewal” instead of “time extension.” The same commenter recommended using terminology consistent with industry standards for contractor “adjustment factors” in JOC. In the ANPRM, FHWA referred to “mark-up rates.” Relative to the meaning of a unit price book or construction task catalog used by JOC, the same commenter recommended changing the phrase “with pre-priced work item descriptions” from the ANPRM to “which includes a list of defined construction tasks, and for each task, includes a unit of measure and a preset unit price.”

Another commenter observed that it is unclear how time limits for contract length are defined—calendar year, Federal fiscal year, or start of work. The same commenter also observed that it is unclear how \$2 million annual contract limit applies—estimated work, scheduled or planned work, or invoiced work. Another State DOT recommended clarifying whether the maximum contract limit is total contract value or Federal funds only.

The FHWA has attempted to address these comments in this regulation. The comments regarding the annual contract value limit no longer apply because such a limit is not provided in the regulation.

### G. Additional Comments

Some commenters also recommended clarifying certain elements of ID/IQ procedures. For example, one State DOT recommended minimizing reporting requirements and focusing on critical areas. Another commenter recommended clarifying what contracting agencies must do to use ID/IQ or JOC beyond providing assurances

to FHWA regarding implementation and reporting. It suggested that FHWA align reporting requirements for ID/IQ with other standard contracting techniques. Regarding comments concerning reporting requirements, as this IFR operationalizes the ID/IQ method, FHWA intends to cancel Notice N5060.2 and FHWA is not establishing reporting requirements for contracts authorized under this regulation.

To provide flexibility to State DOTs and ease of transition, during a period of no more than 12 months following publication of this IFR, FHWA Division Administrators may continue to concur in the use of ID/IQ for low-cost contracts per the terms of the Notice and other ID/IQ contracts authorized under an approved SEP-14 work plan. Division Administrators may continue to allow extensions of contracts authorized under the Notice or applicable SEP-14 work plan for the duration of these contracts. For low-cost contracts authorized under the Notice or ID/IQ contracts authorized under an approved SEP-14 work plan, State DOTs may continue to administer the contracts per the requirements of the Notice or applicable SEP-14 work plan for the duration of these contracts. However, the reporting requirements described in Question and Answer No. 9 of the Notice or applicable SEP-14 work plan would no longer apply to these projects after the effective date of this IFR. The FHWA may continue to use SEP-14 to authorize and evaluate contracting methods that are outside the scope of this regulation.

Another commenter proposed using “Fixed Price/Variable Scope or Fixed Budget/Best Value contracts,” an alternative contracting method. Another commenter referred to certain best practices including partnering, use of software to promote transparency, training, use of a task catalog tailored to the specific contracting agency, detailed scopes of work, and transparent proposal review process. As discussed above, FHWA believes that sufficient benefits will result if ID/IQ contracting is operationalized under this rulemaking on a permanent basis. The FHWA is not considering other alternative contracting methods in the context of this rulemaking.

### Section-by-Section Discussion of the Changes

#### *General Conforming Amendments in 23 CFR Parts 630 and 635*

The FHWA makes several amendments in 23 CFR parts 630 and 635 to address the application of various Federal requirements to ID/IQ projects.

In addition, FHWA replaces the terms “State transportation department” and “STD” with the more commonly used terms “State department of transportation” and “State DOT” throughout 23 CFR part 630 and 635. Finally, FHWA also corrects certain outdated citations in 23 CFR parts 630 and 635.

#### *Section 630.106*

The FHWA amends 23 CFR 630.106(a)(9) to provide for the execution and modification of the project agreement for ID/IQ projects. This amendment is similar to the existing language for design-build projects at 23 CFR 630.106(a)(7) and Construction Manager/General Contractor projects at 23 CFR 630.106(a)(8) in that this amendment makes clear that FHWA execution or modification of a project agreement for final design or physical construction, and authorization to proceed, shall not occur until after the completion of the NEPA process. This language conforms with 23 CFR 771.113(a) regarding the relationship between the completion of required environmental reviews and the obligation of funds for final design and construction.

#### *Section 630.112*

The FHWA amends 23 CFR 630.112(c)(3) and (4) to correct outdated citations. The changes to 23 CFR 630.112(c)(3) are intended to update the drug-free workplace requirements to reflect the new DOT regulations. The changes to 23 CFR 630.112(c)(4) are intended to update the suspension and debarment requirements to reflect the new Office of Management and Budget regulations at 2 CFR part 180, as adopted by the DOT at 2 CFR part 1200. The requirements of the previous 49 CFR part 29 have been updated and moved to these new regulations. The updates to these cross references in 23 CFR 630.112(c)(3) and (4) do not impose any new requirements or burdens under this part.

#### *Section 630.205*

The FHWA amends 23 CFR 630.205(e) to provide an exception from the standard contracting approval process for contracts that conform to the requirements of the revised 23 CFR part 635 subpart F. In addition, FHWA amends 23 CFR 630.205(d) by revising the term “State Highway Agency” to conform with the more commonly used term, “State DOT.”

#### *Section 635.102*

The FHWA amends the definitions in 23 CFR 635.102 by adding a definition for “ID/IQ project” and “State DOT.”

#### *Section 635.104*

The FHWA amends 23 CFR 635.104 to state that the applicable regulations pertaining to the ID/IQ contracting process found in this rule apply to ID/IQ projects. In addition, no justification of cost effectiveness is necessary in selecting projects for this method of construction.

#### *Section 635.107*

The FHWA amends 23 CFR 635.107 to clarify that the disadvantaged business enterprise program requirement will also apply to ID/IQ projects.

#### *Section 635.109*

The FHWA amends 23 CFR 635.109 to provide that State DOTs are strongly encouraged to use “suspensions of work ordered by the engineer” clauses, and may consider “differing site condition” clauses and “significant changes in the character of work” clauses, as appropriate, for contracts for ID/IQ projects.

Commenters addressed what changed conditions clause would be appropriate for ID/IQ and JOC contracts including for significant changes in the character of work. One State DOT recommended that the content of this clause be left to the discretion of the State or local contracting agency. Another State DOT recommended standard specifications. Another State DOT stated that changes should be minimal due to nature of work. It supports use of existing standard changed conditions clauses with additional specificity left to the States. A municipality recommended that the nature of any extra work should relate to a specific work order. It recommended a 10 percent threshold for higher authority approval. Another municipality provided its local job order specification, which is tailored for ID/IQ. Another commenter supported use of the standard changed condition clause of 23 CFR 635.109 and issuing a supplemental job order with pre-established prices in the contract when changed conditions are encountered. Finally, another State DOT recommended adjustments related to geography and changes due to unknown utilities, design ambiguity, and other factors. This commenter also suggested limiting the amount of changes in scope from the original contract, such as to 30 percent of the original contract.

Considering the comments, FHWA is not establishing specific requirements



relating to standardized changed conditions clauses. The regulation amends 23 CFR 635.109 to allow contracting agencies a choice regarding the inclusion of clauses in that section or clauses developed locally, as may be appropriate for the ID/IQ method. Consistent with the design-build project delivery method, the regulation encourages contracting agencies to incorporate the “suspensions of work ordered by the engineer” clauses.

#### Section 635.110

The FHWA amends 23 CFR 635.110(f) to clarify that State DOTs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of ID/IQ procurement.

#### Section 635.112

The FHWA amends 23 CFR 635.112 to indicate that the FHWA Division Administrator’s approval of the solicitation document constitutes FHWA’s approval to use the ID/IQ contracting method and approval to release the solicitation document. The amendment also provides that the State DOT must obtain the approval of the FHWA Division Administrator before issuing addenda which result in major changes to the solicitation document.

#### Section 635.114

The FHWA amends 23 CFR 635.114 to clarify that the award of a contract for an ID/IQ project and FHWA’s concurrence in such award are subject to the requirements in 23 CFR part 635 subpart F.

#### Section 635.309

The FHWA amends 23 CFR 635.309(q) to clarify what certification is required as a prerequisite to FHWA authorization of physical construction and final design activities. Since ID/IQ contracts may be awarded before the completion of the NEPA process, FHWA establishes specific certification requirements to apply to ID/IQ contracts.

### ID/IQ Procedures and Requirements

The FHWA adds a new subpart F to 23 CFR part 635 to provide the policies, requirements, and procedures relating to the use of ID/IQ contracting. With the exception of approval of State DOT ID/IQ procedures, all FHWA approval requirements established in this new subpart would be subject to assumption by the State DOT in accordance with 23 U.S.C. 106(c).

#### Section 635.601—Purpose

In 23 CFR 635.601, FHWA adds a paragraph describing that the general purpose of subpart F is to prescribe the policies, requirements, and procedures for the use of the ID/IQ contracting method.

#### Section 635.602—Definitions

In 23 CFR 635.602, FHWA establishes definitions for certain terms used in subpart F. The FHWA has found that contracting agencies and practitioners use a variety of terms to describe the components of the ID/IQ contracting method.

For clarity and simplicity of use, FHWA establishes eight definitions associated with this regulation. *Best value selection* is used to describe a process using both price and qualitative components as a basis of award of contracts. *Contracting agency* means the State DOTs, and any State or local government agency, public-private partnership, or Indian Tribe (as defined in 2 CFR part 200) that is the acting under the supervision of the State DOT and is awarding and administering an ID/IQ contract. The term *ID/IQ* refers to a method of contracting that allows an IQ of services for a fixed time. An *ID/IQ contract* is used to describe the principal contract between the contracting agency and the contractor under the ID/IQ method of contracting. The term *JOC* refers to a specific form of ID/IQ contracting, distinguished by its use of a unit price book in the solicitation and the bidder’s adjustment factors or multipliers to establish contract prices. A *JOC contract* means a type of ID/IQ contract delivered using the JOC method. The term *NEPA process* refers to the applicable environmental reviews and has the same meaning as defined in Subpart E. *Unit price book* is used to describe the document that lists construction tasks, units of measure, and unit prices in the JOC method of contracting. *Work order* is used to describe the contract document issued for a definite scope of work under an ID/IQ contract.

#### Section 635.603—Applicability

In 23 CFR 635.603, FHWA establishes that the requirements of this subpart apply to all Federal-aid construction projects except engineering and design service contracts, to which 23 CFR part 172 applies, and Federal Lands Highway contracts, to which 48 CFR subpart 16.5 applies. The requirements do not apply to other non-construction activities, such as the procurement of supplies, to which 2 CFR part 200 applies.

#### Section 635.604—ID/IQ Requirements

In 23 CFR 635.604, FHWA establishes requirements related to ID/IQ solicitations, contracts, and the ID/IQ procurement process.

##### 1. Provisions Relating to Fairness, Transparency, and Competition

In 23 CFR 635.604(a)(1), FHWA clarifies that the contracting agency may procure the ID/IQ contract using applicable State or local competitive selection procurement procedures if those procedures: (i) Comply with 23 CFR 635.604; (ii) are effective in securing competition; and (iii) do not conflict with applicable Federal laws and regulations. The requirement for free and open competition is a fundamental principle under 23 U.S.C. 112 for the procurement of all Federal-aid highway projects.

Other requirements that apply to contracting agencies’ ID/IQ procedures are discussed below. Beyond these requirements, FHWA believes that preserving contracting flexibility for contracting agencies is consistent with contracting practices used by participants in the ID/IQ SEP–14 experiments approved by FHWA and provides needed flexibility to the States to manage Federal financial assistance under 23 U.S.C. 145.

In 23 CFR 635.604(a)(2) through 635.604(a)(4), FHWA establishes several requirements that apply to contracting agencies’ ID/IQ procedures. In FHWA’s experience, the information required under 23 CFR 635.604(a)(2)–(4) is needed to have an effective, fair, and transparent procurement process. In addition, this information is typical of what many of the contracting agencies that have utilized ID/IQ under SEP–14 have included in their solicitation documents.

Responding to the ANPRM, commenters suggested procedures to ensure fairness and transparency in the selection and implementation of multiple-award ID/IQ contracts. Suggestions related to work order awards included considering contractor performance and work-load; requiring secondary bidding (or bidding for individual work orders) from all contractors in the contract pool; or offering the work order to the lowest cost contractor, subject to the contractor’s availability.

In addition, commenters recommended the solicitations and contracts clearly identify the procedures and criteria to be used by the contracting agency to award work. Commenters also recommended public posting of solicitations, selection

criteria, bidder questions and answers, bids, contract awards, and work order awards.

Commenters also addressed how authorizations to proceed with work should be given for individual work orders. One commenter recommended that the process should follow the applicable stewardship and oversight plan with FHWA. Multiple commenters indicated that in practice they issue notices to proceed once the work order is authorized. Another commenter uses a signed contract modification with the work order.

The FHWA believes the provisions established in this rulemaking enable contracting agencies to ensure fairness and transparency in the selection and implementation of both single-award and multiple-award ID/IQ contracts. Section 635.604(a)(2) requires solicitations for ID/IQ contracts to state the procedures and criteria the contracting agency will use to award an ID/IQ contract. In addition, 23 CFR 635.604(a)(3) requires that an ID/IQ contract, and any solicitation for an ID/IQ contract, include: The period of the contract; whether optional contract extensions will be used and for what period; the basis for adjusting prices in optional contract extensions; the estimated minimum and maximum quantity of services to be acquired; appropriate statements of work generally describing the services to be acquired; the procedures and selection criteria to be used to issue work orders; and the dispute resolution procedures available to awardees in cases where multiple awards are made.

To further ensure fairness and transparency, 23 CFR 635.604(a)(3)(ii) prohibits the use of Federal-aid funds for negotiated contract price adjustments on optional contract extensions.

In addition to the general requirements for ID/IQ solicitations and contracts, additional requirements for JOC solicitations and contracts are listed in 23 CFR 635.604(a)(4). The FHWA believes these requirements specific to JOC are necessary to ensure transparency and consistency.

Regarding authorizations to proceed with work for individual work orders, the comments responding to the ANPRM exhibited a variety of locally developed procedures that agencies considered successful during the SEP-14 Program. Considering this, FHWA is not requiring specific methodology for the issuance of work orders under the IFR.

## 2. Provisions Relating to Selection of Contractors

Section 635.604(a)(5) allows a contracting agency's procurement procedures to include selection of one or multiple contractors based on competitive low bid or best value selection under a single solicitation. Other than specifying that price must be included in the analysis, FHWA neither specifies nor limits the best value factors an agency may consider. For contracts awarded to multiple contractors under a single solicitation, the issuance of work orders must be based on lowest cost or lowest cost-plus time to the Government for the specified work. The FHWA requires that work orders must not be issued to contractors on a rotating basis or other non-competitive method.

Several commenters recommended that FHWA should permit multiple awards under ID/IQ contracts, which is not allowed under Notice N5060.2. One State DOT commented that multiple awards allow for greater efficiency and require competition both at contract level and the work order level, which increases competition overall. This commenter explained that robust competition existed when it experimented with this method under the SEP-14 Program. It also explained that multiple-award contracts provide flexibility to States to use certain innovative bidding practices. With multiple-award ID/IQ contracts, this commenter explained that it achieved certain efficiencies in work order transactions, increased contractor participation and competition, and completed projects more quickly. Another State DOT also supported multiple awards based on its experience and success with that method on an experimental basis under the SEP-14 Program. Another State DOT supported multiple-award contracts with individual work orders awarded based on lowest bid using prices in the initial solicitation from awarded contractors.

Another commenter argued that multiple-award contracts should be allowed to maximize the flexibility of agencies to address project-specific needs and requirements. This commenter also argued, however, that secondary bidding for individual work orders should not be required since competition on price will have already occurred at time of initial bid. This commenter argued that secondary bidding would be redundant, slow project delivery, allow for variance from the contract pricing structure, and increase administrative burden.

Other commenters supporting multiple-award contracts cited reasons that FHWA believes could potentially harm competition or violate requirements of Title 23, U.S.C. For example, one municipality stated that multiple-award contracts allow for "spreading work evenly." Another municipality referred to the ability to use rotating and round-robin selection methods under multiple-award contracts. Another commenter referred to agencies issuing orders on a rotating basis or equally distributing work to contractors. The FHWA believes these objectives are inconsistent with the statutory competition requirements under 23 U.S.C. 112.

Considering the comments, FHWA believes these provisions provide a balance of allowing flexibility to contracting agencies on procurement and selection procedures while also requiring contracting agencies to secure free and open competition. The FHWA is not prohibiting secondary bidding or bidding on individual work orders on multiple-award contracts under this IFR, but FHWA agrees it could defeat certain benefits and efficiencies gained by ID/IQ contracting. The FHWA will also not require secondary bidding for individual work orders under multiple-award contracts, provided that another competitive method of selection is used based on prices and other terms set forth in the contract.

Although FHWA is allowing multiple-award contracts, they must not be used in non-competitive ways that are inconsistent with the requirements of Title 23, U.S.C. When administering multiple-award contracts, State DOTs and other contracting agencies must continue to ensure that they comply with the requirement to secure competition effectively under 23 U.S.C. 112. To address this, the regulation provides that work orders shall not be issued to contractors on a rotating basis or other non-competitive method.

In addition to recommending FHWA permit multiple-award ID/IQ contracts, commenters also addressed whether FHWA should allow best value considerations in awarding ID/IQ contracts. All responsive comments supported allowing best value considerations.

Considering the comments, FHWA allows, but does not require, best value considerations in awarding ID/IQ contracts. Under the IFR, contracting agencies may determine the appropriate best value factors or considerations to use in combination with price. The FHWA neither specifies nor limits the best value factors an agency may consider—except that price must be

included. The FHWA also notes that best value considerations must not restrict competition.

The FHWA is aware that many contracting agencies utilize a method that monetizes construction completion time and uses that value as a factor in analyzing and awarding bids, commonly known as “A+B” bidding. The FHWA anticipates that this or similar contracting methods may be used in soliciting and awarding ID/IQ contracts in a manner consistent with the procedures set forth in the IFR.

### 3. Provisions Relating to Duration of Contract and Extension Periods

In 23 CFR 635.604(a)(6), FHWA prohibits the sum of the duration of the initial ID/IQ contract and any optional contract extensions from exceeding 5 years. The contracting agency may include a provision in the ID/IQ contract to exercise an option to extend the contract for a term that does not exceed the initial duration of the ID/IQ contract. Provided that the duration of the base contract and extension periods do not exceed 5 years, the ID/IQ contract may include multiple options and extension periods.

Most commenters argued in favor of allowing base contracts of 1–5 years with various extension options. They believed that longer contract terms and the availability of extensions allow flexibility and reduce administrative burden on States. Another State DOT argued that minimum and maximum contract lengths should not be pre-determined by regulation, and that States should be allowed to use their own processes to make those determinations. The FHWA believes the provisions in this IFR provide a balance of allowing flexibility to contracting agencies on the length of contract terms and extensions while also setting reasonable limits to account for risk, inflation, and transparency.

Section 635.604(a)(6)(i) establishes that, prior to granting a contract extension, the contracting agency must receive concurrence from the Division Administrator. The FHWA believes requiring this concurrence is consistent with the requirements of 23 U.S.C. 112. In addition, for ID/IQ contracts where prevailing wages apply under 23 U.S.C. 113, 23 CFR 635.604(a)(6)(ii) establishes that the current prevailing wage rate determination, as determined by the U.S. Department of Labor (DOL), to be in effect on the date of the execution of the contract extension shall apply to work covered under the contract extension. The FHWA believes this provision is necessary to conform with DOL policy as outlined in its All

Agency Memorandum No. 157, as clarified in the **Federal Register** on November 20, 1998, at 63 FR 64542.

Section 635.604(a)(6)(iii) provides that, for ID/IQ contracts exceeding 1 year in duration, the contracting agency may use price escalation methods, such as referring to a published index, to adjust the payment for items of work in the issuance of work orders. Such price escalation methods, however, shall not be applied to items of work when those items are separately covered under commodity price escalation clauses in the ID/IQ contract. The FHWA believes this provision is necessary to avoid improper compounding of overlapping escalation factors. For example, if a contracting agency normally applies a commodity price escalation clause based upon a published index for steel and iron items, this index would account for changes in the material’s cost relative to the time the contract was bid. The FHWA believes it would be improper and duplicative also to apply a price escalation method based on the duration of the ID/IQ contract or optional extension to steel and iron items, in this example, because changes in material costs have already been accounted for.

### 4. Provisions Relating to Certain Payments Ineligible for Federal-Aid Participation

Section 635.604(a)(7) clarifies that a contracting agency’s payment to a contractor to satisfy a minimum award provision that is not supported by eligible work is not eligible for Federal-aid participation. The FHWA recognizes some State and local procurement rules may require a minimum award provision. The FHWA anticipates rare situations where a contracting agency executes an ID/IQ contract but does not receive work from a contractor and is required to make payment to the contractor to satisfy the agency’s minimum award provision. The FHWA believes it would be improper for Federal-aid funds to participate in such a payment if insufficient eligible work is performed to support the payment.

### 5. Other Miscellaneous ID/IQ Requirements

Section 635.604(b) clarifies that the requirements of 49 CFR part 26 and the State’s approved DBE plan apply to ID/IQ contracts. The ID/IQ contracting method by its nature is less predictable regarding the total amount of procured work, as compared to traditional contracting methods. Thus, FHWA believes the regulation should provide State DOTs the option of how to apply DBE contract or project goal setting and

goal attainment, either to ID/IQ contracts in their entirety, or to individual work orders for ID/IQ contracts with single or multiple awards, or both.

Section 635.604(c) clarifies that, at the option of the State DOT, the minimum prime contractor participation requirement set forth at 23 CFR 635.116 may be applied over the entirety of the ID/IQ contract or applied to each individual work order. The solicitation shall specify the applicable requirements.

Commenters addressed how the 30 percent self-performance requirement in 23 CFR 635.116(a) would apply to ID/IQ contracts and JOC contracts. Commenters appear to believe that contracting agencies should have the discretion to determine how to meet the minimum self-performance requirement under 23 CFR 635.116(a) in this context. The FHWA agrees with these comments and establishes that the minimum self-performance requirement will continue to apply to ID/IQ contracts, but it may be applied either over the entirety of the ID/IQ contract or to each individual work order. To ensure transparency, the regulation also requires the solicitation to specify the applicable requirements related to satisfying 23 CFR 635.116(a).

In 23 CFR 635.604(d), FHWA requires that when a contracting agency’s processes or procedures use project cost to establish the assessed rate of liquidated damages under 23 CFR part 635.127, the work order cost must be used to determine the rate when liquidated damages are assessed. Since an individual work order is a smaller part of a larger ID/IQ contract, FHWA believes this clarification is necessary to reduce confusion and the disproportionate application of liquidated damages.

In 23 CFR 635.604(e), FHWA clarifies that nothing in this subpart shall be construed as prohibiting a State DOT from adopting more restrictive policies and procedures than contained herein regarding ID/IQ contracts.

### *Section 635.605—Approvals and Authorizations*

Section 635.605 outlines requirements to establish the relationship between the ID/IQ procurement process and the NEPA process. The requirements in this section are designed to protect the integrity of the NEPA decision-making process because the solicitation and award of an ID/IQ contract will often occur before the completion of the NEPA process.

Through ID/IQ projects under the SEP–14 process, FHWA found that the NEPA process often cannot be

completed until specific work locations are identified. The FHWA believes certain requirements preclude FHWA from authorizing final design and construction to proceed, or from obligating funds for final design and construction work, prior to completing the NEPA decision-making process; these requirements include 23 U.S.C. 112(c), 23 CFR 630.106, and 23 CFR 771.113(a). The FHWA thus establishes the requirements set forth in the following sections.

To call attention to the indefinite nature of the ID/IQ contracting method, 23 CFR 635.605(a)(1) stipulates that the solicitation for an ID/IQ contract may identify all, some, or none of the specific locations where construction is to be required under the contract.

To expedite project delivery, 23 CFR 635.605(a)(2) and (a)(3) allow a contracting agency to solicit and award an ID/IQ contract prior to completion of the NEPA process or processes, as applicable. In addition, FHWA requires prior concurrence of the Division Administrator for these actions, which FHWA believes is consistent with other project delivery methods and is necessary to conform with the requirements of 23 U.S.C. 112.

To protect the NEPA decision-making process, 23 CFR 635.605(a)(4) prohibits the execution of an authorization to proceed and formal project agreement under 23 CFR 630.106 for final design and construction for the portion of an ID/IQ contract for work until the NEPA process has been completed for said work.

The FHWA anticipates that, through the duration of an ID/IQ contract, additional work locations will be identified by the contracting agency and the NEPA process will be completed for these locations. To address this, 23 CFR 635.605(a)(5) allows for modifications to the formal project agreement to accommodate the additional work.

In the ANPRM, FHWA solicited input regarding the agreement estimates required under 23 CFR 635.115, which must be submitted to FHWA Division Offices for use in the preparation of project agreements. The FHWA asked whether the estimate should be of the minimum value provided under the contract, the estimate for the base contract, or the estimated maximum value under the contract including contract extensions.

The FHWA considered the widely varied responses the commenters provided as well as the requirements of 23 CFR 771.113(a) regarding the relationship between the completion of required environmental reviews and the obligation of funds for final design and

construction. Section 635.605(a)(6) establishes that the agreement estimate for final design or physical construction of an ID/IQ contract must not exceed the actual or best estimated costs of items necessary to complete the scope of work considered in applicable work orders and in the completed NEPA processes since the estimate serves as the basis for the obligation of funds pursuant to 23 CFR 630.106(a)(3), and to satisfy the requirements of 23 CFR 771.113(a). The estimate also must be adjusted as necessary as set forth under 23 CFR 630.106(a)(4).

The FHWA recognizes that a contracting agency may use a project estimate developed for planning purposes under 23 CFR part 450 as it develops its ID/IQ solicitation. However, for projects to which NEPA applies, the allowable amount of an agreement estimate for final design or physical construction of an ID/IQ contract is determined after the NEPA process is complete.

In 23 CFR 635.605(b)(1), subject to the requirements in subpart F, the contracting agency may request Federal participation in the costs associated with an ID/IQ contract, or portion of a contract. In such cases, FHWA's construction contracting requirements will apply to all ID/IQ contract work orders if any ID/IQ contract work orders are funded with Title 23, U.S.C. funds. This provision is consistent with other project delivery methods. The FHWA believes this provision is necessary to ensure the ID/IQ contract is compliant with applicable Federal requirements, even if some portion of that contract's expenses are funded with non-Federal-aid funds. Further, any expenses incurred before FHWA authorization shall not be eligible for reimbursement except as may be determined in accordance with 23 CFR 1.9.

The FHWA anticipates contracting agencies may use an ID/IQ contract for multiple purposes during the contract period, such as for both planned work and emergency work. These situations may include separate Federal funding sources with differing Federal share payable requirements. Section 635.605(b)(2) permits contracting agencies such flexibility while also requiring the applicable Federal share requirements for each work order be specified in the relevant project agreements.

#### *Section 635.606—ID/IQ procedures*

In 23 CFR 635.606(a), a State DOT must submit its proposed ID/IQ procurement procedures to the Division Administrator for review and approval. Following approval by the Division

Administrator, any subsequent changes in procedures and requirements are also subject to approval by the Division Administrator before they are implemented. This review and approval is consistent with 23 U.S.C. 112(a), and is necessary to facilitate efficient administrative oversight of a State DOT's ID/IQ procurement process for compliance with Federal requirements. The FHWA's approval of the State DOT's process will eliminate the need for FHWA to review and evaluate the State DOT's ID/IQ procurement process on a project-by-project basis, subject to the terms of the Stewardship and Oversight Agreement between FHWA and the State DOT. This review and approval is consistent with other project delivery methods. Other contracting agencies may follow approved State DOT procedures in their State or their own procedures if approved by both the State DOT and FHWA. The Division Administrator's approval of ID/IQ procurement procedures is a program-level action and may not be delegated or assigned to the State DOT.

The FHWA establishes the parameters for the Division Administrator's approval of the State DOT's ID/IQ procedures. Under 23 CFR 635.606(b), the Division Administrator would be required to review a State DOT's ID/IQ procedures to verify that the procedures do not operate to restrict competition and conform to the requirements of applicable Federal regulations.

In 23 CFR 635.606(c), FHWA requires that ID/IQ procurement procedures document several procedures and responsibilities. The procedures and responsibilities listed relate to changes in this regulation and have been identified by FHWA as being sufficiently different under ID/IQ procurement when compared to other project delivery methods. As such, FHWA believes these procedures and responsibilities warrant having a documented and approved process to ensure compliance with applicable Federal requirements.

The FHWA is aware that some agencies combine the design-build contracting method with ID/IQ contracting. One commenter recommended that FHWA should allow a small percentage of design work to be performed under ID/IQ contracts when needed. In 23 CFR 635.606(d), FHWA clarifies that, subject to the approval of the Division Administrator as described in 23 CFR 635.606(a), contracting agencies may incorporate the design-build contracting method with ID/IQ contracts. In addition to the requirements of subpart F, the contracting agency must include

procedures as needed to ensure compliance with 23 CFR part 636 and related requirements.

### Request for Comments on Specific Issues

Amendments to FHWA's current policies for reviewing and approving ID/IQ projects are necessary to allow this contracting technique on a permanent basis. To assist the Agency in this effort, FHWA seeks public comments on the following specific questions in addition to comments on its attempt to quantify cost savings from the regulation and the regulatory text:

1. *Section 635.604(a)(3)(iii)*: To ensure transparency and effective competition, should FHWA require contracting agencies to provide estimated minimum and maximum quantities of services in both ID/IQ solicitations and contracts? Or should FHWA require such estimates for any other reason?

2. *Section 635.604(a)(3)(iii)*: Should FHWA require contracting agencies to specify in ID/IQ solicitations and contracts the estimated maximum or minimum quantities that may be expected under each work order?

3. *Section 635.604(a)(5)*: When using multiple-award contracts, what criteria should, or should not be used, to issue work orders?

4. *Section 635.604(a)(5)*: When using multiple-award contracts, are typical cause and convenience termination clauses sufficient to remove contractors from the pool of those to be considered when issuing work orders, when those contractors are not meeting the terms of the contract?

5. *Section 635.605*: What procedures can be implemented to review efficiently and approve small, preventive maintenance projects that provide for a very limited scope of work at numerous locations (e.g., impact attenuator repair, guardrail repair, pavement marking projects, etc.)?

6. *Section 635.606(d)*: When using ID/IQ procedures within a design-build contract, what procedures should be in place to ensure compliance with this subpart, 23 CFR part 636, and related requirements?

7. In this IFR, FHWA attempted to quantify cost savings resulting from increasing administrative efficiency but lacked sufficient data to quantify cost savings based on: (a) Expediting project delivery; and (b) reducing project or construction costs. Compared to a baseline scenario under which ID/IQ contracting is not allowed, and apart from cost savings based on increasing administrative efficiency (as addressed in this IFR), do you expect State DOTs to achieve additional cost savings based

on (a) or (b)? If so, how much? What is your estimate based on? What data, if any, is available and may be used to support and quantify any such cost savings?

8. Assuming ID/IQ contracting was not allowed (either experimentally or operationally), approximately how many traditional construction contracts would a State DOT process in a typical year? Of those contracts, what percentage do you anticipate the State DOT in your State would process using the ID/IQ contracting method if allowed in the form required by this IFR?

9. Approximately how long does it take State DOTs to administer a traditional contract as discussed in Question 8?

10. Approximately how long does it take to administer an ID/IQ contract as discussed in Question 8?

### Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the closing date will be filed in the docket and will be considered to the extent practicable, but FHWA may issue a final rule at any time after the close of the comment period. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment closing date, and interested persons should continue to examine the docket for new material.

The FHWA has determined that prior notice and opportunity for comment are unnecessary under 5 U.S.C. 553(b)(3)(B) because this IFR does not impose any new obligation or requirement on the States or highway contractors. Instead it simply enables ID/IQ contracting for Federal-aid highway construction on a permanent basis and thus provides benefits to State DOTs and other contracting agencies including expediting project delivery, increasing administrative efficiency, reducing project costs, and increasing flexibility for State DOTs to use Federal-aid funds on certain projects. Furthermore, prior notice and an opportunity for public comment is contrary to the public interest because allowing States DOTs to utilize this method of contracting as soon as possible would promote economic recovery. Because of the Coronavirus Disease (COVID-19) public health emergency, and in response to E.O. 13924, "Regulatory Relief to Support Economic Recovery" (issued on May 22, 2020), FHWA believes this IFR would promote job creation and

economic growth. Many State DOTs and Local Public Agencies are already familiar with this method of contracting and could begin using it in a very short period of time. ID/IQ contracting also offers an opportunity to streamline procurement through bundling similar-type projects, which reduces the contracting agencies' administrative overhead by having fewer contracts to prepare, advertise, and award. In addition, ID/IQ would provide more flexibility to States that are struggling with reduced budgets and programming of projects due to COVID-19 issues.

For these reasons, FHWA finds good cause to forgo further procedures for notice and opportunity for comment under 5 U.S.C. 553(b)(3)(B). For these same reasons, this IFR is effective upon its date of publication under 5 U.S.C. 553(d)(3) and, therefore, is exempt from the 30-day delayed effective date requirement of that section for these same reasons. Nonetheless, this IFR includes a 60-day comment period. The FHWA will consider and address any submitted comments in a final rule that will follow this IFR.

### Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), and DOT Policies and Procedures for Rulemaking (49 CFR Part 5, Subpart B)

The FHWA has determined that this action would not be a significant regulatory action within the meaning of Executive Order (E.O.) 12866, and within the meaning of DOT's Policies and Procedures for Rulemaking (49 CFR part 5, subpart B). This action complies with EOs 12866, 13563, and 13771 to improve regulation. The FHWA anticipates that the economic impact of this rulemaking would be minimal. The FHWA anticipates that the rule would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Although FHWA has determined that this action would not be a significant regulatory action, this action is expected to be an E.O. 13771 deregulatory action because it would generate cost savings. These cost savings, measured in 2019 dollars and discounted at 7 percent, are expected to be \$3.4 million per year. These cost savings are generated by allowing ID/IQ contracting on a permanent basis. States' experience

shows that ID/IQ contracting can lead to cost savings due to increased administrative efficiency, faster project delivery, and reduced project costs. By granting States the flexibility to use ID/IQ contracting, they can achieve the associated cost savings.

Currently, as explained in more detail above, there are two methods available to approve ID/IQ contracts for use on Federal-aid highway construction projects:

1. *Special Experimental Project Number 14*: Under the SEP-14 Program, contracting agencies interested in testing an innovative contracting technique submit project-specific (or programmatic) work plans to FHWA for their implementation. The FHWA Division Office evaluates the work plan, coordinates with FHWA Headquarters, and, if it finds the work plan to be acceptable, FHWA approves the use of the technique on a temporary basis for a project or group of pilot projects.

2. *FHWA Notice N5060.2*: Under Notice N5060.2, an ID/IQ contract not requiring advance approval under the SEP-14 Program must satisfy certain conditions, including that the contract must be: Low-cost (the total value of task or work orders may not exceed \$2,000,000 per year on average over the contract term); short-term (a base contract of 1 to 2 years); awarded by competitive bidding to the lowest responsive bidder; a single-award contract; qualified for a NEPA categorical exclusion listed under 23 CFR 771.117; and compliant with certain other laws and regulations related to Federal-aid construction. Additional requirements are detailed in FHWA Notice 5060.2.

These approval methods are only authorized experimentally and on a temporary basis. To estimate the cost savings from operationalizing ID/IQ contracting on a permanent basis, FHWA compared a baseline scenario under which ID/IQ contracting is undertaken for 32 contracts per year under the SEP-14 Program, based on the historical record, with the scenario established by the rule. The SEP-14 Program historical average assumes that approximately two to three States actively use ID/IQ contracting each year. Some States have also sought approval for individual contracts.<sup>4</sup>

<sup>4</sup> The survey responses in Appendix A of NCHRP Synthesis 473 were averaged to determine that each State surveyed undertakes approximately 10.5 contracts per year. FHWA assumes this average was consistent for States undertaking ID/IQ using the SEP-14 Program. The full listing of ID/IQ SEP-14 Program projects can be found at: <https://www.fhwa.dot.gov/programadmin/contracts/sep14list.cfm>.

To conduct the analysis, FHWA used the evaluations of ID/IQ contracts required under the SEP-14 Program, ANPRM comments, and responses to *NCHRP Synthesis 473: Indefinite Delivery/Indefinite Quality Contracting Practices*. The estimates used within the analysis are based on this small sample of data. The FHWA welcomes additional feedback on potential impacts of using ID/IQ contracts.

The FHWA estimated cost savings over an 11-year analysis period, with year one modeled as an implementation year, assuming lower than normal contracting volume as contracting processes take time to plan and initiate in general, and two 5-year contract cycles. Elapsed contracting times, based on agency estimates, were converted to labor hours, assuming a standard 40-hour work week. These labor hours were monetized using a mix of State employee wage rates.<sup>5</sup> To account for the cost of employer provided benefits, wage rates were multiplied by a factor of 1.43.<sup>6</sup>

The NCHRP Synthesis 473 included survey responses for how many new ID/IQ contracts are awarded each year by each State agency. The average of these responses was multiplied by 50 States, assuming all States will implement ID/IQ contracting using the rule.<sup>7</sup> One major advantage of ID/IQ contracting is the ability to issue a work order instead of making a separate, time-intensive traditional contract. The average number of work orders per contract (9) reported by agencies was multiplied by expected domestic ID/IQ contracts annually to estimate total work orders issued per year. Based on data presented within NCHRP Synthesis 473, approximately 4 percent of work orders will be processed separately using ID/

<sup>5</sup> BLS May 2018 National Industry-Specific Occupational Employment and Wage Estimates NAICS 999200—State Government, excluding schools and hospitals (OES Designation). Three employees are expected to work on the contracts: Buyers and Purchasing Agents (13-1020), Purchasing Manager (11-3061), and Procurement Clerk (43-3061). The weighted average wage rate is \$26.65.

<sup>6</sup> BLS Employer Costs for Employee Compensation, December 2018, Table 5 (page 9) State and Local Government, Management, Professional, and Related Occupations. For this group, 70.0 percent of employee compensation is wages and the remainder is the cost of benefits, which suggests factoring wages by 1.43 (100%/70%) to estimate the total cost of compensation. The adjusted weighted average wage rate is \$38.12.

<sup>7</sup> The survey responses to question 8, catalogued in Appendix A of NCHRP Synthesis 473 were averaged to determine that each State surveyed undertakes approximately 10.5 contracts per year.

<sup>8</sup> The survey responses to question 8, catalogued in Appendix A of NCHRP Synthesis 473 were averaged to determine that each State surveyed undertakes approximately 10.5 contracts per year.

IQ, rather than with traditional contracts.<sup>8</sup> Furthermore, the number of work orders was further scaled down by 30 percent because FHWA assumes smaller work orders would not have been done as traditional contracts. The cost savings associated with avoided traditional contracts was monetized using this conversion rate, and the estimated elapsed time difference between issuing a work order versus a new traditional contract. The estimate incorporates a modest assumed growth rate of 1 percent for contracts and work orders per contract annually.

The FHWA estimates that an average traditional contract takes 911 hours to complete, whereas an ID/IQ contract takes 272 hours, leading to total time savings of 639 hours per contract. The FHWA assumes administrative time savings from this action will account for approximately 25 percent, or 160 hours (639 hours × 0.25), of the shortened contract time. In addition to the administrative savings per contract, a small amount of time savings is estimated to avoid the need for new contracts altogether, based on having ID/IQ contracts in place. The FHWA estimates administrative time savings of approximately 25 percent of the traditional contract time, or 228 hours saved per avoided contract (911 hours × 0.25).

The per contract time savings were multiplied by the number of contracts and wage rates to determine total savings. For example, in 2021, FHWA assumes 499 ID/IQ contracts will lead to 79,695 hours saved (499 contracts × 160 hours) and 57 avoided traditional contracts will lead to 12,980 hours saved (57 contracts × 228 hours), for total administrative time savings of 92,675 hours (79,695 hours + 12,980 hours). Dollars saved were calculated in a similar manner by applying wage rates to the administrative time savings. In 2021 this led to approximately \$3.0 million in savings generated by using ID/IQ contracts and \$505,000 in savings, leading to total 2021 cost savings of approximately \$3.5 million. In future years FHWA assume the number of contracts will grow by approximately 1 percent.

Aggregating over the 11-year analysis period leads to total time savings of approximately 1.0 million hours from the use of ID/IQ contracts. This leads to total undiscounted cost saving of \$38.8 million. When discounted at 7 percent and 3 percent present value, the cost savings equal approximately \$25.8 million and \$32.3 million, respectively.

<sup>8</sup> Minnesota DOT reports that 1 of 24 work orders (4 percent) would be eligible for ID/IQ.

Table 1 shows these costs savings for the analysis period.

TABLE 1—ID/IQ ADMINISTRATIVE COST SAVINGS

Year	Expected new ID/IQ contracts	Expected traditional contracts avoided	Hours saved	Total cost savings (undiscounted)	Total cost savings (discounted at 7%)	Total cost savings (discounted at 3%)
2020 .....	231	26	42,818	\$1,632,031	\$1,525,263	\$1,584,496
2021 .....	499	57	92,675	3,532,317	3,085,263	3,329,548
2022 .....	504	58	93,733	3,572,637	2,916,336	3,269,469
2023 .....	509	59	94,804	3,613,461	2,756,692	3,210,513
2024 .....	514	61	95,888	3,654,796	2,605,819	3,152,659
2025 .....	519	62	96,986	3,696,648	2,463,233	3,095,884
2026 .....	524	63	98,098	3,739,025	2,328,477	3,040,170
2027 .....	530	64	99,224	3,781,935	2,201,121	2,985,495
2028 .....	535	66	100,364	3,825,385	2,080,756	2,931,839
2029 .....	540	67	101,518	3,869,383	1,966,998	2,879,184
2030 .....	546	68	102,687	3,913,936	1,859,483	2,827,511
<b>Total .....</b>	<b>5,452</b>	<b>651</b>	<b>1,018,794</b>	<b>38,831,555</b>	<b>25,789,440</b>	<b>32,306,768</b>

In addition to the cost savings that have been quantified here, there may be additional positive impacts from the rulemaking related to allowing ID/IQ contracts. Many of the SEP-14 evaluations claim that, along with administrative savings, the agencies saw savings in the construction phase, getting lower prices than they were quoted with traditional contracting. These construction cost savings were not quantified but are likely to be significant and will lead to increased efficiency and quickened construction timelines.

Although FHWA has undertaken various efforts to grant States the flexibility to use ID/IQ contracts, specifically through the SEP-14 Program, to the extent that the current rules and guidance discourage their use, this rule removes those barriers.

**Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this action on small entities and has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. The amendment addresses obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

**Unfunded Mandates Reform Act of 1995**

This rule would not impose unfunded mandates as defined by the Unfunded

Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, Tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any 1 year (2 U.S.C. 1532 *et seq.*). In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

**Executive Order 13132 (Federalism)**

This action has been analyzed in accordance with the principles and criteria contained in E.O. 13132 dated August 4, 1999, and FHWA has determined that this action would not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this action would not preempt any State law or regulation or affect the States’ ability to discharge traditional State governmental functions.

**Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

**Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that the rule does not contain collection of information requirements for the purposes of the PRA.

**National Environmental Policy Act**

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and has determined that this action would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

**Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this action under E.O. 13175, dated November 6, 2000, and believes that the action would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal laws. The rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and would not impose any direct compliance requirements on Indian Tribal governments. To the extent that Tribes utilize these regulations, they would be expected to derive the same benefits identified above. Therefore, a Tribal summary impact statement is not required.

**Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

**List of Subjects**

23 CFR part 630

Government contracts, grant programs-transportation, highway safety, highways and roads, reporting and recordkeeping requirements, traffic regulations.

23 CFR part 635

Grant programs-transportation, highways and roads, reporting and recordkeeping requirements.

Nicole R. Nason,

Administrator, Federal Highway Administration.

For the reasons stated in the preamble, FHWA amends title 23, Code of Federal Regulations, parts 630 and 635 as follows:

**PART 630—PRECONSTRUCTION PROCEDURES**

■ 1. Revise the authority citation for part 630 to read as follows:

**Authority:** 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1303 of Pub. L. 112–141, 126 Stat. 405; Sec. 1501 and 1503 of Pub. L. 109–59, 119 Stat. 1144; Pub. L. 105–178, 112 Stat. 193; Pub. L. 104–59, 109 Stat. 582; Pub. L. 97–424, 96 Stat. 2106; Pub. L. 90–495, 82 Stat. 828; Pub. L. 85–767, 72 Stat. 896; Pub. L. 84–627, 70 Stat. 380; 23 CFR 1.32 and 49 CFR 1.85.

**Subpart A—[Amended]**

■ 2. In subpart A, revise all references to “STD” to read “State DOT”.

■ 3. Amend § 630.106 by revising the first sentence of paragraph (a)(1) and adding paragraph (a)(9) to read as follows:

**§ 630.106 Authorization to proceed.**

(a)(1) The State Department of Transportation (State DOT) must obtain an authorization to proceed from the FHWA before beginning work on any Federal-aid project. \* \* \*

(9) For Indefinite Delivery/Indefinite Quantity projects, the execution or modification of the project agreement for final design or physical construction, and authorization to proceed, shall not

occur until after the completion of the NEPA process.

\* \* \* \* \*

■ 4. Amend § 630.112 by revising paragraphs (c)(3) and (4) to read as follows:

**§ 630.112 Agreement provisions.**

\* \* \* \* \*

(c) \* \* \*

(3) *Drug-free workplace.* By signing the project agreement, the State DOT agrees to maintain a drug-free workplace, identify all known workplaces under Federal awards, and fulfill other responsibilities required by 49 CFR part 32.

(4) *Suspension and debarment verification.* By signing the project agreement, the State DOT agrees to verify that contractors are not excluded through suspension or debarment, as required by 2 CFR parts 180, subpart C, and 1200.

\* \* \* \* \*

**Subpart B—Plans, Specifications, and Estimates**

■ 5. Amend § 630.205 by revising paragraphs (d) and (e) to read as follows:

**§ 630.205 Preparation, submission, and approval.**

\* \* \* \* \*

(d) The State DOT shall be advised of approval of the PS&E by the FHWA.

(e) No project or part thereof for actual construction shall be advertised for contract nor work commenced by force account until the PS&E has been approved by the FHWA and the State DOT has been so notified, except in the case of an Indefinite Delivery/Indefinite Quantity project conforming to the requirements of 23 CFR part 635 subpart F.

**PART 635—CONSTRUCTION AND MAINTENANCE**

■ 6. The authority citation for part 635 continues to read as follows:

**Authority:** Sections 1525 and 1303 of Pub. L. 112–141, Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041(a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

■ 7. In part 635, revise all references to “STD” to read “State DOT”.

**Subpart A—Contract Procedures**

■ 8. Amend § 635.102, by adding in alphabetical order the definition of “Indefinite Delivery/Indefinite Quantity (ID/IQ) Project” and revising the definition of “State Department of

Transportation (State DOT)” to read as follows:

**§ 635.102 Definitions.**

\* \* \* \* \*

*Indefinite Delivery/Indefinite Quantity (ID/IQ) Project* means a project to be developed using one or more ID/IQ contracts.

\* \* \* \* \*

*State department of transportation (State DOT)* means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction. The term “State” should be considered equivalent to State DOT if the context so implies. In addition, State Highway Agency (SHA), State Transportation Agency (STA), State Transportation Department, or other similar terms should be considered equivalent to State DOT if the context so implies.

\* \* \* \* \*

■ 9. Amend § 635.104 by adding a new paragraph (e) to read as follows:

**§ 635.104 Method of construction.**

\* \* \* \* \*

(e) In the case of an ID/IQ project, the requirements of subpart F of this part and the appropriate provisions pertaining to the ID/IQ method of contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the ID/IQ delivery method.

■ 10. Amend § 635.107 by revising paragraph (b) to read as follows:

**§ 635.107 Participation by disadvantaged business enterprises.**

\* \* \* \* \*

(b) In the case of a design-build, a CM/GC, or an ID/IQ project funded with title 23 funds, the requirements of 49 CFR part 26 and the State’s approved DBE plan apply.

■ 11. Amend § 635.109 by adding paragraph (d) to read as follows:

**§ 635.109 Standardized changed condition clauses.**

\* \* \* \* \*

(d) For ID/IQ projects, State DOTs are strongly encouraged to use “suspensions of work ordered by the engineer” clauses, and may consider “differing site condition” clauses and “significant changes in the character of work” clauses, as appropriate.

■ 12. Amend § 635.110 by revising paragraph (e) and the first sentence of paragraph (f) to read as follows:

**§ 635.110 Licensing and qualification of contractors.**

\* \* \* \* \*



(e) Contractors who are currently suspended, debarred or voluntarily excluded under 2 CFR parts 180 and 1200, or otherwise determined to be ineligible, shall be prohibited from participating in the Federal-aid highway program.

(f) In the case of design-build, CM/GC, and ID/IQ projects, the State DOTs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of procurement.

\* \* \* \* \*

■ 13. Amend § 635.112 by revising paragraph (g) and adding paragraph (k) to read as follows:

**§ 635.112 Advertising for bids and proposals.**

\* \* \* \* \*

(g) The State DOT shall include the lobbying certification requirement pursuant to 49 CFR part 20 and the requirements of 2 CFR parts 180 and 1200 regarding suspension and debarment certification in the bidding documents.

\* \* \* \* \*

(k) In the case of an ID/IQ project, the FHWA Division Administrator's approval of the solicitation document will constitute FHWA's approval to use the ID/IQ contracting method and approval to release the solicitation document. The State DOT must obtain the approval of the FHWA Division Administrator before issuing addenda which result in major changes to the solicitation document.

■ 14. Amend § 635.114 by adding paragraph (m) to read as follows:

**§ 635.114 Award of contract and concurrence in award.**

\* \* \* \* \*

(m) In the case of an ID/IQ project, the ID/IQ contract shall be awarded in accordance with the solicitation document. See subpart F of this part for ID/IQ project approval procedures.

**§ 635.118 [Amended]**

■ 15. Amend § 635.118 by removing "49 CFR part 18" and adding in its place "2 CFR 200.333".

**§ 635.123 [Amended]**

■ 16. Amend § 635.123(b) by removing "49 CFR part 18" and adding in its place "2 CFR 200.333".

**Subpart C—Physical Construction Authorization**

■ 17. Amend § 635.309 by adding paragraph (q) to read as follows:

**§ 635.309 Authorization.**

\* \* \* \* \*

(q) In the case of an ID/IQ project, FHWA may authorize advertisement of the solicitation document prior to approving the PS&E. However, FHWA's project authorization for final design and physical construction will not be issued until the following conditions have been met:

(1) All projects must conform with the statewide and metropolitan transportation planning requirements (23 CFR part 450).

(2) All projects in air quality nonattainment and maintenance areas must meet all transportation conformity requirements (40 CFR parts 51 and 93).

(3) The NEPA process has been concluded as described in § 635.605.

(4) A statement is received from the State that either all ROW, utility, and railroad work has been completed or that all necessary arrangements will be made for the completion of ROW, utility, and railroad work.

■ 18. Add subpart F, consisting of §§ 635.601—635.606, to read as follows:

**Subpart F—Indefinite Delivery/ Indefinite Quantity (ID/IQ) Contracting**

Sec.

- 635.601 Purpose.
- 635.602 Definitions.
- 635.603 Applicability.
- 635.604 ID/IQ Requirements.
- 635.605 Approvals and authorizations.
- 635.606 ID/IQ procedures.

**§ 635.601 Purpose.**

The regulations in this subpart prescribe policies, requirements, and procedures relating to the use of the ID/IQ method of contracting on Federal-aid construction projects.

**§ 635.602 Definitions.**

As used in this subpart:

*Best value selection* means any selection process in which proposals contain both price and qualitative components and award of the contract is based upon a combination of price and qualitative considerations. Qualitative considerations may include past performance, timeliness, reliability, experience, work quality, safety, or other considerations.

*Contracting agency* means the State department of transportation (State DOT), and any State or local government agency, public-private partnership, or Indian tribe (as defined in 2 CFR part 200) that is the acting under the supervision of the State DOT and is awarding and administering an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract.

*ID/IQ* means a method of contracting that allows an indefinite quantity of

services for a fixed time. This method is used when a contracting agency anticipates a recurring need but has not determined, above a specified minimum, the precise quantities of services that it will require during the contract period. Contractors bid unit prices for estimated quantities of standard work items, and work orders are used to define the location and quantities for specific work.

*ID/IQ contract* means the principal contract between the contracting agency and the contractor. Contracting agencies may use other names for ID/IQ contracts including job order contracting (JOC) contracts, master contracts, on-call contracts, push-button contracts, design-build ID/IQ contracts, design-build push button contracts, stand-by contracts, or task order contracts.

*JOC, or Job order contracting*, means a form of ID/IQ contracting that uses a unit price book in the solicitation and the bidder's adjustment factors or multipliers to establish contract prices.

*JOC contract* means a type of ID/IQ contract delivered using the JOC method. Requirements for ID/IQ contracts apply to JOC contracts unless otherwise specified in this subpart.

*NEPA process* has the same meaning as defined in § 635.502 of this part.

*Unit price book* means a book, guide, list, or similar document which includes defined construction tasks, and for each task, includes a unit of measure and a preset unit price.

*Work order* means the contract document issued for a definite scope of work under an ID/IQ contract. It defines the location, time, and scope of work required by the contracting agency. It also defines required pay items, quantities, and unit prices, as applicable. Contracting agencies may use other names for work orders including job orders, service orders, task orders, or task work orders.

**§ 635.603 Applicability.**

(a) Except as provided in paragraph (b) of this section, the provisions of this subpart apply to all Federal-aid construction projects.

(b) This subpart does not apply to engineering and design service contracts, to which 23 CFR part 172 applies, or Federal Lands Highway contracts, to which 48 CFR subpart 16.5 applies.

**§ 635.604 ID/IQ Requirements.**

(a) *Procurement requirements.*

(1) The contracting agency may procure the ID/IQ contract using applicable State or local competitive selection procurement procedures if those procedures:

(i) Comply with this section;

(ii) Are effective in securing competition; and

(iii) Do not conflict with applicable Federal laws and regulations.

(2) The solicitation for an ID/IQ contract shall state the procedures and criteria the contracting agency will use to award the ID/IQ contract.

(3) In addition to the requirements set forth under (a)(2), the ID/IQ contract, and any solicitation for an ID/IQ contract, must:

(i) Specify the period of the contract, including the number of optional contract extensions and the period for which the contracting agency may extend the contract under each optional extension.

(ii) Specify the basis, such as a published index, and procedure to be used for adjusting prices for optional contract extensions when optional contract extensions are included. Negotiated contract price adjustments for optional contract extensions are not eligible for Federal-aid participation.

(iii) Specify the estimated minimum and maximum quantity of services the contracting agency will acquire under the contract. The ID/IQ contract may also specify estimated minimum or maximum quantities that the contracting agency may order under each work order.

(iv) Include appropriate statements of work, specifications, or other descriptions that reasonably and accurately describe the general scope, nature, complexity, and purpose of the services the contracting agency will acquire under the contract.

(v) State the procedures that the contracting agency will use in issuing work orders, and, if multiple awards may be made, state the procedures and selection criteria that the contracting agency will use to provide awardees a fair opportunity to be considered for each work order.

(vi) Include the contracting agency's dispute resolution procedures available to awardees if multiple awards may be made.

(4) In addition to the requirements set forth under (a)(3), a JOC contract shall:

(i) Use a unit price book to contain or reference the information described under (a)(3)(iv).

(ii) Include the unit price book both in the contract and the solicitation.

(iii) Include prices adjusted by the contractor's adjustment factors or multipliers for each item in the unit price book.

(5) The contracting agency's procurement procedures may include selection of one or multiple contractors based on competitive low bid or best

value selection under a single solicitation. For contracts awarded to multiple contractors under a single solicitation, the issuance of work orders must be based on lowest cost or lowest cost plus time to the government for the specified work. Work orders shall not be issued to contractors on a rotating basis or other non-competitive method.

(6) The sum of the duration of the initial ID/IQ contract and any optional contract extensions shall not exceed five years. The contracting agency may include a provision in the ID/IQ contract to exercise an option or options to extend the contract for a term or terms such that the duration of each optional contract extension does not exceed the initial duration of the ID/IQ contract.

(i) Prior to granting a contract extension, the contracting agency must receive concurrence from the Division Administrator.

(ii) For ID/IQ contracts where prevailing wages apply under 23 U.S.C. 113, the current prevailing wage rate determination as determined by the U.S. Department of Labor in effect on the date of the execution of the contract extension shall apply to work covered under the contract extension.

(iii) For ID/IQ contracts exceeding one year in duration, the contracting agency may use price escalation methods, such as referring to a published index, to adjust the payment for items of work in the issuance of work orders. Such price escalation methods, however, shall not be applied to items of work when those items are separately covered under commodity price escalation clauses in the ID/IQ contract.

(7) Contracting agency payment to a contractor to satisfy a minimum award provision that is not supported by eligible work is not eligible for Federal-aid participation.

(b) *Participation by disadvantaged business enterprises.* The requirements of 49 CFR part 26 and the State's approved Disadvantaged Business Enterprise (DBE) plan apply to ID/IQ contracts. At the option of the State DOT, DBE contract or project goal setting and goal attainment may apply to ID/IQ contracts in their entirety, or to individual work orders for ID/IQ contracts with single or multiple awards, or both. The solicitation for ID/IQ contracts shall specify the applicable requirements.

(c) *Subcontracting.* At the option of the State DOT, the minimum prime contractor participation requirement set forth at § 635.116 may be applied over the entirety of the ID/IQ contract or applied to each individual work order.

The solicitation shall specify the applicable requirements.

(d) *Liquidated damages.* When a contracting agency's processes or procedures use project cost to establish the assessed rate of liquidated damages under § 635.127, the work order cost shall be used to determine the rate when liquidated damages are assessed.

(e) *Applicable State procedures.*

Nothing in this subpart shall be construed as prohibiting a State DOT from adopting more restrictive policies and procedures than contained herein regarding ID/IQ contracts.

#### § 635.605 Approvals and authorizations.

(a) *Advertisement, award, and the relationship to NEPA.*

(1) The solicitation for an ID/IQ contract may identify all, some, or none of the specific locations where construction is to be required under the ID/IQ contract.

(2) With prior concurrence of the Division Administrator, the contracting agency may advertise the solicitation for an ID/IQ contract prior to the completion of the NEPA process.

(3) With prior concurrence of the Division Administrator, the contracting agency may award an ID/IQ contract prior to the completion of the NEPA process.

(4) An authorization to proceed, or formal project agreement under § 630.106 of this chapter for an ID/IQ contract, shall not be issued or executed for final design or physical construction for work until the NEPA process has been completed for said work. An authorization or agreement under this paragraph may apply to work in multiple locations.

(5) With the approval of the Division Administrator, the formal project agreement under § 630.106 of this chapter for final design or physical construction under an ID/IQ contract may be amended as necessary as additional work locations are identified and the NEPA process is completed for the additional work locations.

(6) The agreement estimate for final design or physical construction required for an ID/IQ contract under § 635.115 shall not exceed the actual or best estimated costs of items necessary to complete the scope of work considered in applicable work orders and in the completed NEPA processes as described in paragraphs (4) and (5) of this subsection. The estimate shall be adjusted as necessary as set forth under § 630.106(a)(4) of this chapter.

(b) *Federal participation.*

(1) Subject to the requirements in this subpart, the contracting agency may request Federal participation in the

costs associated with an ID/IQ contract, or portion of a contract. In such cases, FHWA's construction contracting requirements will apply to all ID/IQ contract work orders if any ID/IQ contract work orders are funded with Title 23, U.S.C. funds. Any expenses incurred before FHWA authorization shall not be eligible for reimbursement except as may be determined in accordance with § 1.9 of this chapter.

(2) The applicable Federal share for each work order shall be specified in the relevant project agreement.

#### § 635.606 ID/IQ procedures.

(a) *FHWA approval.* The State DOT shall submit its proposed ID/IQ procurement procedures to the Division Administrator for review and approval. Following approval by the Division Administrator, any subsequent changes in procedures and requirements shall also be subject to approval by the Division Administrator before they are implemented. Other contracting agencies may follow approved State DOT procedures in their State or their own procedures if approved by both the State DOT and FHWA. The Division Administrator's approval of ID/IQ procurement procedures may not be delegated or assigned to the State DOT.

(b) *Competition.* ID/IQ procurement procedures shall effectively secure competition in the judgment of the Division Administrator.

(c) *Procurement requirements.* ID/IQ procurement procedures shall include the following procedures and responsibilities:

- (1) Review and approval of ID/IQ solicitations;
- (2) Review and approval of work item descriptions and specifications;
- (3) Approval to advertise solicitations;
- (4) Concurrence with ID/IQ contract awards to single or multiple contractors;
- (5) Approval of and amendments to formal project agreements and authorizations to proceed pursuant to § 630.106 of this chapter;
- (6) Issuance of work orders;
- (7) Approval of and amendments to agreement estimates pursuant to § 635.115;
- (8) Changed conditions clauses;
- (9) Approval of contract changes and extra work pursuant to § 635.120; and
- (10) Other procedures as needed to ensure compliance with other requirements in this subpart and under Title 23, U.S.C. and its implementing regulations and 49 CFR part 26.

(d) *Design-build and ID/IQ.* Subject to the approval of the Division Administrator, as described in § 635.606(a), contracting agencies may incorporate the design-build contracting

method with ID/IQ contracts. In addition to the requirements of this section, the contracting agency shall include procedures as needed to ensure compliance with part 636 of this chapter and related requirements.

[FR Doc. 2020-23675 Filed 11-13-20; 8:45 am]

BILLING CODE 4910-22-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; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations; correction.

**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 16, 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) contain errors that need to be corrected.

#### Correction of Publication

■ Accordingly, the final regulations (TD 9909) that are the subject of FR Doc. 2020-18543, appearing on page 53068

in the *Federal Register* of August 27, 2020, are corrected as follows:

1. On page 53075, third column, removing the second and third sentence of the last full paragraph.

2. On page 53076, first column, the seventh line from the bottom of the first full paragraph, after the sentence ending "See proposed § 1.245A-5(e)(3)(i)(C).", adding the language "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 an election to close the taxable year, 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 to close the taxable year, such as the application of section 954(b)(4) to a short taxable year created as a result of the election."

3. On page 53076, first column, the sixth and seventh lines from the bottom of the first full paragraph, the language "Because the election can only" is corrected to read "Furthermore, because the election to close the taxable year can only".

4. On page 53077, the second column, the sixth line from the bottom of the first full paragraph, the language "under sections 7805(b)(2)" is corrected to read "under section 7805(b)(2)".

5. On page 53078, the first column, the seventh line of the second full paragraph, the language "Earning subject" is corrected to read "Earnings subject".

6. On page 53082, the third column, the last line of the bottom partial paragraph, "gap period" is corrected to read "disqualified period".

**Crystal Pemberton,**

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

[FR Doc. 2020-24092 Filed 11-13-20; 8:45 am]

BILLING CODE 4830-01-P

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2510

RIN 1210-AB94

#### Registration Requirements for Pooled Plan Providers

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** This final regulation establishes the requirements for registering with the Department of Labor as a “pooled plan provider” for “pooled employer plans” under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) provides that newly permitted pooled plan providers can begin offering pooled employer plans on January 1, 2021, but requires such persons to register with the Secretary of Labor before beginning operations. This final regulation also establishes a new form—EBSA Form PR (Pooled Plan Provider Registration)—as the required filing format for pooled plan provider registrations. The Form PR must be filed electronically with the Department of Labor. Filing the Form PR with the Department of Labor also satisfies the SECURE Act requirement to register with the Department of the Treasury. This final regulation affects persons wishing to serve as pooled plan providers, defined contribution pension benefit plans that are operated as pooled employer plans, employers participating in such plans, and participants and beneficiaries covered by such plans.

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

**ADDRESSES:** Form PR and the accompanying instructions are the required filing format for pooled plan provider registrations and the Form PR must be filed electronically with the Department of Labor at <https://www.efast.dol.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Colleen Brisport Sequeda, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8500 (this is not a toll-free number), for questions related to pooled plan provider reporting requirements under Title I of ERISA.

*Customer service information:* Individuals interested in obtaining general information from the Department of Labor concerning Title I of ERISA may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department’s website ([www.dol.gov/agencies/ebsa](http://www.dol.gov/agencies/ebsa)).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Legal Framework**

Under ERISA, an employee benefit plan (whether a pension plan or a welfare plan) must be sponsored by an employer, by an employee organization, or by both. Section 3(5) of ERISA defines the term “employer” for this purpose as “any person acting directly as an employer, or indirectly in the

interest of an employer, in relation to an employee benefit plan, and includes a group or association of employers acting for an employer in such capacity.” These definitional provisions of ERISA have been interpreted as permitting a multiple employer plan (MEP) to be established or maintained by a bona fide group or association of employers that is controlled by the employer members and that acts in the interests of its employer members to provide benefits to their employees.<sup>1</sup> This approach is based on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representational interest or genuine organizational relationship unrelated to the provision of benefits. The Department of Labor (Department) has taken steps, through a final rule on “association retirement plans” at 29 CFR 2510.3–55, to clarify and expand the types of arrangements that can be treated as multiple employer plans under Title I of ERISA. That final rule did not, however, extend to so-called “open MEPs.”<sup>2</sup>

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)<sup>3</sup> removed possible legal barriers to the broader use of multiple employer plans by authorizing a new type of ERISA-covered defined contribution plan—a “pooled employer plan” operated by a “pooled plan provider.” The SECURE Act amended section 3(2) of ERISA to authorize these pooled employer plans, which offer benefits to the employees of multiple unrelated employers without the need for any commonality among the participating employers or other genuine organizational relationship unrelated to participation in the plan, thus enabling a type of open MEP. A

<sup>1</sup> The SECURE Act did not change the conditions for plans that were already permitted under section 3(2) of ERISA to act as a single MEP. See, e.g., Advisory Opinions 2008–07A, 2003–17A, and 2001–04A. Those classes of multiple employer plans (e.g., employer association retirement plans and plans sponsored by professional employer organizations) are outside of the scope of this rulemaking, as are multiple employer plans established and maintained pursuant to bona fide collective bargaining.

<sup>2</sup> See the preamble discussion in the Final Rule on the Definition of “Employer” Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 FR 37508 (July 31, 2019). The Department did, however, seek comments through a Request for Information published with that proposed rule seeking comments on whether, and if so under what conditions, open MEP structures should be treated as a multiple employer plan for purposes of Title I of ERISA.

<sup>3</sup> The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94) (December 20, 2019).

pooled employer plan arrangement allows most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to a pooled plan provider. Therefore, a pooled employer plan can offer employers, especially small employers, a workplace retirement savings option with reduced burdens and costs compared to sponsoring their own separate retirement plan. New section 3(44) of ERISA establishes requirements for pooled plan providers, including a requirement to register with the Department and the Department of the Treasury (Treasury Department) before beginning operations as a pooled plan provider. The effective date for these provisions allows “pooled employer plans” to begin operating on January 1, 2021.

Under section 3(2) of ERISA, a pooled employer plan is treated for purposes of ERISA as a single plan that is a multiple employer plan. A pooled employer plan is generally defined in section 3(43) as a qualified retirement plan that is an individual account plan or a plan that consists of individual retirement accounts described in Internal Revenue Code (Code) section 408 that is established or maintained for the purpose of providing benefits to the employees of two or more employers, the terms of which meet certain requirements set forth in the statute.<sup>4</sup> Specifically, the terms of the plan must:

- Designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;
- designate one or more trustees (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan, and require the trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;
- provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring, in accordance with ERISA fiduciary requirements, of the person designated as the pooled plan provider and any other person who is designated as a named fiduciary of the plan, and the investment and management of the portion of the plan’s assets attributable

<sup>4</sup> 29 U.S.C. 1002(43)(B). The term “pooled employer plan” does not include a multiemployer plan or plan maintained by employers that have a common interest other than having adopted the plan. The term also does not include a plan established before the date the SECURE Act was enacted unless the plan administrator elects to have the plan treated as a pooled employer plan and the plan meets the ERISA requirements applicable to a pooled employer plan established on or after such date.

to the employees of that employer (or beneficiaries of such employees) in the plan to the extent not delegated to another fiduciary by the pooled plan provider and subject to the ERISA rules relating to self-directed investments;

- provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with applicable rules for plan mergers and transfers;

- require the pooled plan provider to provide to employers in the plan any disclosures or other information that the Secretary of Labor may require, including any disclosures or other information to facilitate the selection or monitoring of the pooled plan provider by employers in the plan;

- require each employer in the plan to take any actions that the Secretary of Labor or pooled plan provider determines are necessary to administer the plan or to allow for the plan to meet the ERISA and Code requirements applicable to the plan, including providing any disclosures or other information that the Secretary of Labor may require or which the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet such ERISA and Code requirements; and

- provide that any disclosure or other information required to be provided to participating employers may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and employers in the plan.

The fidelity bonding requirements in ERISA section 412 apply to fiduciaries and other persons handling the assets of a pooled employer plan, but the maximum bond amount for each such plan official is \$1,000,000, as compared to the \$500,000 maximum that applies in the case of other ERISA-covered plans that do not hold employer securities.<sup>5</sup>

<sup>5</sup> The SECURE Act requires that pooled plan providers must ensure that all plan fiduciaries and other persons who handle plan assets are bonded in accordance with section 412 of ERISA. In the Department's view, the SECURE Act confirms the application of ERISA section 412 requirements to pooled employer plans, except that the Act establishes \$1,000,000 as the maximum bond amount as compared to \$500,000 for plans that do not hold employer securities. Thus, the normal section 412 rules for ERISA plans govern the bonding requirements for pooled employer plans and the pooled plan provider is subject to the provisions of ERISA section 412(b), which provides that "it shall be unlawful for any plan official of such plan or any other person having authority to direct the performance of such functions, to permit such functions, or any of them, to be performed by

A pooled plan provider with respect to a pooled employer plan is defined in ERISA section 3(44) to mean a person that—

- is designated by the terms of the plan as a named fiduciary under ERISA, as the plan administrator, and as the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) that are reasonably necessary to ensure that the plan meets the Code requirements for tax-favored treatment and the requirements of ERISA and to ensure that each employer in the plan takes such actions as the Secretary or the pooled plan provider determines necessary for the plan to meet Code and ERISA requirements, including providing to the pooled plan provider any disclosures or other information that the Secretary may require or that the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet Code and ERISA requirements;

- acknowledges in writing its status as a named fiduciary under ERISA and as the plan administrator;

- is responsible for ensuring that all persons who handle plan assets or are plan fiduciaries are bonded in accordance with ERISA requirements; and

- registers as a pooled plan provider.

The SECURE Act specifies that the Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of the provision. The SECURE Act also directs the Department to issue such guidance as it determines appropriate to carry out the pooled employer plan and pooled plan provider provisions, including guidance (1) to identify the administrative duties and other actions required to be performed by a pooled plan provider; and (2) that provides, in appropriate cases involving a noncompliant employer, for transfer of plan assets attributable to employees of the noncompliant employer (or beneficiaries of such employees) to (a) a

any plan official, with respect to whom the requirements of subsection (a) [of ERISA section 412] have not been met." See 29 CFR 2550.412-1, 29 CFR part 2580; see also Field Assistance Bulletin 2008-04 (providing a general description of statutory and regulatory requirements for bonding). The Department does not read the SECURE Act as broadening the section 412 bonding rules to apply to persons who handle plan assets regardless of whether they handled plan funds or other property within the meaning of section 412. Similarly, the existing statutory and regulatory exemptions for certain banks, insurance companies, and registered broker-dealers continue to apply.

plan maintained only by that employer (or its successor), (b) a tax-favored retirement plan for each individual whose account is transferred, or (c) any other arrangement that the Department determines is appropriate. The SECURE Act further provides such guidance must provide for the noncompliant employer (and not the plan with respect to which the failure occurred or any other employer in the plan) to be liable for any plan liabilities attributable to employees of the noncompliant employer (or beneficiaries of such employees), except to the extent provided in the guidance. An employer or pooled plan provider is not treated as failing to meet a requirement of guidance issued by the Secretary if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions to which the guidance relates.

The SECURE Act also provides that the Form 5500 annual return/report of employee benefit plan (Form 5500) filing for a multiple employer plan subject to section 210 of ERISA, including a pooled employer plan, must include a list of the employers in the plan, a good faith estimate of the percentage of total contributions made by such employers during the plan year, the aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of each employer and the beneficiaries of such employees) and, with respect to a pooled employer plan in particular, the identifying information for the person designated under the terms of the plan as the pooled plan provider. In addition, the provision authorizes the Department to prescribe simplified reporting for pooled employer plans that cover fewer than 1,000 participants, but only if no single employer in the plan has 100 or more participants covered by the plan.

The SECURE Act does not limit the class of persons who can act as pooled plan providers, but it is expected that many financial services companies (such as insurance companies, banks, trust companies, consulting firms, record keepers, and third-party administrators) will be pooled plan providers. As noted above, however, section 3(44) does require as a condition of being a pooled plan provider that the person "registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information the Department may require, before beginning operations as a pooled plan provider."<sup>6</sup>

<sup>6</sup> ERISA section 3(44)(a)(ii).

In the Department's view, the primary statutory purpose of the registration requirement is to provide the Department with sufficient information about persons acting as pooled plan providers to engage in effective monitoring and oversight of this new type of ERISA-covered retirement plan. Although the Department does not have specific details as to how pooled employer plans authorized under the SECURE Act will be structured or operated, the Department has assumed that they may be similar to other currently operating multiple employer plans, and the Department did not receive any comments suggesting a contrary view. Additionally, there may be challenges associated with these new types of multiple employer plans that the Department, the Treasury Department, or the Internal Revenue Service (IRS), as the Federal agencies charged with oversight of private-sector pension plans, may need to address. The SECURE Act expressly provides that participating employers will retain certain residual fiduciary responsibilities, including responsibilities with respect to the selection and oversight of the pooled plan provider and the plan's other named fiduciaries. This raises concerns that there may be greater potential for inadequate employer oversight of the activities of a pooled employer plan, its fiduciaries, and service providers than is true of more traditional employer-sponsored plans because participating employers pass along more responsibility to the pooled plan provider than they do in other plan arrangements.

The registration process and requirements must enable the Department to identify pooled plan providers when they begin operating and to effectively oversee the providers and plans. While pooled plan providers will be required to file Forms 5500 for the pooled employer plans they operate, Forms 5500 generally are not filed until seven to nine-and-a-half months after the end of the plan year.<sup>7</sup> In the absence of appropriate detail in the registration

statement, a pooled plan provider could begin operating multiple plans with hundreds or thousands of participants and millions of dollars without the agencies having any information about the pooled employer plans for almost two years.

In determining how best to implement the statutory registration requirement, the Department considered a number of alternatives including whether the statement must be filed when the provider begins operations in anticipation of offering one or more pooled employer plans, when it begins operating each individual pooled employer plan, or both. The Department also does not believe that the SECURE Act provisions preclude the Department from imposing reasonable ongoing reporting requirements to enable the Department to effectively oversee pooled plan providers and the pooled employer plans they operate. Therefore, as discussed in more detail below, relying on the language in the SECURE Act requiring a registration statement, as well as on its broad authority under section 505 of ERISA to prescribe regulations,<sup>8</sup> including forms, to enable the Department to carry out its statutory oversight mission, the Department has chosen the structure set out in the final rule, which adopts the structure essentially as proposed.

The final rule requires an initial registration filing and supplemental filings. The supplemental filings are to report changes in the information in the initial filing, information about each specific pooled employer plan before initiation of operations, and information on specified reportable events. These filings (initial and supplemental) capture information that is important for the Department, the Treasury Department, and the IRS to carry out oversight and for participating employers to exercise their fiduciary duties of selection and monitoring. The final rule also requires a final filing once the last pooled employer plan offered by a pooled plan provider has been terminated and has ceased operations.

The Department believes that the initial registration, supplemental filing, and final filing requirements, when combined with the Form 5500 annual reporting requirements, will give the

Department the timely access to pooled plan provider information needed to fulfill the monitoring and oversight tasks the SECURE Act placed on the agencies and will be less burdensome and less costly for pooled plan providers and pooled employer plans than some of the alternatives considered. The final rule establishes a new EBSA form—EBSA Form PR (Pooled Plan Provider Registration) (Form PR)—as the required filing format for pooled plan provider registrations. Filing the Form PR satisfies the requirements under Title I of ERISA and the Code to register with the Department and the Treasury Department, respectively.

This final rule is a deregulatory action under Executive Order (E.O.) 13771. Details on the estimated costs of this final rule can be found in the regulatory impact analysis, set forth later in this preamble. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

On September 1, 2020, the Department published in the **Federal Register** a proposed rule and proposed EBSA Form PR. The Department invited interested persons to submit comments on these items and, in response to this invitation, the Department received 20 written comments from a variety of parties, including plan sponsors and fiduciaries, plan service and investment providers, and employee benefit plan and participant representatives. These comments are available for review on the "Public Comments" page of the Department's Employee Benefits Security Administration website under the "Laws and Regulations" tab. Below is a detailed discussion of the provisions of the final rule, the public comments the Department received, and how these comments affected the Department's decision-making when adopting the final rule.

## II. Registration Requirements for Pooled Plan Providers

The SECURE Act expressly requires, as a condition of being a pooled plan provider, that the provider register with the Department and provide other information that the Secretary may require. The SECURE Act, however, did not include specific content requirements for pooled plan provider registration. Under the final rule, the requirement to register and provide information to the Department is triggered by specific events. The rule's requirements can be divided into three sets of filing obligations corresponding

<sup>7</sup> Title I and Title IV of ERISA and the Code establish annual reporting requirements for employee benefit plans. DOL, the Treasury Department (specifically the IRS), and the Pension Benefit Guaranty Corporation jointly developed the Form 5500 so employee benefit plans could use one form to satisfy annual reporting requirements under ERISA and the Code. The Form 5500 is part of ERISA's overall reporting and disclosure framework, helping to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, are provided or have access to sufficient information to protect the rights and benefits of plan participants and beneficiaries.

<sup>8</sup> Section 505 of ERISA provides generally that the Secretary may prescribe such regulations the Secretary "finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title)." 29 U.S.C. 1135.

to the timing of specific events. First, there is an initial registration filing of basic identifying information about the pooled plan provider and additional information about pending legal or administrative proceedings. Second, there is a supplemental filing or filings requirement. A supplemental filing is required if there is a change in the information that was reported in the initial registration or if there is a significant new financial and/or operational event related to the pooled plan provider. A supplemental filing also is required when a pooled employer plan starts operations. The requirement for supplemental information is intended to provide the agencies, participating employers and employees, and the public information about noteworthy events occurring after the initial registration. Third, there is a final filing that is required once the last pooled employer plan has been terminated and ceased operations.

#### A. Initial Registration

##### Beginning Operations as a Pooled Plan Provider

Paragraph (a) of the final regulations states that section 3(44) of ERISA sets forth the criteria that a person must meet in order to be a pooled plan provider for pooled employer plans under section 3(43) of ERISA. This introductory paragraph provides the context and scope for the registration requirement established in the remainder of the final rule. Commenters did not raise questions or concerns with paragraph (a) in the proposed rule. Therefore, the final rule adopts this provision as proposed.

Section 3(44)(A)(ii) of ERISA contains the registration requirement. That section, in relevant part, defines a pooled plan provider as a person who “registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information as the Secretary may require, before beginning operations as a pooled plan provider.” The statute does not define what is meant by “beginning operations as a pooled plan provider.”

Paragraph (b) of the proposed rule defined the central phrase “beginning operations as a pooled plan provider” to mean “publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan.” The preamble to the proposal clarified that this definition was not intended to require registration as a result of preliminary business activities, such as establishing the business organization, creating a business plan, obtaining necessary licenses or entering into

contracts with subcontractors or partners, obtaining a Federal employer identification number from the IRS, or actions and communications designed to evaluate market demand in advance of publicly marketing pooled plan provider services or publicly offering one or more pooled employer plans.

The proposed rule specifically solicited comments on this crucial definition in paragraph (b) by asking the following questions: Is the definition of “beginning operations as a pooled plan provider,” which determines whether initial registration is required, appropriate in scope? Should the definition exclude marketing and solicitation efforts so that the initial registration is tied solely to beginning operation of a pooled employer plan? Should the deadlines for filing an initial registration be nearer to the date of actual public marketing activities if the pooled plan provider intends only to engage in marketing and solicitation efforts, and will not enroll any employer or employee in a pooled employer plan until at least 30 days after initial registration?

A number of commenters raised significant concerns with this proposed definition, particularly with its reliance on “publicly marketing services as a pooled plan provider” or “publicly offering a pooled employer plan” as the alternative acts that would decisively establish precisely when a person is considered to have begun “operations” as a pooled plan provider. A more global objection was that registration should not turn on such early-stage and inchoate activities of firms with potential interest in eventually serving as a pooled plan provider. A more specific concern was based on the assertions that the two selected activities—marketing and offering—were too vague.

The consensus of these commenters was that more precision and clarity is needed when dealing with the establishment of a regulatory trigger for a governmental filing requirement, especially the “public marketing” trigger. These commenters uniformly agreed that firms need to evaluate market demand before deciding whether to offer a pooled employer plan, and that there is no clear distinction between commonly accepted methods for evaluating demand and the act of “publicly marketing services” within the plain meaning of these words in the proposal.

A number of commenters stated that the line between “communications designed to evaluate market demand,” which the Department explained in the preamble of the proposal would not be

actions that would trigger the proposal’s filing requirement, and “publicly marketing services as a pooled plan provider” is not clear. Neither of these terms, according to these commenters, is clearly defined in the proposed rule or its preamble, and there is no safe harbor communication design or disclaimer described that could be used to ensure that a communication provided by a pooled plan provider to evaluate market demand does not also constitute public marketing material.

To illustrate this ambiguity, commenters offered the following examples. An announcement at an industry conference of a firm’s intent to enter the marketplace as a pooled plan provider, for example, could be construed as public marketing by some but not by others. In addition, a commenter suggested that a firm making references to developing pooled plan provider services or to establishing a pooled employer plan in personal biographies, company websites, or company handouts could be construed as public marketing by some but not by others. Similarly, communications to current clients about future intentions to offer a pooled employer plan could be construed as public marketing. Call center responses by employees, with or without marketing responsibilities in their job descriptions, could be construed as public marketing by some but not by others. In citing these examples, commenters stated that public marketing and communication is a necessary predicate for firms to gauge demand and decide whether it makes financial sense to offer or bring to market a particular product or service, and pooled employer plans are no different. Firms need to solicit interest publicly before determining whether to enter the marketplace, according to these commenters, and the proposal does not recognize that reality.

Several commenters predicted certain potential negative effects of this proposed definition. One possible effect of the ambiguity of the proposal, according to comments, is that potential pooled plan providers would register before they have fully considered and designed a product or approach to bring to market. Another possible effect, according to comments, is that potential providers would avoid entering the marketplace altogether. A third possible effect of this ambiguity relates to firms that have already begun research and marketing efforts in anticipation of pooled employer plan business operations to commence on January 1, 2021. These firms, according to one commenter, will be in immediate violation of the registration requirement

upon the effective date of the final rule because research and marketing activity will have preceded registration, even if these firms register on the first possible date following publication.

For these reasons, the commenters overwhelmingly favor a final rule that defines “beginning operations as a pooled plan provider” in a manner that ties the initial registration to some core operational facet of the pooled employer plan, rather than to the type of early-stage marketing and soliciting activities in the proposal. Some commenters suggested that registration could be required in advance (*e.g.*, 30 days) of a specific and objectively determinable act customarily associated with the start of a retirement plan. Commenters offered the following examples: The date of plan establishment; the date of enrollment of the first participating employer and its employees; the first date of actual plan operation; the date of the first participating employer’s formal adoption of a participation or similar agreement; the date of the pooled plan provider’s first appointment as such by an adopting employer under a pooled employer plan; and the date when the first dollar is obligated to be held in trust.

Alternatively, other commenters suggested a less objective approach. In particular, they suggested tying the registration to whenever the pooled employer plan is considered covered under ERISA, *e.g.*, 30 days in advance of that point. This suggestion is based on a different provision in the proposal, at paragraphs (b)(2) and (b)(6) (relating to a supplemental report containing the name and EIN for the pooled employer plan, and the name, address, and EIN for the trustee of the plan), which relies on the same longstanding facts-and-circumstances coverage principles that have governed plans under ERISA for decades. In an attempt to bring some certainty to this highly facts-and-circumstances-dependent approach, one commenter suggested that the final rule could clarify, perhaps by example, that this standard would be considered satisfied if registration occurred at some designated period (*e.g.*, 30 days) before “the date the first pooled employer plan offered by the pooled plan provider is positioned to enter into participation arrangements with employers.”

Regardless of the approach taken to define this concept, these commenters uniformly agreed that there is no need to prevent providers from marketing to potential employer members during the period between registration and plan operations. Any such prohibition would be counterproductive or even harmful to potential participating employers,

according to these commenters. Providers must be able to market their pooled employer plan and pooled plan provider services as early as practicable so that prospective participating employers can assess their options, according to these commenters.

In response to these commenters, paragraph (b) of the final rule adopts operation of a pooled employer plan as the event requiring prior registration rather than “marketing” or “offering services” as a pooled plan provider. Specifically, paragraph (b) of the final rule provides that, for purposes of implementing the statutory phrase “beginning operations as a pooled plan provider,” the final rule defines that phrase to mean when the pooled plan provider begins “initiation of operations of the first plan that the person operates as a pooled employer plan.” This term must be read in conjunction with paragraph (b)(6) of the final rule, which states, in response to the many commenters looking for a brighter-line test, that a pooled employer plan is treated as initiating operations as a pooled employer plan when the first participating employer executes or adopts a participation, subscription, or similar agreement for the plan specifying that it is a pooled employer plan or, if earlier, when the trustee of the plan first holds any asset in trust. A benefit of this approach is that it encompasses the traditional activities of pension plan formation and is intended to provide would-be pooled plan providers with maximum flexibility.

The Department agrees with the commenters that this approach will simplify the registration process. Preliminary business activities of a would-be pooled plan provider, such as establishing the business organization, creating a business plan, obtaining necessary licenses, entering into contracts with subcontractors or partners, obtaining a Federal employer identification number from the IRS, or actions and communications designed to evaluate market demand, including marketing activity, do not trigger the registration requirement. This approach also continues to advance and support the Department’s oversight functions, as the proposal sought to do. From the outset, an important purpose of the registration requirement is to provide the Department, the Treasury Department, the IRS, and importantly, prospective employer customers and the public, with notice and relevant information about the pooled plan provider. The Department has determined that this purpose is served equally as well by the final rule’s focus on plan operations, as compared to the

proposal’s focus on marketing and offering of services.

#### Timing of Initial Registration—Changes to the Proposal’s 90/30 Rule

Paragraph (b)(1) of the proposal established a registration window by providing, in relevant part, that a person intending to act as a pooled plan provider must file the Form PR with the Department “[n]o earlier than 90 days and no later than 30 days before beginning operations as a pooled plan provider[.]” Many commenters questioned the necessity of the complex aspects of the proposal, including this provision. One commenter, in particular, stated that it is not clear what value this narrow time period (60 days) would provide to the Department in its oversight role. This commenter instead suggested expanding the 90-day period to 180 days before beginning operations. A longer window, according to this commenter, would give providers more leeway in getting a plan up and running after registration, as there could be unforeseen circumstances that delay the official establishment date of a plan.

The Department agrees with the commenters that this aspect of the proposal could be streamlined without compromising important safeguards. The principal purpose of the 90-day restriction in the proposal was to ensure the information filed with the Department is relatively accurate and current so that Federal oversight agencies and employers are able to effectively discharge their oversight and monitoring obligations. Consistent with the arguments of these commenters, the Department has concluded this purpose is adequately supported by the final rule’s requirement, in paragraph (b)(3)(i) of the final rule, that a pooled plan provider submit a timely supplemental filing when there is a change in the information that was reported in an initial filing. Accordingly, paragraph (b)(1) of final rule is changed from the proposal and does not include the “no earlier than 90 days” clause, but instead requires the filing of an initial registration “at least 30 days before the initiation of operations of a plan as a pooled employer plan.”

#### Special Transition Provision—Delayed Application of the 30-Day Rule

Paragraph (b)(1) of the final rule requires an initial registration at least 30 days before the initiation of operations of a plan as a pooled employer plan. Some commenters on the proposal stated that a significant number of firms already have committed substantial resources toward, and intend to initiate, operations of pooled employer plans on



January 1, 2021, or as soon as possible thereafter. These commenters are concerned that they will be compelled to delay the initiation of operations of pooled employer plans solely because of the Department's timeline for publishing a final rule. To address these concerns, paragraph (c) of the final rule contains a special provision that allows an initial registration to be filed anytime before February 1, 2021, provided that it is filed "on or before" the initiation of operations of a plan as a pooled employer plan. The effect of this provision is to waive the otherwise applicable 30-day waiting period between registration and the start of plan operations. The provision applies with respect to pooled plan providers that would initiate operations of a plan as a pooled employer plan on or after January 1, 2021 and before February 1, 2021. Paragraph (c) of the final rule has no effect after that date. Some commenters requested a much longer period, e.g., a period of 180 days following publication of a final rule. Requests of this magnitude, however, appear to have been predicated, at least in part, on the proposal's reliance on "publicly marketing services" as the trigger for the registration requirement, which has been eliminated.

#### Content Requirements

The SECURE Act left it to the agencies' discretion to establish specific content requirements for the pooled plan provider registration. In developing this proposal, the Department focused on information needed by the agencies to identify, contact, and engage in timely oversight of pooled plan providers, as well as on the information that the Department could post on its website that would provide employers considering participating in a pooled employer plan, participating employees, covered employees, and other interested stakeholders the ability to identify, contact, and perform some due diligence on pooled plan providers. The Department also considered the content requirements of other registration requirements under Federal and State securities laws for investment advisers and broker-dealers. For example, among other information, registrations require disclosures of identifying and contact information, background information about the registrant's business, information about relevant management policies, names of executives and general partners, relevant legal proceedings and previous violations, and relevant negative information, such as legal problems or other business events or trouble that would be of consequence to users of the registration

information. The Department also focused on minimizing the administrative burden and expense involved for pooled plan providers and the pooled employer plans they operate.

Based on those considerations, and as a result of applicable comments more fully described below, paragraph (b)(1) sets out the specific information a prospective pooled plan provider would need to file on Form PR at least 30 days before beginning operations as a pooled plan provider:

1. *Legal Business Name and any Trade Name (Doing Business As)*. Commenters did not raise questions or concerns with this requirement; therefore, the final rule adopts this provision as proposed.

2. *Federal Employer Identification Number (EIN)*. An EIN is a nine-digit employer identification number (for example, 00-1234567) that has been assigned by the IRS. Entities that do not have an EIN may apply for one on Form SS-4, Application for Employer Identification Number. The Form SS-4 is available by calling 1-800-829-4933 or on the IRS website at <https://www.irs.gov/pub/irs-pdf/fss4.pdf>. EIN data is important for accurately identifying registrants and cross-referencing information reported about the registrant on other filings, such as the Form 5500 filed by the pooled employer plans operated by the registrant. Commenters did not raise questions or concerns with this requirement. Therefore, the final rule adopts this provision as proposed.

3. *Business Telephone*. Paragraph (b)(1)(ii) of the final rule requires a business telephone number as a way for interested/participating employers and covered employees to contact the pooled plan provider for information. Some commenters, responding to questions in the preamble of the proposal, requested confirmation that this final regulation does not preclude a pooled plan provider from permitting a call center number to be reported as the business phone. The view of these commenters is that registrants should be able to determine the most appropriate contact information to provide on the registration. Other commenters suggested a better business practice for pooled employer plans may be to have one telephone number for potential participating employers and a different telephone for participating employers and participants, as the nature of the callers' questions and needs could be quite different. This paragraph of the final rule requires the phone number of the pooled plan provider; it does not prescribe or proscribe anything beyond that. Registrants decide what business

phone number to include in the registration for this purpose. Accordingly, the final rule adopts the provision as proposed.

4. *Business Mailing Address*. Commenters did not request any revisions to this requirement, which is adopted as proposed.

5. *Address of any public website or websites of the pooled plan provider or any affiliates to be used to market any such person(s) as a pooled plan provider to the public or to provide public information on the pooled employer plan operated by the pooled plan provider*. The preamble to the proposed rule explained that the Department considers this information useful for its oversight of pooled plan providers and will also assist employers performing due diligence in selecting and monitoring pooled employer plans. The preamble also stated that the Department expects that most pooled plan providers will have such websites and believes that having information on such websites provides an alternative to requiring more information to be submitted as part of the registration process. Commenters did not raise questions or concerns with or request any revisions to this requirement in the proposal. Therefore, the final rule adopts this provision as proposed.

6. *The name, mailing address, telephone number, and email address for the responsible compliance official of the pooled plan provider*. Paragraph (b)(1)(v) of the proposal required the reporting of basic contact information about the pooled plan provider's "primary compliance officer." The Department is aware that many companies of the type likely to be pooled plan providers have individuals or teams of compliance officers with varying responsibilities, and this provision of the proposal relied on that relatively uncontroversial fact. The intent behind this provision of the proposal was to capture and make available basic contact information of the person responsible for these individuals or compliance officers because, in the Department's view, it is important that the Department, as well as participating employers and covered employees, have an effective means of communicating with a responsible person at the pooled plan provider regarding compliance questions or concerns.

Some commenters questioned the necessity of providing contact information for a "primary compliance officer." To the extent the purpose of the requirement is to provide a contact for the Department's own use, they argued that the Department as a Federal

regulatory authority independently has the capacity to identify and contact a compliance officer without regard to this regulation. To the extent the requirement is designed to provide employers and employees with contact information for a person that is able to answer questions about their pooled employer plan, the commenters believed that the primary compliance officer would not be helpful. They suggested that the type of information employers and employees were likely to seek, or that they should seek, is more appropriately provided by the plan administrator, and noted that contact information for the plan administrator could be found in the summary plan description, or answered by the general business number required by paragraph (b)(1)(ii) of the proposal. These commenters accordingly suggested eliminating this aspect of the proposal.

The Department declines to adopt this global suggestion. The Department continues to believe that employers, participants, and oversight agencies will have legitimate questions specifically regarding the pooled employer plans' compliance with applicable provisions under ERISA and the Code that cannot be answered by contacting, for example, the general number of the pooled plan provider, a salesperson, or an entry-level clerk. Pooled plan providers and pooled employer plans are new types of entities under the law, and it is reasonable to expect that affected individuals will have genuine compliance-oriented questions that may not have ready answers. Moreover, even in its own experience, the Department sometimes encounters friction when attempting to communicate with responsible compliance officials, especially at large companies with numerous touchpoints. The Department, therefore, retains a version of this requirement in the final rule, but is modifying it to address public comments.

Some commenters stated that the term "primary compliance officer" is imprecise and possibly confusing. According to commenters, some companies that might be pooled plan providers do not have compliance officers at all, while other firms have many compliance officers none of whom are necessarily "primary." For the former group, commenters stated that presumably the Department is not requiring that a pooled plan provider hire a primary compliance officer solely for this registration regulation, and, as regards the latter group, the commenters stated that the proposal was unclear as to what laws or regulations the identified person had to be responsible

for as primary compliance officer. Finally, some commenters objected to having to identify a specific individual by name, as a contact, asserting that this could raise privacy or similar concerns and necessitate supplemental filings, as required by paragraph (b)(3)(i) of the regulation, with every change in compliance officer. In response to these comments, the Department has made adjustments to the proposal.

Paragraph (b)(1)(v) of this final rule requires the "[n]ame, address, contact telephone number and email address for the responsible compliance official of the pooled plan provider." For this purpose, the term *responsible compliance official* means "the person or persons, identified by name, title, or office, responsible for addressing questions regarding the pooled plan provider's status under, or compliance with, applicable provisions of the Employee Retirement Income Security Act and the Internal Revenue Code as pertaining to a pooled employer plan." As revised, this does not require a pooled plan provider to hire or promote an individual with any particular degree or certification. Rather, this standard simply requires an identification of, and basic contact information for, the person, unit, or element designated by the pooled plan provider as the point-person responsible for fielding and addressing questions about the pooled plan provider's status under ERISA and the Code. Put differently, this provision requires nothing more than that the company identify with modest specificity whom *it* wishes to receive and address status and compliance-oriented questions under the two laws (ERISA and the Code) that sanction the existence of this novel type of plan, and how to contact this person, office, or other element of the pooled plan provider.

7. *The agent for service of legal process for the pooled plan provider and the address at which process may be served on such agent.* The proposal rule explained that this provision would allow either a person or a process service company to be identified as the agent for service of legal process. Commenters did not raise any material questions or concerns with this requirement, therefore, the final rule adopts this provision substantially as proposed. However, in response to observations that the rule implements a registration requirement and does not otherwise implement substantive mandates, the final rule removes from the proposal the phrase "and in addition a statement that service of legal process may be made upon the pooled plan provider." This removal clarifies

that paragraph (b)(1)(vi) of the final rule does not confer or affect rights or obligations of parties.

8. *The approximate date when pooled plan operations are expected to commence.* Because the SECURE Act requires that the registration must be filed "before the pooled plan provider begins operations," this data element will enable the Department to ensure compliance with the SECURE Act requirement. Paragraph (b)(1) of the final regulation requires that the registration be filed at least 30 days before beginning operations as a pooled plan provider, except where a provider falls within the initial 30-day transition period. Commenters did not raise questions or concerns about this provision or request any revisions to its text. Therefore, the final rule adopts this provision as proposed.

9. *A description of the administrative, investment, and fiduciary services that will be offered or provided in connection with the pooled employer plans, including a description of the role of any affiliates in such services.* Paragraph (b)(1)(viii) of the proposal requires the registrant to include in the initial filing a "description of the administrative, investment, and fiduciary services that will be offered or provided in connection with the pooled employer plans, including a description of the role of any affiliates in such services." The preamble to the proposal explained that information about various plan services to be provided by the pooled plan provider or any affiliate will assist the Department and prospective participating employers in evaluating the pooled plan provider and identifying potential conflicts of interest with respect to the operations or investments of any pooled employer plans to be operated by the provider.

Commenters raised multiple concerns with this provision. A few commenters argued that this provision (in conjunction with other provisions) is inconsistent with a simple registration requirement and should be eliminated from the final rule. These commenters argue broadly that the success of this new retirement vehicle (*i.e.*, the pooled employer plan) will be jeopardized by excessive and unnecessary regulations. These commenters generally advocated for fewer regulatory obstacles to starting up pooled employer plans, but with careful monitoring and possible adjustments over time.

Other commenters asserted that the Department's expectations for paragraph (b)(1)(viii) of the proposal are unclear because of tensions between the text of the regulation, on the one hand, and the proposed Form PR and related

instructions, on the other. The commenters noted that the proposed regulatory text requires a “description” of the services that will be offered or provided by a pooled plan provider or affiliate, as well as a “description of the role” of any affiliates in such services. By contrast, the proposed Form PR and related instructions require only that certain boxes be checked to indicate *whether* certain services will be offered or provided by the pooled plan provider or an affiliate (no description at all), according to these commenters. Assuming that the Department intends that the narrower requirements in the proposed Form PR (*i.e.*, *whether* services will be provided, instead of a description of and the role of affiliates) would satisfy the operative text, the commenters additionally questioned whether such reporting offers the Department or employers any value or information not otherwise available already, such as through existing reporting obligations (Form 5500, Schedule C) and disclosure regulations.

Other commenters argued that the information required by paragraph (b)(1)(viii) of the proposal is unnecessary. This is because, according to these commenters, the SECURE Act, among other things, requires the pooled plan provider to serve as the ERISA 3(16) administrator and as a named fiduciary. As such, the pooled plan provider is “the person responsible for the performance of all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan).” Accordingly, it should be evident, these commenters assert, that the pooled plan provider will provide administrative and fiduciary services. These commenters see no benefit to this proposed provision that would require the pooled plan provider to report such obvious information back to the government on the Form PR.

Other commenters questioned whether this provision would result in the disclosure of information helpful to carry out the stated objectives of the Department (to assist in the evaluation of potential for conflicts of interest). These commenters stated their belief that many pooled plan providers will offer or sponsor multiple pooled employer plans. Further, these commenters stated that many pooled plan providers will offer multiple services, directly or through affiliates, to these plans. These commenters stated their belief that some pooled employer plans will use some services offered by the pooled plan provider (or affiliates), and other pooled employer plans will use a different combination of services

offered by the pooled plan provider (or affiliates). In recognition that each pooled employer plan ultimately will select its own combination of services from the pooled plan provider (or affiliates), these commenters question whether the generic list of information required by paragraph (b)(1)(iii) of the proposal (as implemented through the proposed Form PR), which is not specific to any particular pooled employer plan, would meaningfully advance the stated objectives of the Department. These commenters suggested that potential participating employers need different information—information specific to their particular pooled employer plan—to evaluate potential conflicts, such as information more closely approximating the information covered service providers furnish to responsible plan fiduciaries under 29 CFR 2550.408b–2.

The Department declines to eliminate this provision. The SECURE Act clearly imposes an oversight duty on the Department with respect to pooled employer plans. A chief concern of the Department is potential conflicts of interest. Pooled plan providers are in a unique statutory position in that they are granted full discretion and authority to establish the plan and all of its features, administer the plan, and to act as a fiduciary, hire service providers, and select investments and investment managers. Further, at this point in time, business models for these plans are still being developed.<sup>9</sup> In light of all of this, the Department does not agree that a question that requires a pooled plan provider to identify whether it or any of its affiliates will provide services to a pooled employer plan is unreasonable or excessive in scope. In response to specific commenters’ concerns about the vagueness of the proposal’s requirement to explain the role of affiliates in connection with providing services, the final rule has been simplified to require merely an identification, by name and EIN, of any affiliate that is expected to provide services to the pooled employer plan. This will allow the Department to follow up as necessary.

10. *A statement disclosing any ongoing Federal or State criminal proceeding, or any Federal or State criminal convictions, related to the provisions of services to, operation of, or investments of, any employee benefit plan against the pooled plan provider, or any officer, director, or employee of a pooled plan provider, provided that*

<sup>9</sup> 85 FR 36880 (June 18, 2020) (titled Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans).

*disclosure of any criminal conviction may be omitted if the conviction, or related term of imprisonment served, is outside ten years of the date of the registration.* This provision in paragraph (b)(1)(ix) of the final rule was adopted from the proposed regulation with only one non-substantive change. A few commenters argued that this provision need not focus on individual employees of the pooled plan provider for reasons of privacy, as well as for reasons of scope and burden. In terms of privacy, this provision encompasses only information (*e.g.*, caption, docket number, State) that is already in the public record. For instance, if the entire case is under seal and there is no docket or caption, the filer would not need to disclose the existence of any such sealed case. In terms of scope, a commenter objected to the notion that a pooled plan provider would have to report criminal conviction information about “any employee”—including rank-and-file employees, such as janitors or maintenance staff, whose positions make it unlikely that they could threaten the safety of a pooled employer plan. These commenters also noted that the firms likely to be pooled plan providers have thousands of employees. Like the proposal, however, the final rule does not reach as broadly as some commenters suggest. This provision reaches only those rank-and-file employees of the pooled plan provider whose conviction relates to providing services to, the operation of, or investments of, an employee benefit plan, and whose conviction or imprisonment is within the last ten years. The final rule retains this provision because it focuses on relevant negative information that will be useful in the Department’s oversight of pooled plan providers. Other statutory provisions in ERISA already evidence the relevance of this type of activity and inform the scope of paragraph (b)(1)(ix) of the final rule. For example, under ERISA section 411, the Department is responsible for ensuring that disqualified parties do not serve in positions or capacities prohibited under the statute.<sup>10</sup> Although paragraph

<sup>10</sup> Section 411 of ERISA provides “[n]o person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnapping, perjury, assault with intent to kill, . . . any felony involving abuse or misuse of such person’s position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan . . . shall serve or be permitted to serve . . . (1) as

(b)(1)(ix) of the final rule is intentionally constructed without all the technical nuance and specifications in section 411 of ERISA, that statutory provision prohibits individuals convicted of disqualifying crimes from serving in plan-related capacities during or for a period of 13 years after such conviction or the end of imprisonment, whichever is later, subject to provisions allowing that period to be shortened.<sup>11</sup>

Finally, the proposal specifically solicited comments on whether civil judgments in private litigation should be added to this provision, and if so, the types. In the Department's view, criminal judgments are more likely, as a broad category, to be good indicators of the need for additional review or inquiry than are civil judgments in private litigation. None of the commenters unambiguously advocated including civil judgments of this type in this provision, accordingly, the Department declines to expand this provision in this manner. A non-substantive change was made to this provision. For organizational purposes, the words "ongoing" and "proceedings" were moved to this provision from paragraph (b)(1)(x) of the proposal to accommodate changes made to that provision.

11. *A statement disclosing any ongoing civil or administrative proceedings in any court or administrative tribunal by the Federal or State government or other regulatory authority against the pooled plan provider, or any officer, or director, or employee of the pooled plan provider, involving a claim or fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets.* Paragraph (b)(1)(x) of the proposal required the initial filing to include a statement disclosing any ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan, in any court or administrative tribunal by the Federal or State government or other regulatory authority against the pooled plan

an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of any employee benefit plan, (2) as a consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan, or (3) in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan . . . ."

<sup>11</sup> See also *Beck v. Levering*, 947 F.2d 639 (2d Cir. 1991) (in a civil action, permitting lifetime injunction against an individual from providing services to ERISA plans).

provider or any officer, director, or employee of the pooled plan provider.<sup>12</sup> Similar to the information on criminal convictions, this data element focuses on information that may be useful in the Department's oversight of pooled plan providers and that may also assist employers performing due diligence in selecting and monitoring pooled employer plans.

Regarding ongoing administrative proceedings (as opposed to criminal and civil proceedings), a number of commenters were concerned that the clause "any ongoing administrative proceeding" could be read to include routine audits, investigations, or informal inquiries by Federal and State regulators. These commenters stated that most pooled plan providers likely will be financial service organizations that are routinely subject to investigations, audits, and other administrative actions by any number of Federal and State agencies and that requiring these providers to report such actions would be burdensome and potentially misleading as to the "risks" of working with a specific provider. These commenters suggested limiting the scope of the types of administrative proceedings falling into this category in a manner that does not include routine administrative activities carried out by executive agencies as part of their routine oversight functions and responsibilities.

In response to these commenters, the Department agrees that the public would benefit from a more precise definition of "administrative proceeding" that does not include routine regulatory oversight activities of the type suggested by some commenters and that the scope of this provision could be narrowed without compromising the Department's objectives. Paragraph (b)(1)(x) of the final rule, therefore, is limited to formal administrative hearings. This limitation was accomplished by adding a definition of "administrative proceeding" in paragraph (b)(8) of the final rule. This definition is grounded in established procedures for administrative hearings by the Department.<sup>13</sup> Paragraph (b)(8) defines this term to mean "a judicial-type proceeding of public record before an

<sup>12</sup> Other regulatory authority includes self-regulatory organizations authorized by law, such as the Financial Industry Regulatory Authority (FINRA). However, as used in the final rule, other regulatory authority does not include any foreign regulatory authorities.

<sup>13</sup> See, e.g., 29 CFR 2571.2 (Procedures for Administrative Hearings on the Issuance of Cease and Desist Orders Under ERISA Section 521—Multiple Employer Welfare Arrangements).

administrative law judge or similar decision-maker." The key elements of this definition ensure a level of formality and process that operate to exclude the types of routine administrative proceedings mentioned by the commenters, such as routine audits, examinations, and benefits reviews by executive-branch agencies. In sum, the definition elevates the level of administrative proceeding above the numerous array of preliminary administrative and oversight activities mentioned by the commenters, to proceedings that involve disputes that are ripe for adjudication and matters that are of public record.

Additionally, regarding all three types of proceedings covered by paragraph (b)(1)(x) of the proposal (criminal, civil, and administrative), many commenters raised concerns regarding the general breadth of activities covered by this provision of the proposal. They requested a more substantial limitation on the type of activities covered by the subject proceedings than merely any act "related to" the "operation of" or "investments of" any employee benefit plan to which the pooled plan provider has a commercial (service or investments) relationship. Additionally, the commenters were concerned with the proposal's extension of this provision to "any . . . employee" of the pooled plan provider. Many pooled plan providers will likely be large firms and may have thousands—even tens of thousands—of employees, according to the commenters. The commenters maintained that the cumulative effect of these open-ended or undefined concepts will result in an expensive, impracticable, or unworkable registration.

In response to these commenters, the final rule makes another narrowing change to the proposal. The Department has determined that, without this additional change, this aspect of the final rule may be impractical for large providers and could result in so much reporting that the registration requirement would become less useful. Accordingly, paragraph (b)(1)(x) of the final rule limits the type of reportable event to matters involving claims of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets. These matters go to the core of the Department's oversight responsibilities and, similarly, should be of utmost relevance to potential or participating employers. These changes will reduce the reporting burden on pooled plan providers, while improving the quality of the information on file by encompassing only the most egregious

claims. Commenters' concerns regarding the coverage of rank-and-file employees are not without merit. Limiting the scope of actions as described in this paragraph addresses this concern.<sup>14</sup>

Finally, the proposal specifically requested comments on the feasibility and advisability of expanding this provision in the final rule to include settlements of fiduciary liability claims against pooled plan providers with the Department or the Pension Benefit Guaranty Corporation, including settlements under ERISA

§ 206(d)(4)(A)(iii). Commenters were asked whether such information would be helpful to employers performing due diligence in selecting and monitoring pooled employer plans. The commenters who responded to this specific request uniformly rejected such an expansion. They reasoned that most lawsuits are settled without admission of fault and disclosure of such information, therefore, would not necessarily prove itself to be helpful or reliable to prospective or participating employers and may even have adverse or otherwise chilling effects on the establishment of pooled plan providers and pooled employer plans. Based on the public record, the Department declines to expand this provision in this manner.

#### *B. Reportable Event Supplemental Filings*

The final rule provides for two types of supplemental filings. The first type focuses on the commencement of operations by a pooled plan provider of a pooled employer plan. The second type of supplemental filing deals more generally with changes in circumstances of the pooled plan provider that have occurred since the provider's initial filing. Both types of supplemental filings will provide important information to the Department, the Treasury Department, and the IRS, to help them protect plan participants and

<sup>14</sup> The preamble to the proposal provided that, for purposes of registration, employees of the pooled plan provider would include employees of the pooled employer plan, but only those who handle assets of the plan within the meaning of section 412 of ERISA or who are responsible for the operations or investments of the plan. 85 FR 54288. The intent of this provision is to avoid potential oversight gaps by treating certain employees of the pooled employer plan, if any, as if they are employees of the pooled plan provider in order to subject them to the disclosure requirements of the regulation. The provision identifies a subset of employees of the pooled employer plan who are in important positions of plan operations or handle plan assets. Commenters did not raise questions or concerns about this provision. Therefore, the final rule adopts this provision as proposed. In response to one comment, however, this provision was relocated from the preamble to paragraph (b)(10) of the final rule for complete transparency.

beneficiaries and conduct more effective monitoring and oversight of pooled employer plans and pooled plan providers. Without this kind of timely information, the agencies would typically not learn of risks to a pooled employer plan until the plan files a Form 5500, possibly many months after the event (assuming the information was even required to be reported on the Form 5500), and when opportunities for protecting plan participants from financial injury have been missed. Reporting changes in the previously filed registration information also will help the Department ensure that the information regarding pooled plan providers posted on its website and available to the public is up to date. Otherwise the Department, employers, and the public would have to rely on outdated information until a Form 5500 was filed for the plan and then would need to compare the registration information with the subsequently filed information about pooled plan providers in Forms 5500 submitted by the pooled plan provider on behalf of the pooled employer plans the providers operate. The need to rely upon, compare, and resolve differences between registration statements and Forms 5500 would dramatically reduce the value of registration filings as a ready and reliable data source for the Department, employers, and the public.

#### *Commencement of a Pooled Employer Plan—Paragraph (b)(2)*

Paragraph (b)(2) of the final rule requires a pooled plan provider to file a supplemental report before beginning to operate a pooled employer plan. The supplemental filing must contain the name and plan number (PN) that the pooled employer plan will use for annual reporting, and the name, address, and EIN for the trustee for the plan.<sup>15</sup> Under paragraph (b)(2), this supplemental information must be filed “[n]o later than the initiation of operations of a plan as a pooled employer plan.” Sometimes, however, a pooled plan provider will know this information at the time it submits its initial filing. If so, paragraph (b)(2) is satisfied if the pooled plan provider includes this information with the initial filing. This supplemental information must be reported earlier than the other supplemental information required pursuant to paragraph (b)(3) of the final rule, which

<sup>15</sup> Subsequent filings on Form 5500 are publicly available through the Department's EFAST website, available at [efast.dol.gov](http://efast.dol.gov). Using the EFAST search function, an interested person may review any Form 5500 filings by a specific pooled employer plan by entering the plan's name and PN.

must be reported within the later of 30 days after the calendar quarter in which the reportable event occurred or 45 days after a reportable event. The earlier timing requirement in paragraph (b)(2) arises from Code section 413(e)(3), which provides that the requirements to be a pooled plan provider (including the requirement to register with the Secretary of the Treasury before beginning operations as a pooled plan provider) must be satisfied “with respect to any plan.”

One change was made to this provision from the proposed regulation. Whereas the proposal required the EIN for the pooled employer plan, paragraph (b)(2) of the final rule requires the PN that the pooled employer plan will use for annual reporting purposes. Paragraph (b)(1)(iii) of the final rule already requires disclosure of the EIN of the pooled plan provider. Thus, the combination EIN/PN for each pooled employer plan would be the pooled plan provider's nine-digit EIN and the three-digit PN that the pooled plan provider assigns to each pooled employer plan it operates. This change eliminates the burden on a pooled plan provider to obtain a separate EIN for each pooled employer plan it operates. Instead, the pooled plan provider simply uses its own EIN and self-assigns a PN for the particular pooled employer plan. This change also establishes a much stronger link between the Form PR and the pooled employer plan's Forms 5500 Annual Return/Report. One commenter requested the Department, among other things, to take active efforts to ensure that the pooled plan provider's Form PR and the pooled employer plan's annual reports will be appropriately cross-linked. This change responds to this commenter's request.

#### *Other Reportable Events—Paragraph (b)(3)(i) through (v)*

Paragraph (b)(3) of the final rule requires a supplemental filing for any changes in the previously reported registration information and for certain specified events within the later of 30 days after the calendar quarter in which the change or reportable event occurred or 45 days after a reportable event. This is a longer period than was permitted under the proposed regulation, which required a supplemental filing within 30 days of each such reportable event. This extension was based on commenters' concerns with the brevity of the timeframe in the proposal.

In evaluating the 30-day deadline in the proposal, the commenters were concerned that they would need to establish a complex and costly tracking system to monitor for supplemental

reporting events, reducing the profit margins and incentives to offer pooled employer plans. The commenters argued that the number and scope of potential reportable events would effectively require daily tracking and reporting because every day necessarily is the end of a prior 30-day period. The commenters suggested an annual updating requirement as an alternative.

In response to these concerns, the final rule requires a supplemental filing for any changes in the previously reported registration information and for certain specified events within the later of 30 days after the calendar quarter in which the change or reportable event occurred or 45 days after a reportable event. The Department agrees with the commenters that the proposal's 30-day deadline could have potentially created unnecessary burden for some pooled plan providers. The Department, however, is unable to conclude that a single annual update for all reportable events that occurred in that year reliably provides the Department, other agencies, and participating employers with sufficiently timely information to discharge the obligations that underpin the establishment of this rule. Such an approach would reduce the reliability of registration information, which could be quite stale. For instance, an annual update of the sort recommended by the commenters would be well in excess of the 180 days creditors generally have to file against a debtor in matters of bankruptcy. Further, the final rule limits the scope of the supplemental reporting requirements in paragraph (b)(3)(iii) of the final rule, potentially obviating at least some of the concerns underpinning the length of commenters' request. On balance, the Department believes the "quarterly" rule in the final regulation strikes a fair balance between the proposal and the commenters' request. The Department recognizes that an occurrence triggering a supplemental filing could happen within days of the end of a quarter; the final rule thus provides that pooled plan providers at a minimum will have 45 days to submit a supplemental filing.

Changes that trigger a supplemental filing under paragraph (b)(3) are as follows:

1. *Changes in information previously reported.* Paragraph (b)(3)(i) of the final rule requires a supplemental filing in the case of a change in the registration information previously reported by the pooled plan provider. This provision in the final rule is the same as in the proposed rule with one non-substantive change. One commenter suggested that we limit the changes that require a supplemental filing under paragraph

(b)(3)(i) to those that are "material." The Department declines this suggestion because, in its view, all of the registration information required in an initial filing is material. The purpose of paragraph (b)(3)(i) of the final rule is to ensure that the registration information the Department has, and that it posts on its website, is accurate and up to date so that the Department and prospective and participating employers are able to perform their oversight and due diligence activities, respectively, and accurate and up-to-date information is essential to these functions. Moreover, in other parts of this final rule, we have circumscribed the information that is to be included in an initial filing and have also extended the timeframe for submitting the supplemental filing, both of which should ameliorate concerns that registrants potentially would be filing copious non-material information. The non-substantive change is to clarify that updated disclosure relating to criminal, civil, or administrative proceedings need not be made pursuant to paragraph (b)(3)(i) if such information is otherwise being disclosed pursuant to paragraphs (b)(3)(iii)–(v).

2. *Changes in corporate or business structure.* Paragraph (b)(3)(ii) of the final rule requires a supplemental filing in the case of any significant change in corporate or business structure of the pooled plan provider, e.g., merger, acquisition, or initiation of bankruptcy, receivership, or other insolvency proceeding for the pooled plan provider or affiliate that provides services to any pooled employer plan, or ceasing all operations as a pooled plan provider. A significant change in corporate or business structure could have consequences that affect the pooled employer plans as well as participating employers and covered employees and could also give rise to possible conflicts of interest that would not have existed in the absence of the transaction.

One clarification was made to this provision from the proposed regulation. The proposal would have required a supplemental filing in the case of an insolvency proceeding of an affiliate of a pooled plan provider regardless of whether the affiliate provides services to a pooled employer plan. Some commenters broadly questioned the need for any supplemental reporting of any event involving affiliates of the pooled plan provider, arguing that this registration requirement should be limited to pooled plan providers only. Other commenters, however, suggested that insolvency proceedings of affiliates may be relevant for purposes of this rule if the affiliate provides services to the pooled employer plan. The Department

agrees with these commenters that insolvency proceedings of an affiliate of the pooled plan provider are more relevant when the affiliate is a service provider of the pooled employer plan, and less so when the affiliate has no service relationship to the plan. Information about an insolvency proceeding of an affiliate that does not provide services to the pooled employer plan, although not irrelevant, may be in excess of what is necessary for the Department to discharge its oversight obligations under the statute. Such information, moreover, may be of limited or no value to participating employers with respect to their selection and monitoring obligations identified in section 3(43) of ERISA. Accordingly, information about an insolvency proceeding of an affiliate does not have to be reported in a supplemental filing under the final rule, unless the affiliate is a service provider of a pooled employer plan. In these circumstances, the Department believes the cost of the disclosure is justified by its value to oversight officials. The Department added "that provides services to any pooled employer plan" to paragraph (b)(3)(ii) to effect this clarification.<sup>16</sup>

One commenter suggested that the Department consider narrowing this proposed requirement even further to limit reporting of mergers and acquisitions of pooled plan providers. These events, according to this commenter, could be quite common for financial corporations and in some cases, may involve entities that will have no relation to the pooled employer plan. Instead of a blanket reporting obligation, the commenter recommend limiting this requirement to situations that will directly impact the pooled plan provider and its pooled employer plan offerings. The Department declines to adopt this suggestion because the pooled plan provider serves a critical role in sponsoring the pooled employer plan and therefore significant changes in its corporate or business structure may raise important considerations with respect to the plan. Unlike the disclosure provisions related to insolvency, this provision only applies to the pooled plan provider and does not apply to any affiliates. Therefore, the Department believes that the burden in providing this disclosure will be infrequent and low.

3. *Receipt of notice of new administrative proceedings or*

<sup>16</sup> In response to a comment seeking confirmation, the Department confirms that the supplemental reporting with respect to merger or acquisition relates only to "M&A" activity of the pooled plan provider, not any of its affiliates.

*enforcement actions.* Paragraph (b)(3)(iii) of the proposed regulation required supplemental reporting by the registrant on “receipt of written notice of the initiation of any administrative or enforcement action related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan, in any court or administrative tribunal by any Federal or State governmental agency or other regulatory authority against the pooled plan provider or any officer, director, or employee of the pooled plan provider.” Commenters raised similar concerns with this provision in the proposal as with paragraph (b)(1)(x) of the proposal (which dealt with disclosures of *ongoing* criminal, civil, or administrative proceedings). These concerns were mostly based upon the provision’s scope and breadth, particularly regarding the types of actions, the types of administrative proceedings, and the class of actors against whom actions would be initiated. The Department narrowed the scope of paragraph (b)(1)(x) of the final rule in two ways, as discussed above in this preamble. The Department, therefore, narrowed the scope of paragraph (b)(3)(iii) of the final rule to match the scope of paragraph (b)(1)(x) of the final rule. Accordingly, paragraph (b)(3)(iii) of the final rule requires a supplemental filing if a pooled plan provider receives written notice of the initiation of any administrative proceeding or enforcement action in any court or administrative tribunal by any Federal or State governmental agency or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets. Timely knowledge of such actions will help the agencies fulfill their oversight functions and assist prospective and existing participating employers in properly carrying out their duties under the SECURE Act provisions with respect to selection and monitoring of pooled employer plans.

4. *Receipt of notice of finding of fraud, dishonesty, or mismanagement.* Paragraph (b)(3)(iv) of the final regulation requires a supplemental filing if the registrant receives written notice of a negative finding in any matter described in paragraph (b)(1)(x) or (b)(3)(iii) of this section. This provision is essentially the same as its predecessor in the proposed rule, although changes were made to conform

to revisions to paragraphs (b)(1)(x) and (b)(3)(iii) of the final rule. Those revisions to paragraphs (b)(1)(x) and (b)(3)(iii) of the final rule, which dictated the revisions to paragraph (b)(3)(iv), are discussed above in this preamble. The purpose of paragraph (b)(3)(iv) of the final regulation is to capture the findings, if negative, of the proceedings described in paragraphs (b)(1)(x) and (b)(3)(iii) of the final regulation. A decision is negative if there is finding of fraud or dishonesty related to providing services to any employee benefit plan (including a pooled employer plan), or if there is a finding of mismanagement of plan assets. This information is important for agency oversight and for participating employers with respect to their duties under the SECURE Act provisions regarding selection and monitoring of the pooled employer plans.

5. *Receipt of notice of filing of criminal charges.* Paragraph (b)(3)(v) of the final rule requires a supplemental filing if a pooled plan provider receives written notice of the filing of any Federal or State criminal charges related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan against the pooled plan provider or any officer, director, or employee of the pooled plan provider. Such actions, too, are relevant to the selection and monitoring obligations of participating employers, and while ERISA section 411 bars serving as an ERISA fiduciary following a wide range of crimes, this information is limited to those criminal charges related to the provision of services to, operation of, or investments of any pooled employer or other employee benefit plan. Commenters did not raise questions or concerns with this requirement. Therefore, the final rule adopts this provision as proposed.

Although the final rule largely adopts the proposed criminal disclosures without change, the Department is concerned with potential reputational harm in the cases of persons acquitted of the criminal charges for which a prior reporting has been made under this section. To address this concern, the Department added paragraph (d) to the final rule. Paragraph (d) provides that a pooled plan provider may file an update to remove any matter previously reported under paragraph (b)(1)(ix) or (b)(3)(v) of the final rule for which the defendant has received an acquittal.” For this purpose, the term “acquittal” means a finding by a judge or jury that a defendant is not guilty or any other dismissal or judgment which the government may not appeal and

includes situations where a prosecuting authority voluntarily dismisses charges with an ability to subsequently re-file. Likewise, the Department reserves the right to remove such information independently or in response to a request from a person acquitted of such charges.

#### *C. Amendment and Correction of Registration Information*

Pooled plan providers can file corrections and amendments of their initial registration and reportable event filings through the electronic filing system. Inadvertent or good faith errors in registrations do not nullify a person’s status as a pooled plan provider, provided that a corrected or amended filing is submitted within a reasonable period of the discovery of the error or omission. If correcting only information previously reported, such as entry of an incorrect name for the agent for service of legal process, a person would indicate on the form that the filing is an amended filing, not a supplemental filing.

Further, the Department expects to propose, through a separate rulemaking, new questions on the Form 5500 that would ask whether a pooled plan provider filed its registration statement with the Secretary, including any required updates, and to report the electronic confirmation number provided to the pooled plan provider at the time that the registration was received. These would be similar to the questions currently on the Form 5500 that require reporting by multiple employer group health plans about their compliance with registration and reporting requirements on the Form M-1 (Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)). The questions would provide the Department, the Treasury Department, the IRS, participating employers, and other stakeholders with information that would allow them to connect the Form PR registration with the Form 5500 for all pooled employer plans operated by the registrant.

#### *D. Final Filing*

If a pooled plan provider has ceased operating all pooled employer plans and has filed a supplemental reportable event filing to indicate that the last pooled employer plan for which it served as the pooled plan provider has been terminated and ceased operating, the provider is required to file a final registration filing. For this purpose, a plan is treated as terminated and having ceased operations when a resolution has been adopted terminating the plan, all

assets under the plan (including insurance/annuity contracts) have been properly distributed to the participants and beneficiaries or legally transferred to the control of another plan, and when a final Form 5500 has been filed for the plan. The final Form PR filing is due within the later of (a) 30 days after the calendar quarter in which the final Form 5500 for the last pooled employer plan operated by the pooled plan provider was filed,<sup>17</sup> or (b) 45 days after such filing. A single combined filing may be used both to report the date that the last pooled employer plan operated by the provider has been terminated and ceased operating, including filing the final Form 5500 in accordance with its instructions, and to serve as the final Form PR filing by the pooled plan provider. The final filing assists the Department's maintenance of an accurate database of persons serving as pooled plan providers and provides accurate public information about pooled plan providers to employers, participants, beneficiaries, and other interested persons.

#### E. Electronic Filing

This final regulation requires electronic filing of all pooled plan provider registrations with the Department. The Department is using the same electronic system for pooled plan providers to file the Form PR that plan administrators currently use to file the Form 5500. Regular mail is not the most efficient or cost-effective way to file and process this information. Because the internet is widely accessible to persons who the Department expects to be interested in being pooled plan providers, they will find electronic filing easier and more cost-effective than paper filing. The electronic submission process will also assist pooled plan providers by ensuring that all required information is included in the registration before the electronic filing can be completed through the internet site. In addition, the process provides an electronic registration confirmation receipt. Electronic filing also will facilitate the disclosure of the information to participating employers, covered participants and beneficiaries,

<sup>17</sup> A final Form 5500 cannot be filed for a pooled employer plan until all assets under the plan (including insurance/annuity contracts) have been distributed to the participants and beneficiaries or legally transferred to the control of another plan. The final Form 5500 must be filed, absent an extension of time, no later than the last day of the 7th calendar month after the end of the plan year in which the plan terminated, but it can be filed earlier, including as a short plan year filing, if the pooled employer plan were to cease having participants and beneficiaries and distribute all the assets in the middle of a plan year.

and other interested members of the public. Once a registration is filed, the data would be posted on the Department's website and be available to the public. Therefore, filers and data users all stand to benefit from electronic filing in ways that are consistent with the goals of the E-Government Act of 2002.<sup>18</sup>

Under ERISA Section 505, in addition to having the authority to prescribe such regulations the Department determines may be necessary or appropriate to carry out the provisions of Title I of ERISA, the Department has the authority to prescribe forms. The Department used this authority to create the Form PR. Form PR and the accompanying instructions are the required filing format for pooled plan provider registrations and the Form PR must be filed electronically with the Department of Labor at <https://www.efast.dol.gov/>.

#### F. Coordination With the Treasury Department and the Internal Revenue Service

The SECURE Act requires pooled plan providers to register with the Department as well as with the Treasury Department and the IRS. The Department coordinated with those agencies to develop the final regulation. Filing the registration statement with the Department, including the supplemental statement identifying a pooled employer plan for which the pooled plan provider is acting in that capacity prior to the initiation of operations of each such plan, satisfies the Code requirement to register as a pooled plan provider with respect to that plan. The Department will continue to consult with the Treasury Department and the IRS in connection with their development of the pooled plan provider registration requirements and filing process.

#### G. Good Cause Finding for Immediate Registration

The Administrative Procedure Act (5 U.S.C. 553 (d)) (APA) permits a rule to become effective immediately, rather than after a 30-day delay, if there is good cause to do so. The SECURE Act allows pooled plan providers to begin operations on January 1, 2021, but only if they first register with the Department. Commenters on the proposed rule requested that the Department make the registration process available as soon as possible. Some commenters even requested that the Department accept registrations before publication of a final rule. The Department agrees that pooled plan

providers will benefit from having the ability to register immediately, and not wait for a 30-day effective date period. For those providers that plan to begin operating a pooled employer plan on January 1, 2021, making them wait for the expiration of the APA's 30-day effective-date period will unnecessarily compress their overall start-up obligations into a smaller window of time and may, in fact, impede a provider's contractual obligation to begin operation of a pooled employer plan on January 1, 2021. Moreover, no one is harmed by allowing registrants to file early, as the statute itself does not allow pooled employer plans to begin operations until January 1, 2021. In fact, an immediate effective date will allow important information to be publicly available that will enable employers, and ERISA plan participants and beneficiaries, more time to evaluate the bona fides of a particular pooled employer plan. Accordingly, the Department finds there is good cause for the final rule to become effective immediately, rather than after a 30-day delay.

#### Regulatory Impact Analysis

*Summary*—The SECURE Act was enacted to expand retirement savings. Section 101 of the SECURE Act amends section 3(2) of ERISA to eliminate the commonality of interest requirement for establishing certain individual account plans, or "pooled employer plans," that meet specific requirements. Among these requirements, such plans must designate a pooled plan provider to serve as a named fiduciary and as the plan administrator. Further, section 101 of the SECURE Act requires pooled plan providers to register with the Department and the Treasury Department before beginning operations. The statute expressly provides a separate authorization for the Department to require additional information.

The Department has examined the effects of this rule as required by Executive Order 12866,<sup>19</sup> Executive Order 13563,<sup>20</sup> the Congressional Review Act,<sup>21</sup> Executive Order 13771,<sup>22</sup> the Paperwork Reduction Act of 1995,<sup>23</sup> the Regulatory Flexibility Act,<sup>24</sup> section 202 of the Unfunded Mandates Reform

<sup>19</sup> Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

<sup>20</sup> Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

<sup>21</sup> 5 U.S.C. 804(2) (1996).

<sup>22</sup> Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (Jan. 30, 2017).

<sup>23</sup> 44 U.S.C. 3506(c)(2)(A) (1995).

<sup>24</sup> 5 U.S.C. 601 *et seq.* (1980).

<sup>18</sup> Public Law 107-347, sec. 2 (Dec. 17, 2002).



Act of 1995,<sup>25</sup> and Executive Order 13132.<sup>26</sup>

1.1. Executive Orders

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, 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 subject to review by the Office of Management and Budget (OMB).<sup>27</sup> Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to produce a rule that does any of the following:

(1) Has an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (such actions are also referred to as “economically significant”);

(2) creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency;

(3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

A full regulatory impact analysis must be prepared for major rules with economically significant effects (for example, impacts of \$100 million or more in any one year), and OMB reviews “significant” regulatory actions. OMB determined that this rule is not economically significant within the meaning of section 3(f)(1) of the Executive Order but is significant under 3(f)(4). Therefore, the Department has provided an assessment of the potential

costs, benefits, and transfers associated with this final rule. In accordance with the provisions of Executive Order 12866, OMB has reviewed this final rule.

1.2. Introduction and Need for Regulation

As added by the SECURE Act, section 3(44) of ERISA requires a person to register as a pooled plan provider with the Secretary, and provide other information the Secretary may require, before operating a pooled employer plan. This final rule responds to the direction given to the Secretary in the SECURE Act and specifies the requirements for registering with the Secretary.

The required information allows the Department to identify pooled plan providers so that it may monitor their actions. While the Form 5500, which pooled plan providers will also be required to file, collects important information, Form 5500 reporting is generally unavailable for more than 18 months after a plan starts. The SECURE Act’s registration requirement gives the Department more immediate access to pooled plan provider information, allowing the Department (and other agencies) to observe how this new market develops and assess the need for further guidance.

1.3. Affected Entities

The goal of the SECURE Act is to increase retirement savings, particularly by expanding the options for small employers to participate in multiple employer plans, such as pooled employer plans. The Department expects this expansion to produce administrative savings and new opportunities to provide retirement savings plans for many small employers. Section 101 of the SECURE Act allows commercial service providers to serve as plan administrators and named fiduciaries of defined contribution pension plans that offer retirement benefits to the employees of more than one unrelated employer. Expanding the ways in which service providers and employers may craft and join multiple employer plans (including pooled employer plans) should reduce costs

and administrative burdens for participating employers. For example, a single Form 5500 filing by the pooled plan provider would satisfy the annual reporting requirement for all the participating employers, instead of separate Form 5500 filings and audits for each individual employer. Pooled plan providers would be both a named fiduciary and plan administrator for the pooled employer plan, and they are required to register with the Department before operating any such plans.

The Department has identified certain existing entities that it believes would be most likely to serve as pooled plan providers. For example, recordkeepers that currently administer retirement plans may be well positioned to serve as pooled plan providers and some recordkeepers have affiliated entities that may seek to provide investment alternatives and services to the plan. Similarly, many Professional Employer Organizations (PEOs) have served as plan administrators and would likely have relevant experience to serve as pooled plan providers. Further, insurance companies have expressed interest in serving as pooled plan providers and some have prior experience providing similar services. Chambers of Commerce have connections with employers, but many are small with few full-time staff. Also, few Chambers of Commerce have sponsored MEWAs. While retirement plan advisors such as broker-dealers and registered investment advisers are also plausible candidates, the Department believes that some would be reluctant to assume the named fiduciary and plan administrator roles. Entities such as registered investment advisers may be more comfortable serving as section 3(38) investment managers for the pooled plan providers.

Given these considerations, the Department estimates that approximately 3,200 unique entities will initially register to serve as pooled plan providers. Recordkeepers and plan administrators of existing defined contribution plans are most likely to enter the market, followed by PEOs, direct annuity writers, Chambers of Commerce, and plan advisors.

ESTIMATED POOLED PLAN PROVIDER

	Universe	Expected share (%)	Estimated number
Unique Recordkeepers and Plan Administrators for existing DC Plans <sup>a</sup> .....	2,378	50	1,189
Professional Employer Organizations <sup>b</sup> .....	907	25	227

<sup>25</sup> 2 U.S.C. 1501 *et seq.* (1995).

<sup>26</sup> Federalism, 64 FR 153 (Aug. 4, 1999).

<sup>27</sup> Regulatory Planning and Review, *supra* note 2.

## ESTIMATED POOLED PLAN PROVIDER—Continued

	Universe	Expected share (%)	Estimated number
Chambers of Commerce <sup>c</sup> .....	4,000	5	200
Large Broker-Dealers <sup>d</sup> .....	173	5	9
Registered Investment Adviser Firms <sup>d</sup> .....	30,246	5	1,512
Direct Annuity Writers (Insurance Companies) <sup>e</sup> .....	386	25	97
Total .....	38,090	8	3,233

<sup>a</sup> 2017 Form 5500 Schedule C Data.

<sup>b</sup> National Association of Professional Employers, <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics> <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics>.

<sup>c</sup> Association of Chamber of Commerce Executives reports that there are 4,000 Chambers with at least 1 full-time staff person.

<sup>d</sup> 2019 FINRA Industry Snapshot. FINRA reported 3,607 FINRA registered firms in 2018. There were 173 with 500 or more registered representatives.

<sup>e</sup> National Association of Insurance Commissioners.

#### 1.4. Benefits

The SECURE Act requirement that pooled plan providers first register with the Department before beginning operations alerts regulators to the presence and intent of new entities. Registering allows potential pooled plan providers access to this newly created market. These registrations would require contact information, the address of any public website(s) of the pooled plan provider or affiliates used to market such person as pooled plan provider to the public, and the date operations are expected to commence. The registrations will be publicly available and provide a complete list of registered pooled plan providers. In addition, the supplemental filing requirement ensures that providers update their initial filing to report changes relevant to the pooled plan provider's and participating employers' fiduciary duties (including, for example, inception of bankruptcy and criminal or regulatory enforcement actions against the pooled plan provider involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets). This will help provide transparency regarding the provider's management and business practices, allowing employers to better survey the market when choosing a pooled plan provider or deciding whether to continue to rely on an existing provider and enabling the Department and Treasury Department to carry out their statutory oversight duties.

Some commenters were concerned that the information required in the registration would expose pooled plan providers to litigation risk and a heightened degree of regulatory scrutiny. Some commenters also were concerned that disclosing ongoing criminal, civil, or administrative proceedings against the pooled plan

providers would deter employers from engaging with pooled plan providers. While the Department acknowledges these concerns, the Department believes that the registration and supplemental filing requirements will provide the Department, other agencies, and potential or participating employers information (including transparency regarding fraud, dishonesty, and mismanagement of plan assets) they need to discharge their legal obligations under the law.

In the Department's view, the statutory purpose of the registration requirement is to provide the Department with sufficient information about entities acting as pooled plan providers to engage in effective monitoring and oversight of this new type of ERISA retirement plan. As discussed above, the potential for inadequate employer oversight of the activities of a pooled employer plan and its plan fiduciaries and other service providers may be greater than is true of other plans sponsored by employers because the participating employers in pooled employer plans give more responsibility to the pooled plan provider than they typically give service providers in other plan arrangements. The final regulation's information collection, which the Department has limited to minimize burden, will assist the Department in fulfilling its oversight responsibilities. Disclosure of any websites containing marketing information for any pooled employer plan(s) established by the provider, the date operations are expected to commence, and changes relevant to the pooled plan provider's fiduciary duties (including, for example, bankruptcy, litigation, and ongoing criminal or regulatory enforcement actions involving fraud or dishonesty) all serve to help with monitoring and oversight.

As stated above, the SECURE Act amended ERISA to remove possible

barriers to the broader use of multiple employer plans. This objective was accomplished primarily by allowing multiple unrelated employers to participate in an open MEP called a pooled employer plan that does not require commonality among participating employers or a genuine organizational relationship unrelated to participation in the plan. By allowing most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to pooled plan providers, pooled employer plans give employers the option of providing a workplace retirement plan to their employees with reduced burdens and costs as compared to sponsoring their own separate single employer retirement plan. Consequently, more plan formation and broader availability of workplace retirement plans should occur, especially among small employers.

The Department is uncertain of the number of pooled employer plans that could be created based on the final rule, the number of employers that will participate in such plans, and the number of participants and beneficiaries that will be covered by them. The Department is confident, however, that pooled employer plans will be created to take advantage of the new statutory structure.

It is possible that each pooled plan provider that registers will offer at least one new pooled employer plan and larger pooled plan providers will offer more than one new pooled employer plan. As is the case with multiple employer plans generally, pooled employer plans are likely to vary substantially in size, although small pooled employer plans are less likely to offer the economies of scale that could exist for large or very large pooled employer plans.

The effects on coverage are somewhat uncertain because of the possibility of at

least some zero-sum gain. Some new pooled employer plans will attract participating employers that currently do not offer retirement savings opportunities to their employees. The result in this situation would be a net coverage increase, and retirement security could be improved to some extent for the employees of these participating employers.<sup>28</sup> At the same time, however, the Department expects that some existing retirement plans, most likely those of small single employer plan sponsors, could terminate or otherwise cease to operate in their current form and merge into pooled employer plans. A dominant influence in this direction would be the administrative cost savings and other operational efficiencies that come with economies of scale. The Department has repeatedly acknowledged the potential benefits that could accrue to small employers and their employees if they join together in multiple employer plans and similar cooperative arrangements.<sup>29</sup>

For different reasons, though, it also is possible that some existing multiple employer plans would convert to pooled employer plans.<sup>30</sup> According to the most recent Form 5500 data, there are 4,523 defined contribution multiple employer plans.<sup>31</sup> Conversions of this type might occur, for example, if a multiple employer plan were to conclude that restrictions under section 3(5) of ERISA, such as the geographic limitations imposed pursuant to 29 CFR 2510.3–55(b)(2), the substantial employment function test for bona fide professional employer organization arrangements in 2510.3–55(c)(1), or the

<sup>28</sup> Workplace retirement plans often provide a more effective way for employees to save for retirement than saving in their own IRAs. Compared with saving on their own in IRAs, workplace retirement plans offer employees (1) higher contribution limits; (2) generally lower investment management fees as the size of plan assets increases; (3) a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections; (4) automatic enrollment; and (5) stronger protections from creditors. At the same time, workplace retirement plans provide employers with choice among plan features and the flexibility to tailor retirement plans that meet their business and employment needs. See 84 FR 37528.

<sup>29</sup> 84 FR 37508 (July 31, 2019) (Definition of “Employer” Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans); see also 83 FR 28912 (June 21, 2018) (Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans).

<sup>30</sup> Section 101 of SECURE Act itself contemplates such conversions and provides a special rule for existing plans to elect pooled employer plan status (new section 3(43)(C)) of ERISA).

<sup>31</sup> *Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports*, Employee Benefits Security Administration (forthcoming 2020).

tests articulated in the Department’s subregulatory guidance for an entity to be considered a bona fide group or association of employers were disadvantageous or inefficient relative to the conditions for being a pooled employer plan.

The total number of defined contribution plans, therefore, could decrease as a result of these mergers and conversions. Even so, however, net coverage (*i.e.*, the number of total defined contribution plan participants) could increase, because (1) participants in plans that merge or convert into pooled employer plans would continue to be covered under a retirement plan, and (2) some employers that do not currently provide their employees with retirement plan access would join pooled employer plans and their employees would count as newly-covered participants.

Pooled employer plans generally would benefit from scale advantages that small businesses do not currently enjoy, and the Department expects that such plans will pass some of the attendant savings onto participating employers and participants. Large scale may create two distinct economic advantages for pooled employer plans. First, as scale increases, marginal costs for pooled employer plans would diminish and pooled plan providers would spread fixed costs over a larger pool of member employers and employee participants, creating direct economic efficiencies. Second, asset managers commonly offer proportionately lower prices, relative to money invested, to larger investors, under so-called tiered pricing practices resulting in decreased expense ratios based on the aggregate amount of money invested by a single pooled employer plan.

For example, larger plans tend to have lower fees overall.<sup>32</sup> Generally, small plans with 10 participants pay approximately 50 basis points more than plans with 1,000 participants.<sup>33</sup> Small plans with 10 participants pay about 90 basis points more than large plans with 50,000 participants. Grouping small employers together into

<sup>32</sup> 84 FR 37508, 37535.

<sup>33</sup> Deloitte Consulting and Investment Company Institute, *Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the “All-in” Fee* (Aug. 2014). Deloitte Consulting LLP conducted a survey of 361 defined contribution plans for the Investment Company Institute. The study calculates an “all in” fee that is comparable across plans including both administrative and investment fees paid by the plan and the participant. Deloitte predicted these estimates by analyzing the survey results using a regression approach calculating basis points as a share of assets. See 84 FR 37508, 37535.

a pooled employer plan could facilitate savings through administrative efficiencies and sometimes through price negotiation (market power). The degree of potential savings may be different for different types of administrative functions, *e.g.*, scale efficiencies can be very large with respect to asset management, and may be smaller, but still meaningful, with respect to functions such as marketing, distribution, asset management, recordkeeping, and transaction processing.

Other potential benefits of the expansion of MEPs through the creation of pooled employer plans could include (1) increased economic efficiency as small businesses can more easily compete with larger companies in recruiting and retaining workers due to a competitive employee benefit package; (2) enhanced portability for employees that leave employment with an employer to work for another employer participating in the same pooled employer plan; (3) higher quality data (more accurate and complete) reported to the Department on the Forms PR and 5500; and (4) increased operating efficiency for small businesses by shifting the administrative burden associated with establishing and maintaining a retirement plan to a pooled plan provider.

#### 1.5. Costs

The costs most directly associated with this rule are those incurred to prepare and submit the registration statement. The PRA section, below, discusses these costs in detail. As required under E.O. 13771, the estimated cost is \$688,000 in the first year and \$72,400 in subsequent years.<sup>34</sup> The perpetual time horizon annualized cost is \$106,100 in 2016 dollars, using a seven percent discount rate, discounted from 2016. Other indirect costs may also be attributed to the regulation, depending on the extent of pooled employer plan formation, as well as the extent of conversions, mergers, and contractions among existing plans. The likely extent of these actions and associated costs is highly uncertain. With respect to any new pooled employer plan, these indirect costs would relate to a pooled plan provider complying with the requirements of the SECURE Act that are not codified by this final regulation.

<sup>34</sup> The total ten-year cost is \$1,215,000 with a three percent discount rate and \$1,084,000 with a seven percent discount rate. The annualized ten-year cost is \$142,000 using a three percent discount rate, and \$154,000 using a seven percent discount rate.

Some commenters suggested that the final rule's reporting requirements would be burdensome and duplicative of other ERISA-required reporting requirements. One commenter asserted that the pooled plan provider should not be required to report any information other than the pooled plan provider's basic contact and identifying information. While the Department acknowledges these concerns, the Form 5500 data generally is not available for 18 months after a plan starts operation. Therefore, the Form PR will provide the Department with more immediate access to pooled plan provider information. This will allow the Department to monitor pooled plan providers and assess the need for further guidance, which will help protect the interests of plan participants and beneficiaries. In addition, changes to the proposed rule have been made to address overbreadth and redundancy concerns.

Another commenter suggested that disclosing the pooled plan provider's compliance officer would be burdensome, positing that the Department was effectively requiring pooled plan providers to create a compliance officer role. The Department has now clarified that this is not the case. The final rule simply requires an identification of, and basic contact information for, the person, unit, or element designated by the pooled plan provider as the point-person responsible for fielding and addressing questions about the pooled plan provider's status under ERISA and the Code. Put differently, this provision requires nothing more than for the company to identify whom it wishes to receive and address status and compliance-oriented questions. The Department has tailored this provision as narrowly as possible to advance its intended objective without requiring any changes in business practices. Thus, the Department does not expect that pooled plan providers will incur costs to hire additional employees to serve as responsible compliance officials.

#### 1.6. Transfers

Several potential transfers could occur because of this final rule. To the extent the formation of pooled employer plans leads employers that previously sponsored retirement plans to terminate or freeze these plans and join a pooled employer plan, there may be a transfer if the pooled employer plan has different service providers and asset types than the terminated plan. A similar transfer might occur in cases where employers who previously did not offer their employees a retirement

plan join a pooled employer plan. Employees of these employers may have been saving for retirement previously in different ways, such as through an IRA, which would have different service providers. Service providers that specialize in providing services to pooled employer plans or are affiliated with a pooled plan provider might benefit at the expense of other providers who specialize in providing services to small plans or IRAs. Those different service providers would experience gains or losses of income or market share.

The rule could also result in asset transfers if pooled plan providers invest in different types of assets than plans that merge or convert to pooled employer plans. For example, small plans tend to rely more on mutual funds, while larger plans have greater access to other types of investment vehicles such as bank common collective trusts and insurance company pooled separate accounts, which allow for specialization and plan specific fees. This movement of assets could see profits move from mutual funds to other types of investment managers.

Finally, the Code generally gives tax advantages to certain retirement savings over most other forms of savings.<sup>35</sup> Consequently, all else being equal, workers who are saving money in tax qualified retirement savings vehicles generally can enjoy higher lifetime consumption and wealth than those who do not. The magnitude of the relative advantage generally depends on the worker's tax bracket, the amount contributed to the plan, the timing of contributions and withdrawals, and the investment performance of the assets in the account. Workers that do not contribute to a qualified retirement savings vehicle because they lack access to a workplace retirement plan do not reap this relative advantage. This rule would likely increase the number of American workers with access to tax-qualified workplace retirement plans, which would spread this financial advantage to some people who are not currently receiving it. If access to retirement plans and savings increase because of this rule, a transfer will occur flowing from all taxpayers to those individuals receiving tax preferences as

<sup>35</sup> Employer contributions to qualified pension plans and, generally, employee contributions made at the election of the employee through salary reduction are not taxed until distributed to the employee, and income earned on those amounts is not taxed until distributed. The tax expenditure for "net exclusion of pension contributions and earnings" is computed as the income taxes forgone on current tax-excluded pension contributions and earnings less the income taxes paid on current pension distributions.

a result of new and increased retirement savings.

As is evident from the foregoing, the exact magnitude of the potential transfers is uncertain at this stage, as are the precise identities of the transferors and transferees. Much depends on the number of pooled employer plans that eventually come into existence, the extent of plan consolidation, the number of employers that begin participating anew in pooled employer plans, and the savings habits of the employees of these employers (who might have heretofore been saving through an IRA). Major influences on each of these factors include, among other things, the nature, extent, and timing of the regulatory intervention needed to implement the SECURE Act, as well as the general state of the economy.

#### 1.7. Uncertainty

While the Department has identified types of service providers that it believes will be well positioned to act as pooled plan providers, it is unclear how many will choose to enter the market and whether they will do so in the first year of enactment or in later years. The Department solicited comments on which and how many entities are likely to register as pooled plan providers. However, the Department did not receive comments that specifically addressed this question. Thus, the Department has based its assumptions on discussions with stakeholders and articles on emerging markets.

#### 1.8. Regulatory Alternatives

Section 101 of the SECURE Act requires pooled plan providers to register with the Secretary and provide such other information as the Secretary may require, before beginning operations as a pooled plan provider. The Department considered several alternative forms of information to be included that are discussed below.

The Department could have required fewer data elements, such as contact information only, including address and email. While slightly less burdensome than the final rule's requirements, requiring fewer data elements would provide substantially less information to the Department, which would impede its ability to fulfill its critical oversight role of protecting participants and plan assets. Employers also would receive less information to survey the market when choosing a pooled plan provider or deciding whether to continue to rely on an existing provider.

The Department considered requiring pooled plan providers to file a

registration for each pooled employer plan. This would have required pooled plan providers to file multiple similar filings. The Department did not choose this option, because it would have required pooled service providers to make multiple filings while providing minimal additional benefits.

The Department also considered not requiring pooled service providers to make supplemental filings. While this option would have been less burdensome than the chosen option, it would have provided less information to the Department and interested employers. Requiring pooled service providers to report updated information to the Department can provide key information the Department needs to fulfill its oversight role. Therefore, the Department determined that the benefits of requiring supplemental filings justify any additional cost that pooled plan providers would incur to furnish the updated information.

## 2. 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 Registration Requirements to Serve as a Pooled Plan Provider to Pooled Employer Plans ICR (85 FR 54288). 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).

The Department did not receive comments that specifically addressed the paperwork burden analysis of the information collection requirement contained in the proposed rule.

In connection with publication of this final rule, the Department submitted an ICR to OMB requesting approval of a new collection of information under OMB Control Number 1210-0164, which expires on November 30, 2023. OMB approved the ICR on November 16, 2020.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at [www.RegInfo.gov](http://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](mailto:cosby.chris@dol.gov). Telephone: 202-693-8410; Fax: 202-219-4745. These are not toll-free numbers.

The SECURE Act requires a person to register as a pooled plan provider with

the Secretary, and provide other information the Secretary may require, before beginning operations. This information collection contains the requirements to register with the Secretary under section 3(44) of the Act. The information collection will use the same EFAST 2 electronic filing system that pooled plan providers will use to file the Form 5500 required to be filed on behalf of the pooled employer plan the provider operates.

The Department has designed a two-part approach for this requirement. The first consists of a simple registration of mainly contact information and links to marketing websites. Pooled plan providers must electronically register with the Department at least 30 days before beginning operations. Pooled plan providers that will initiate operations of a plan as a pooled employer plan on or after January 1, 2021, can register anytime before February 1, 2021, provided that the registration is filed "on or before" the initiation of operations of a plan as a pooled employer plan. The 30-day waiting period between registration and the start of plan operations for these pooled plan providers will be waived. The information included in the registration should be collected by the pooled plan provider during its normal course of business, so collection should not require additional effort by the administrator. The Department estimates that compiling and submitting the initial registration information will take about 45 minutes and impose no additional costs on the administrator. To limit costs, a pooled plan provider needs to file only one registration regardless of the number of pooled employer plans it operates, provided that a supplemental statement is filed identifying each pooled employer plan before the initiation of operations of the plan as a pooled employer plan. Assuming roughly 3,200 pooled plan providers, the Department estimates a burden of 2,425 hours, with an equivalent cost of \$402,000, in the first year.<sup>36</sup>

If the pooled plan provider does not begin operating any new pooled employer plans, does not change its contact information, or does not experience any changes as described in the final rule, it may go for a period of months or years without needing to supplement its registration. The

<sup>36</sup> 3,223 pooled plan providers \* 0.75 hours = 2,425 hours. 2,425 hours \* \$165.63 = \$401,653. Labor rates are EBSA estimates, found at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-eba-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

Department anticipates that this will often be the case.

Pooled plan providers are required to file a supplemental filing within the later of 30 days after the calendar quarter in which a reportable event occurred or 45 days after a reportable event. The supplemental filing requirement is similar to, although more limited than, filers' obligations with respect to the Form M-1, which requires entities to submit additional filings to document changes. Approximately seven percent of entities filing a Form M-1 in 2017 submitted an additional filing after undergoing a change. Assuming pooled plan providers will behave in a similar manner, the Department estimates that approximately 230 pooled plan providers will submit supplemental filings documenting changes annually, including in the first year.

The supplemental filing amends the original registration to include information either for pooled employer plans that begin operations or cease operations, or for material changes relevant to the pooled plan provider's fiduciary duties (including, for example, bankruptcy, litigation, and criminal or regulatory enforcement actions involving fraud or dishonesty). Accordingly, the Department estimates the supplemental filing will take 30 minutes for pooled plan providers to submit. The Department does not believe, however, that the pooled plan provider will incur any additional costs beyond the labor costs necessary to collect and submit this information. The Department estimates that there will be 3,460 filings under the second part of this requirement in the first year, imposing a burden of 1,730 hours, with an equivalent cost of \$287,000.<sup>37</sup>

In subsequent years, the Department believes that the percentage of pooled plan providers reporting beginning or ceasing operations of pooled employer plans will roughly parallel the experience of Form M-1 filers. Approximately 14 percent of Form M-1 filers indicated they began operations in 2017, while six percent indicated they ceased operations.<sup>38</sup> Assuming pooled plan providers behave in a similar manner, the Department expects an additional 650 registrations related to

<sup>37</sup> 3,460 pooled plan providers \* 0.50 hour = 1,730 hours. 1,730 hours \* \$165.63 = \$286,540. Labor rates are EBSA estimates, found at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-eba-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

<sup>38</sup> Pension plans face additional burdens in terminating, and so using welfare plans termination rates as a proxy may overstate the number of incidents.

beginning or ceasing operations annually in subsequent years.<sup>39</sup> These filings have an associated hour burden of 324 hours with an equivalent cost of nearly \$54,000 in subsequent years.

The estimated total burden of this information collection is 4,155 hours, with an equivalent cost of \$688,000, in the first year and 437 hours, with an equivalent cost of \$72,400, in subsequent years.<sup>40</sup>

The Department expects many pooled plan providers will file the first part of registrations in the initial year, and significantly fewer will file in subsequent years as the market stabilizes. Incidents of filing updated and amended registration statements are expected to increase after the first year, as pooled employer plans enter and exit the market, change service providers, and change pooled employer plan offerings.

A summary of paperwork burden estimates follows:

*Type of Review:* New collection.

*Agency:* Employee Benefits Security Administration, U.S. Department of Labor.

*Title:* Registration Requirements To Serve as a Pooled Plan Provider To Pooled Employer Plans.

*OMB Control Number:* 1210-0164.

*Affected Public:* Businesses or other for-profits.

*Estimated Number of Respondents:* 1,660 3-year average (3,233 first year, 873 subsequent years).

*Estimated Number of Annual Responses:* 2,813 3-year average (6,693 first year, 873 subsequent years).

*Frequency of Response:* Occasionally.

*Estimated Total Annual Burden*

*Hours:* 1,676 3-year average (4,155 first year, 437 subsequent years).

*Estimated Total Annual Burden Cost:* 0.

### 3. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)<sup>41</sup> imposes certain requirements with respect to Federal rules that are (1) subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act<sup>42</sup> and (2)

likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis of the final rule. The Department has determined that this final rule, which would require prospective pooled plan providers to register with the Department prior to beginning operations, is not likely to have a significant economic impact on a substantial number of small entities. Therefore, the Department certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The Department estimates that only about eight percent of the potential market will be subject to the rule as pooled plan providers. Each of these entities would incur an estimated cost of \$124 to register and \$83 to update the registration if needed. Below is justification for this determination.

#### 3.1. Need for and Objectives of the Rule

Section 101 of the SECURE Act requires pooled plan providers to register with the Department, the Treasury Department, and the IRS. As noted above, the Treasury Department and the IRS have indicated that filing the registration statement with the Department will also satisfy the Code's registration requirement. The information required to be reported under the final rule would allow regulators to identify and monitor pooled plan providers. While some of the required information may be found in the Form 5500, which pooled plan providers will also be required to file on behalf of each participating employer plan they operate, this reporting is not available for more than 18 months after the pooled plan providers begin operating. The Form 5500, however, would not necessarily include some important information regarding the pooled plan providers themselves, such as bankruptcy filings, or the commencement of any criminal, civil, or administrative proceedings involving a claim of fraud or dishonesty with respect to any employee benefit plan or involving the mismanagement of plan assets. Requiring pooled plan providers to register gives both the agencies and the public, including participating employers, more immediate access to the information for monitoring purposes, and enables the agencies to monitor how this new market develops and assess whether further guidance is needed.

#### 3.2. Affected Small Entities

The Department has identified certain existing entities that it believes would be most likely to serve as pooled plan providers. For example, recordkeepers that currently administer retirement plans are well positioned to serve as pooled plan providers. Similarly, many PEOs have served as plan administrators and would likely have little trouble taking on the role of pooled plan provider. Further, many insurers have expressed interest in serving as pooled plan providers. While retirement plan advisors such as broker-dealers and registered investment advisors are also plausible candidates, the Department believes that many would be reluctant to assume the named fiduciary and plan administrator roles. Entities such as registered investment advisors may likely be more comfortable serving as section 3(38) investment managers for the pooled plan providers.

Based on such considerations, the Department estimates that roughly 3,200 unique entities will initially register to serve as pooled plan providers.

Recordkeepers and plan administrators of existing defined contribution pension plans are most likely to enter the market, followed by PEOs, chambers of commerce, and plan advisors.

While the Department does not have complete information on which of these entities meet the Small Business Administration's definition of a small entity, many of these entities likely are small. The Department estimates that about half of current recordkeepers and plan administrators currently serving defined contribution plans would register to become pooled plan providers. Other types of providers will likely comprise a smaller share of entities that register. Overall, the Department estimates that about eight percent of the universe of entities the Department has identified as well-suited to serve as pooled plan providers are likely to register. The table below includes both large and small entities. The Department cannot estimate with specificity the distribution by size of the providers that will choose to become pooled plan providers. However, most of the providers in these service categories meet the Small Business Administration definition of small entities. If the percentages in the footnote are applied to the number of affected entities in the table below, about 2,600 businesses could be small businesses.<sup>43</sup>

<sup>43</sup> Some possible affected industries by NAICS code are as follows: 524292 third-party administration, more than 90 percent small

<sup>39</sup>  $3,233 * 0.14 = 453$  pooled plan providers report pooled employer plans beginning operation,  $453$  pooled plan providers \*  $0.50$  hour =  $227$  hours.  $227$  hours \*  $\$165.63 = \$37,598$   $3,233 * 0.06 = 453$  pooled plan providers report pooled employer plans ending operation,  $194$  pooled plan providers \*  $0.50$  hour =  $97$  hours.  $97$  hours \*  $\$165.63 = \$16,060$ .

<sup>40</sup>  $873$  filings \*  $0.5$  hours =  $437$  hours. The  $873$  filings in subsequent years are  $453$  pooled plan providers reporting pooled employer plans beginning operations,  $194$  pooled plan providers reporting pooled employer plans ending operations, and  $226$  pooled plan providers filing other changes.

<sup>41</sup> 5 U.S.C. 601 *et seq.* (1980).

<sup>42</sup> 5 U.S.C. 551 *et seq.* (1946).

ESTIMATED POOLED PLAN PROVIDER

	Universe	Expected share (%)	Estimated number
Unique Recordkeepers and Plan Administrators for existing DC Plans <sup>a</sup> .....	2,378	50	1189
Professional Employer Organizations <sup>b</sup> .....	907	25	227
Chambers of Commerce <sup>c</sup> .....	4,000	5	200
Large Broker-Dealers <sup>d</sup> .....	173	5	9
Registered Investment Advisor Firms <sup>d</sup> .....	30,246	5	1512
Direct Annuity Writers (Insurance Companies) <sup>e</sup> .....	386	25	97
<b>Total</b> .....	<b>38,090</b>	<b>8</b>	<b>3,233</b>

<sup>a</sup> 2017 Form 5500 Schedule C Data.

<sup>b</sup> National Association of Professional Employers, <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics>.

<sup>c</sup> Association of Chamber of Commerce Executives reports that there are 4,000 Chambers with at least 1 full-time staff person.

<sup>d</sup> FINRA Industry Snapshot. FINRA reported 3,607 FINRA registered firms in 2018. There were 173 with 500 or more registered representatives.

<sup>e</sup> National Association of Insurance Commissioners.

One commenter was concerned that the rule would expose pooled employer plans to litigation risk. The commenter suggested that this would dissuade pooled plan provider from registering and thus, there would be fewer pooled employer plans available to small employers. While the Department acknowledges this concern, the Department believes that the rule will result in a greater availability of workplace retirement plans among small employers. By allowing most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to pooled plan providers, pooled employer plans provide small employers with the option of providing a workplace retirement plan to their employees with reduced burdens and costs as compared to sponsoring their own separate single employer retirement plan.

3.3. Impact of the Rule

The Department estimates that it would take the average pooled plan provider with a labor rate of \$165.63 only 45 minutes to register, at an expense of \$124.23, because the information necessary is readily available through the normal course of business.<sup>44</sup> Pooled plan providers submit the filing only when data elements change, the administrator begins or ceases operations for any pooled employer plan, or the pooled plan provider undergoes a change. The supplemental filing will require an estimated 30 minutes to complete, at an

business; 524113 underwriting annuities and life insurance, more than 70 percent small business; 523999 financial investment services, more than 95 percent small businesses; 523999 brokerage, financial investment services, more than 95 percent small business; 561330 professional employer organization, more than 90 percent small business.

<sup>44</sup> To register: 0.75 hours per pooled plan provider; 0.75 hours \* \$165.63 = \$124.23. To

expense of \$82.82. As with the initial registration, the required information for the supplemental filing is readily available. The cost to file both a registration and a supplemental filing in a single year would be \$207.16, which would be less than one percent of revenue if a business had more than \$20,700 in revenue. The Department lacks complete data to determine the number of firms that do not meet this revenue threshold. Available data suggests that 15 percent of possibly affected firms have less than \$100,000 in revenue.<sup>45</sup>

To further illustrate how small a \$207 burden is, note that a one-person firm consisting of an individual with a labor rate of \$165.63 would need to work only 125 hours to have revenue of \$20,700. That same individual working 2,000 hours, a standard work year, would produce revenue of \$331,260, resulting in \$207.16 being significantly less than one percent of revenue.

3.4. Duplicate, Overlapping, or Relevant Federal Rules

The final rule does not conflict with any relevant Federal rules. Section 101 of the SECURE Act requires pooled plan providers to register both with the Department and with the Treasury Department and the IRS. The final Form PR satisfies requirements under both Title I of ERISA and the Code. Moreover, the statute expressly authorizes the Departments to require reporting of additional information.

update a registration: 0.50 hours \* \$165.63 = \$82.82. The total labor rate for a financial manager is used as a proxy for the labor rate. Labor rates are EBSA estimates found at [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](http://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).

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 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.<sup>46</sup> For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this final rule does not include any Federal mandates that the Department expects would result in such expenditures by State, local, and tribal governments, or the private sector.<sup>47</sup> This rule simply requires entities that choose to become pooled plan providers to register with the Department.

5. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires that Federal agencies adhere to specific criteria when formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government.<sup>48</sup> Federal agencies promulgating regulations that have federalism implications must first consult with State and local officials,

<sup>45</sup> Data set supplied by the Small Business Administration containing data on the number of firms and revenue by NAICS codes. Estimates used NAICS codes 524292, 56133, 523120, 52393, 523130, and 524113.

<sup>46</sup> 2 U.S.C. 1501 *et seq.* (1995).

<sup>47</sup> Enhancing the Intergovernmental Partnership, 58 FR 58093 (Oct. 28, 1993).

<sup>48</sup> Federalism, *supra* note 7.

then describe in the preamble to the final rule the extent of their consultation and the nature of the officials' concerns.

This final rule does not have federalism implications because it will not have direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government. This final rule simply requires private companies that choose to offer pooled employer plans to register with the Department.

#### List of Subjects in 29 CFR Part 2510

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2510 as follows:

#### PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

**Authority:** 29 U.S.C. 1002(1), 1002(2), 1002(3), 1002(5), 1002(16), 1002(21), 1002(37), 1002(38), 1002(40), 1002(42), 1002(43), 1002(44), 1031, and 1135; Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3–101 and 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 App. (E.O. 12108, 44 FR 1065 (Jan. 3, 1979)) and 29 U.S.C. 1135 note. Sec. 2510.3–38 is also issued under sec. 1, Pub. L. 105–72, 111 Stat. 1457 (1997).

■ 2. Add § 2510.3–44 to read as follows:

#### § 2510.3–44 Registration Requirement to Serve as a Pooled Plan Provider to Pooled Employer Plans

(a) *General.* Section 3(44) of the Act sets forth the criteria that a person must meet to be a pooled plan provider for pooled employer plans under section 3(43) of the Act.

(b) *Registration requirement.* Subparagraph (A)(ii) of section 3(44) requires the person to register as a pooled plan provider with the Department and provide such other information as the Department may require, before beginning operations as a pooled plan provider. For this purpose, “beginning operations as a pooled plan provider” means the initiation of operations of the first plan that the person operates as a pooled employer plan, as described in paragraph (b)(6) of this section. To meet the requirements to register with the Department under section 3(44) of the Act, a person intending to act as a pooled plan provider must:

(1) At least 30 days before beginning operations as a pooled plan provider, file with the Department the following information on a complete and accurate

Form PR (Pooled Plan Provider Registration) in accordance with the form's instructions.

(i) The legal business name and any trade name (doing business as) of such person.

(ii) The business mailing address and phone number of such person.

(iii) The employer identification number (EIN) assigned to such person by the Internal Revenue Service.

(iv) The address of any public website or websites of the pooled plan provider or any affiliates to be used to market any such person as a pooled plan provider to the public or to provide public information on the pooled employer plans operated by the pooled plan provider.

(v) Name, address, contact telephone number, and email address for the responsible compliance official of the pooled plan provider. For purposes of this paragraph (b)(1)(v), the term “responsible compliance official” means the person or persons, identified by name, title, or office, responsible for addressing questions regarding the pooled plan provider's status under, or compliance with, applicable provisions of the Act and the Internal Revenue Code as pertaining to a pooled employer plan.

(vi) The agent for service of legal process for the pooled plan provider, and the address at which process may be served on such agent.

(vii) The approximate date when pooled plan operations are expected to commence.

(viii) An identification of the administrative, investment, and fiduciary services that will be offered or provided in connection with the pooled employer plans by the pooled plan provider or an affiliate. For purposes of this paragraph (b)(1)(viii), the term “affiliate” includes all persons who are treated as a single employer with the person intending to be a pooled plan provider under section 414(b), (c), (m), or (o) of the Internal Revenue Code who will provide services to pooled employer plans sponsored by the pooled plan provider and any officer, director, partner, employee, or relative (as defined in section 3(15) of the Act) of such person; and any corporation or partnership of which such person is an officer, director, or partner.

(ix) A statement disclosing any ongoing Federal or State criminal proceedings, or any Federal or State criminal conviction, related to the provision of services to, operation of, or investments of, any employee benefit plan, against the pooled plan provider, or any officer, director, or employee of the pooled plan provider, provided that

any criminal conviction may be omitted if the conviction, or related term of imprisonment served, is outside ten years of the date of registration.

(x) A statement disclosing any ongoing civil or administrative proceedings in any court or administrative tribunal by the Federal or State government or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider, involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets.

(2) No later than the initiation of operations of a plan as a pooled employer plan, as described in paragraph (b)(6) of this section, file with the Department a supplemental report using the Form PR containing the name and plan number that the pooled employer plan will use for annual reporting purposes, and the name, address, and EIN for the trustee for the plan.

(3) File with the Department a supplemental report using the Form PR within the later of 30 days after the calendar quarter in which the following reportable events occurred or 45 days after a following reportable event occurred:

(i) Any change in the information reported pursuant to paragraph (b)(1) or (2) of this section unless otherwise disclosed pursuant to paragraphs (b)(3)(iii) through (v) of this section.

(ii) Any significant change in corporate or business structure of the pooled plan provider, *e.g.*, merger, acquisition, or initiation of bankruptcy, receivership, or other insolvency proceeding for the pooled plan provider or an affiliate that provides services to a pooled employer plan, or ceasing all operations as a pooled plan provider.

(iii) Receipt of written notice of the initiation of any administrative proceeding or civil enforcement action in any court or administrative tribunal by any Federal or State governmental agency or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets.

(iv) Receipt of written notice of a finding involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets in any matter described in paragraph (b)(1)(x) or (b)(3)(iii) of this section.

(v) Receipt of written notice of the filing of any Federal or State criminal



charges related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan against the pooled plan provider or any officer, director, or employee of the pooled plan provider.

(4) Only one registration must be filed for each person intending to act as a pooled plan provider, regardless of the number of pooled employer plans it operates. A pooled plan provider must file updates for each pooled employer plan described in paragraph (b)(2) of this section, any change of previously reported information, and any change in circumstances listed in paragraph (b)(3) of this section, but may file a single statement to report multiple changes, as long as the timing requirements are met with respect to each reportable change.

(5) If a pooled plan provider has terminated and ceased operating all pooled employer plans, the pooled plan provider must file a final supplemental filing in accordance with instructions for the Form PR. For purposes of this section, a pooled employer plan is treated as having terminated and ceased operating when a resolution has been adopted terminating the plan, all assets under the plan (including insurance/annuity contracts) have been distributed to the participants and beneficiaries or legally transferred to the control of another plan, and a final Form 5500 has been filed for the plan.

(6) For purposes of this section, a person is treated as initiating operations of a plan as a pooled employer plan when the first employer executes or adopts a participation, subscription, or similar agreement for the plan specifying that it is a pooled employer plan, or, if earlier, when the trustee of the plan first holds any asset in trust.

(7) Registrations required under this section shall be filed with the Secretary electronically on the Form PR in accordance with the Form PR instructions published by the Department.

(8) For purposes of this section, the term “administrative proceeding” or “administrative proceedings” means a judicial-type proceeding of public record before an administrative law judge or similar decision-maker.

(9) For purposes of this section, the term “other regulatory authority” means Federal or State authorities and self-regulatory organizations authorized by law, but does not include any foreign regulatory authorities.

(10) For purposes of paragraphs (b)(1)(ix) and (x) and (b)(3)(iii) and (v) of this section, employees of the pooled plan provider include employees of the pooled employer plan, but only if they

handle assets of the plan, within the meaning of section 412 of the Act, or if they are responsible for operations or investments of the pooled employer plan.

(c) *Transition rule.* Notwithstanding paragraph (b)(1) of this section, a person intending to act as a pooled plan provider may file the Form PR on or before beginning operations as a pooled plan provider (dispensing with the 30-day advance filing requirement) if the filing is made before February 1, 2021.

(d) *Acquittals and removal of information.* A pooled plan provider may file an update to remove any matter previously reported under paragraph (b)(1)(ix) or (b)(3)(v) of this section for which the defendant has received an acquittal. For this purpose, the term “acquittal” means a finding by a judge or jury that a defendant is not guilty or any other dismissal or judgment which the government may not appeal.

Signed at Washington, DC.

**Jeanne Klinefelter Wilson,**

*Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

[FR Doc. 2020–25170 Filed 11–13–20; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### 36 CFR Parts 1 and 13

**[NPS–AKRO–30677; PPAKAKROZ5, PPMRLE1Y.L00000]**

**RIN 1024–AE63**

#### Jurisdiction in Alaska

**AGENCY:** National Park Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** This rule revises National Park Service regulations to comply with the decision of the U.S. Supreme Court in *Sturgeon v. Frost*. In the *Sturgeon* decision, the Court held that National Park Service regulations apply exclusively to public lands (meaning federally owned lands and waters) within the external boundaries of National Park System units in Alaska. Lands which are not federally owned, including submerged lands under navigable waters, are not part of the units subject to the National Park Service’s ordinary regulatory authority.

**DATES:** This rule is effective on December 16, 2020.

**ADDRESSES:** The comments received on the proposed rule are available on [www.regulations.gov](http://www.regulations.gov) in Docket ID: NPS–2020–0002.

#### FOR FURTHER INFORMATION CONTACT:

Donald Striker, Acting Regional Director, Alaska Regional Office, 240 West 5th Ave., Anchorage, AK 99501. Phone (907) 644–3510. Email: [AKR\\_Regulations@nps.gov](mailto:AKR_Regulations@nps.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

##### *Sturgeon v. Frost*

In March 2019, the U.S. Supreme Court in *Sturgeon v. Frost* (139 S. Ct. 1066, March 26, 2019) unanimously determined the National Park Service’s (NPS) ordinary regulatory authority over National Park System units in Alaska only applies to federally owned “public lands” (as defined in section 102 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3102)—and not to State, Native, or private lands—irrespective of unit boundaries on a map. Lands not owned by the federal government, including submerged lands beneath navigable waters, are not deemed to be a part of the units (slip op. 17). More specifically, the Court held that the NPS could not enforce a System-wide regulation prohibiting the operation of a hovercraft on part of the Nation River that flows through the Yukon-Charley Rivers National Preserve (the Preserve). A brief summary of the factual background and Court opinion follow, as they are critical to understanding the purpose of this rulemaking.

The Preserve is a conservation system unit established by the 1980 Alaska National Interest Lands Conservation Act (ANILCA) and administered by the NPS as a unit of the National Park System. The State of Alaska owns the submerged lands underlying the Nation River, a navigable waterway. In late 2007, John Sturgeon was using his hovercraft on the portion of the Nation River that passes through the Preserve. NPS law enforcement officers encountered him and informed him such use was prohibited within the boundaries of the Preserve under 36 CFR 2.17(e), which states that “[t]he operation or use of a hovercraft is prohibited.” According to NPS regulations at 36 CFR 1.2(a)(3), this rule applies to persons within “[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters” without any regard to ownership of the submerged lands. See 54 U.S.C. 100751(b) (authorizing the Secretary of the Interior to regulate “boating and other activities on or relating to water located within System units”).

Mr. Sturgeon disputed that NPS regulations could apply to his activities on the Nation River, arguing that the river is not public land and is therefore exempt from NPS rules pursuant to ANILCA section 103(c) (16 U.S.C. 3103(c)), which provides that only the public lands within the boundaries of a System unit are part of the unit, and that State-owned lands are exempt from NPS regulations, including the hovercraft rule. Mr. Sturgeon appealed his case through the federal court system.

In its March 2019 opinion, the Court agreed with Mr. Sturgeon. The questions before the Court were: (1) Whether the Nation River in the Preserve is public land for the purposes of ANILCA, making it indisputably subject to NPS regulation; and (2) if not, whether NPS has an alternative source of authority to regulate Mr. Sturgeon's activities on that portion of the Nation River. The Court answered "no" to both questions.

Resolution turned upon several definitions in ANILCA section 102 and the aforementioned section 103(c). Under ANILCA, 16 U.S.C. 3102, "land" means "lands, waters, and interests therein"; "Federal land" means "lands the title to which is in the United States"; and "public lands" are "Federal lands," subject to several statutory exclusions that were not at issue in the *Sturgeon* case. As such, the Court found "public lands" are "most but not quite all [lands, waters, and interests therein] that the Federal Government owns" (slip op. 10). The Court held that the Nation River did not meet the definition of "public land" because: (1) "running waters cannot be owned"; (2) "Alaska, not the United States, has title to the lands beneath the Nation River"; and, (3) federal reserved water rights do not "give the Government plenary authority over the waterway" (slip op. 12–14).

Regarding the second question, the Court found no alternative basis to support applying NPS regulations to Mr. Sturgeon's activities on the Nation River, concluding that, pursuant to ANILCA section 103(c), "only the federal property in system units is subject to the Service's authority" (slip op. 19). As stated by the Court, "non-federally owned waters and lands inside system units (on a map) are declared outside them (for the law)," and "those 'non-federally owned waters and lands inside system units' are no longer subject to the Service's power over 'System units' and the 'water located within' them" (slip op. 18) (quoting 54 U.S.C. 100751(a), (b)).

There are four additional aspects of the *Sturgeon* opinion and ANILCA that inform this rulemaking. First, by incorporating the provisions of the

Submerged Lands Act of 1953, the Alaska Statehood Act gave the State "title to and ownership of the lands beneath navigable waters" effective as of the date of Statehood. The Court recognized that a State's title to lands beneath navigable waters brings with it regulatory authority over public uses of those waters (slip op. 12–13). While the specific example cited by the Court involved the State of Alaska, the conclusion logically extends to any submerged lands owner. Thus, in cases where the United States holds title to submerged lands within the external boundaries of a System unit, the NPS maintains its ordinary regulatory authority over the waters.

Second, the Court noted but expressly declined to address Ninth Circuit precedent finding that "public lands" in ANILCA's subsistence fishing provisions include navigable waters with a reserved water right held by the federal government. *Alaska v. Babbitt*, 72 F. 3d 698 (1995); *John v. United States*, 247 F. 3d 1032 (2001) (en banc); *John v. United States*, 720 F. 3d 1214 (2013) (*Katie John* cases). Because the Ninth Circuit precedent remains valid law for purposes of NPS's subsistence regulations, the revised definition of federally owned lands does not upset the application of the *Katie John* cases to the waters listed in 36 CFR 242.3 and 50 CFR 100.3. Regulations at 36 CFR part 13, subpart F, will be applied accordingly. The NPS primarily participates in regulating subsistence fisheries as part of the Federal Subsistence Management Program, a joint effort between the Departments of the Interior and Agriculture implementing Title VIII of ANILCA. Applicable regulations can be found at 36 CFR part 242 and 50 CFR part 100 and are unaffected by the *Sturgeon* decision or this rulemaking.

Third, the Court acknowledged that NPS maintains its authority to acquire lands, enter into cooperative agreements, and propose needed regulatory action to agencies with jurisdiction over non-federal lands (slip op. 20, 28). Cooperative agreements with the State, for example, could stipulate that certain NPS regulations would apply to activities on the waters and that NPS would have authority to enforce those regulations under the terms of the agreement.

Fourth, ANILCA section 906(o)(2) contains an administrative exemption relative to State and Native corporation land selections, which are excluded from the definition of "public land" in section 102. This exemption did not feature in the *Sturgeon* case and will not be affected by this rulemaking. The

Final Rule section below provides more detail.

#### *Summary of Public Comments*

The NPS published a proposed rule in the **Federal Register** on April 30, 2020 (85 FR 23935). The NPS accepted comments on the rule through the mail, by hand delivery, and through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). The comment period closed on June 29, 2020. A summary of the pertinent issues raised in the comments and NPS responses are provided below.

The overwhelming majority of comments expressed support for the proposed regulatory changes, along with opposition to or concern over the way the Federal government is implementing ANILCA and/or managing Federal lands and waters in Alaska. Many commenters included proposals for changes or clarifications to the wording in the proposed rule. The NPS believes it is administering National Park System areas in Alaska in accordance with ANILCA and other applicable laws. If it is determined otherwise, prompt action will be taken to make any necessary changes, as illustrated by this process. After considering public comments and after additional review, the NPS made several changes in the final rule, as explained below.

**1. Comment:** Several commenters expressed concern that the proposed language for 36 CFR 1.2(f) focused too heavily on the concept of "boundaries" or was otherwise not clear on the extent of NPS regulatory authority (or lack thereof) over non-federal lands and waters surrounded by National Park System units established or expanded by ANILCA. Commenters suggested modifying the proposed text in several different ways.

**NPS Response:** After considering these comments, the NPS has revised 36 CFR 1.2(f) to read as follows: "In Alaska, unless otherwise provided, only the public lands (federally owned lands) within Park area boundaries are deemed a part of that Park area, and non-public lands (including state, Native, and other non-federally owned lands and waters) shall not be regulated in this chapter as part of the National Park System." This language is consistent with the original intent of the proposed rule and the Court's decision in *Sturgeon*.

Focusing the language in paragraph (f) on which lands and waters are regulated as part of the National Park System, rather than which lands and waters are included within the boundary, will also help to resolve a question raised by other commenters about whether persons living on private lands within

national parks or monuments would still be considered within a resident zone for purposes of eligibility to engage in subsistence activities within that National Park System unit. Commenters raised this question because NPS regulations at 36 CFR 13.430 define a resident zone as including the “area within a national park or monument” and “areas near a national park or monument” that meet certain criteria. The concern appears to be that the proposed modifications would make privately owned lands that are within a national park or monument outside the resident zone for purposes of determining eligibility to engage in subsistence.

The NPS does not intend this rule to make any changes to resident zone determinations or to eligibility requirements for engaging in subsistence activities. Under ANILCA, as outlined by the Supreme Court in *Sturgeon*, non-federal lands and waters within the external boundaries of a park unit in Alaska are “deemed” outside of the unit and thus, may not be regulated as if they were a part of the surrounding National Park System lands. But nothing in the *Sturgeon* decisions or ANILCA would correspondingly deem local residents on those lands to be outside the resident zone. To remove any potential ambiguity in the regulations, in concert with the changes to paragraph (f), a clarifying amendment has been added to § 13.430(a)(1) in this final rule responding to concerns that the language could otherwise be interpreted to mean that private land within the external boundaries of an NPS unit would no longer be located “within a national park or monument” for purposes of this section.

**2. Comment:** Multiple commenters suggested use of the Supreme Court’s phrase “ordinary regulatory authority” in the preamble to the proposed rule was too vague, calling the Court’s use of the phrase “offhand” and proposing NPS instead limit the scope of its regulatory authority to that contained in the NPS Organic Act. This was based on a stated presumption that NPS would, in the future, seek to impose regulations on non-federal lands in Alaska by claiming they were not based on any “ordinary” regulatory authority.

**NPS Response:** There are numerous statutes that expressly provide the NPS with regulatory authority which are not part of the Organic Act (see 54 U.S.C. 100101 note, explaining which statutory provisions are referred to as the “NPS Organic Act”). Limiting this phrase just to the Organic Act itself, as suggested in the comments, could open the very door the commenters seek to keep closed,

because it might suggest that the NPS could use these other statutory authorities to apply its regulations to non-federally owned lands in Alaska. The NPS does not believe such action would be consistent with ANILCA under the Supreme Court’s ruling.

The preamble uses the phrase “ordinary regulatory authority” since that was the term repeatedly used by the Court, which spent a considerable part of its opinion in *Sturgeon* discussing and analyzing NPS authorities, not just the NPS Organic Act, and thus meant “ordinary regulatory authority” to include all existing NPS regulatory authorities applicable to National Park System units as of the date of the Court’s decision, not just authority expressly derived from the NPS Organic Act. The phrase is not used in the regulatory text.

**3. Comment:** The NPS received several comments opposing or questioning the merits of the *Sturgeon* decision or recommending certain uses and activities be prohibited in Alaska park areas, particularly mechanized means of access and transportation.

**NPS Response:** As a Federal agency, the NPS has no discretion when it comes to promptly and reasonably implementing federal statutes and Supreme Court decisions that affect its management authorities. In addition to ensuring NPS regulations reflect the outcome of the *Sturgeon* litigation, particularly with respect to non-federally owned lands, ANILCA expressly requires Federal land managers permit the use of snowmachines, motorboats, airplanes, and other mechanized means of transportation in all conservation system units in Alaska for a variety of purposes, including to engage in traditional activities and for travel to and from villages and homesites. Accordingly, NPS has no ability to respond positively to these comments.

**4. Comment:** Comments were supportive of language in the proposed rule stating that the NPS participates in the regulation of subsistence fisheries through its participation in the Federal Subsistence Management Program, and that applicable regulations at 36 CFR part 242 and 50 CFR part 100 are unaffected by the *Sturgeon* decision. Comments requested the NPS clarify that those regulations are additionally unaffected by this regulatory change, and others requested confirmation that regulations at 36 CFR part 13 are affected and apply only to federally owned lands and waters in Alaska park areas.

**NPS Response:** Both suggested clarifications are consistent with the

Supreme Court’s decision and the effect of the regulatory changes being made here, which is limited to and includes 36 CFR parts 1–199. This response serves to affirm those understandings. The revised definition of federally owned lands does not upset the application of the *Katie John* cases to the waters listed in 36 CFR 242.3 and 50 CFR 100.3. Regulations at 36 CFR part 13, subpart F, will be applied accordingly.

**5. Comment:** Several commenters suggested that the NPS limit regulatory changes in response to the Supreme Court’s decision to implementing the final order of the U.S. District Court, or otherwise narrowing the scope of this rule to exempt only the Nation River within the Preserve from the Service’s hovercraft prohibition at 36 CFR 2.17(e), or alternatively, to adopt language making it clear that Wild and Scenic Rivers are not affected by the regulatory changes.

**NPS Response:** The NPS disagrees with the suggestions that regulatory changes should be limited to the Yukon-Charley Rivers National Preserve, or to the Nation River, or to the hovercraft transiting it. While that was the specific issue in the case, it remains the NPS’s duty to enforce the laws applicable to the lands it manages as part of the National Park System, and the Supreme Court’s decision in *Sturgeon* has a broader effect on how those laws apply in Alaska, as explained above. Regulatory changes that are limited to the applicability of the hovercraft ban on the Nation River would be inconsistent with the intent of this rulemaking and fail to implement the Court’s holding in *Sturgeon*. The final rule ensures NPS regulations are consistent with that holding. Inasmuch as the Court expressly declined to address how Wild and Scenic Rivers in Alaska are impacted by its analysis of NPS authorities (slip op. 27, n. 10), these regulations do not address that issue.

**6. Comment:** Several commenters questioned the effect of this rule on waters within National Park System units where navigability has not yet been determined or that overlay submerged lands where ownership is in question. Some commenters recommended that the NPS recognize or presume that title resides with the State, while others recommended the NPS assert title, until adjudicated otherwise. Extensive commentary was also provided on the issue of navigability and determining ownership of submerged lands, and on the purposes for which conservation system units in Alaska were established vis-à-vis the

protection of lakes, rivers, and streams within the units.

*NPS Response:* In response to both sets of comments, the NPS notes that the existing and proposed regulations at 36 CFR Chapter I do not address or determine, and have no impact on, whether waters in Alaska are navigable or who maintains title to the submerged lands. Those are not decisions that can be made by the National Park Service. As noted in some of the comments, those decisions are made by Congress, the Bureau of Land Management, or the courts.

7. *Comment:* Many commenters asked that the NPS work cooperatively with the State of Alaska in the management of waterways, particularly those used by commercial service providers and the public for access to and across park areas.

*NPS Response:* The NPS is working to develop cooperative agreements with the State on this and other matters and remains committed to working closely with its partners and neighbors to promote healthy ecosystems and provide for public use and enjoyment in Alaska park areas.

8. *Comment:* Several commenters recommended additional changes to NPS regulations to reflect the outcome of the *Sturgeon* litigation, including modifying 36 CFR 1.4 to limit the “legislative jurisdiction” of the NPS over private lands, or to confirm the role of “boundaries” in determining regulatory authority in Alaska, and further requested the NPS clarify the relationship between the regulations in 36 CFR part 13 and the other NPS regulations in Title 36.

*NPS Response:* The NPS agrees that it could clarify the language in 36 CFR 13.2(a) consistent with the intent of this rulemaking. The revised paragraph (a) will now read: “The regulations contained in part 13 are prescribed for the proper use and management of park areas in Alaska and supersede any inconsistent provisions of the general regulations of this chapter, which apply only on federally owned lands within the boundaries of any park area in Alaska.”

Regarding the remaining suggested edits, once ownership is taken into account, as directed by the Supreme Court, we believe the scope of authority in the final rule is consistent with ANILCA.

9. *Comment:* The State of Alaska brought to our attention that the authorities cited in support of the proposed rule failed to include relevant sections of ANILCA.

*NPS Response:* The NPS appreciates the opportunity to make the necessary

corrections and has updated the statement of authorities in the final rule.

10. *Comment:* Two commenters requested that the NPS explain the decision to use and define the term “federally owned lands” instead of the terms “Federal lands” or “public lands” or other terms used and defined in ANILCA.

*NPS Response:* As the commenters accurately note, the term “federally owned lands” is not used in ANILCA, and the relevant distinction between the terms that are used in the statute—“Federal lands” and “public lands”—will collapse over time as land selections are conveyed and relinquished in Alaska park units. In the interim, the NPS believed the use of the term “federally owned lands” would be clearer to the general public than the statutorily-defined “public lands”. Due to the many comments and questions we have received on the issue, we are revising the provision to use “public lands (federally owned lands)” as a way of better communicating our meaning to the general public. The definitions are not changed. More detail on how the terms are defined in relation to ANILCA is provided in the “Final Rule” section, below.

#### *Final Rule*

This rule modifies NPS regulations at 36 CFR parts 1 and 13 to conform to the U.S. Supreme Court’s decision in *Sturgeon*. In the interest of clarifying NPS regulations, and in response to a petition for rulemaking filed by the State of Alaska, the NPS is promulgating a set of targeted amendments to ensure its regulations reflect the outcome of the *Sturgeon* case and provide fair notice of where regulations in 36 CFR Chapter I apply and where they do not in System units in Alaska.

Regulations at 36 CFR 1.2 address the “Applicability and Scope” of regulations found in 36 CFR Chapter I, which “provide for the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service” (36 CFR 1.1(a)). Section 1.2(a) identifies where the regulations apply unless otherwise stated. In order to reflect the Court’s holding in *Sturgeon*, the NPS amends 36 CFR 1.2(a)(3) to add the words “except in Alaska” before “without regard to the ownership of submerged lands, tidelands, or lowlands.” This ensures that, consistent with the Court’s holding, NPS regulations “will apply exclusively to public lands (meaning federally owned lands and waters) within system units” (slip op. 19).

The NPS adds a new 36 CFR 1.2(f) to clarify that, under ANILCA, “[o]nly the ‘public lands’ (essentially, the federally owned lands)” within unit boundaries in Alaska are “‘deemed’ a part of that unit,” and lands (including waters) not federally owned “may not be regulated as part of the park” (slip op. 16–17). As stated by the Court, “[g]eographic inholdings thus become regulatory outholdings, impervious to the Service’s ordinary authority” (slip op. 19). The new paragraph (f) in this final rule states that, in Alaska, unless otherwise provided, only the public lands (federally owned lands) within National Park System unit boundaries are deemed a part of that unit, whereas the lands, waters, and interests therein which are not federally owned (including those owned by the State, Native corporations, and other parties) are not a part of the unit and will not be regulated as part of the National Park System. The language has been modified from the proposed rule in response to public comments for the reasons explained above (see comments 1 and 10). The definition of “boundary” in 36 CFR 1.4 has limited operation in Alaska, as NPS published legal descriptions for each unit boundary in 1992 and modifications must be consistent with ANILCA sections 103(b) and 1302(c) and (h).

The NPS also changes its regulations at 36 CFR part 13, which “are prescribed for the proper use and management of park areas in Alaska.” In section 13.1, “park areas” is currently defined as “lands and waters administered by the National Park Service within the State of Alaska.” The NPS modifies this definition and adds a definition of “federally owned lands” (incorporating and relocating the description formerly at 36 CFR 13.2(f)), to reflect ANILCA’s limitations on the lands and waters that are administered by the NPS in Alaska, as outlined in the *Sturgeon* decision. This will not affect NPS administration under a valid cooperative agreement, which would be governed by the terms of the agreement. In response to public comments and for the reasons explained above (see comment 8), the final rule also changes the language in section 13.2(a) to clarify that part 13 regulations supersede general regulations found elsewhere in Title 36 where inconsistent.

The term “federally owned lands” is used instead of “public lands” to account for the authority granted by ANILCA section 906(o)(2) over validly-selected “Federal lands within the boundaries of a conservation system unit,” an exception to the definition of “public lands” in section 102 of

ANILCA (16 U.S.C. 3102(3)). That section notes that definitions in Title IX are governed by the Alaska Native Claims Settlement Act (ANCSA) and the Alaska Statehood Act. Section 3(e) of ANCSA defines “public lands” as “all Federal lands and interests therein located in Alaska” with certain exceptions which, like the definition in ANILCA, predominantly relate to satisfaction of outstanding land entitlements, including section 6(g) of the Alaska Statehood Act.

However, ANILCA section 906(o)(2) uses the term “Federal lands,” which is not separately defined in either ANCSA or the Alaska Statehood Act, meaning it is as defined in ANILCA section 102 to include those lands, waters, and interests therein the title to which is in the United States. As before, selected lands are not considered “federally owned lands” once they are subject to a tentative approval or an interim conveyance; title has been transferred although it is not recordable until the lands are surveyed. Until statutory entitlements are satisfied in Alaska and land selections in National Park System units are adjudicated or relinquished, the definitions in part 13, as amended here, ensure NPS regulations are applied consistent with direction from Congress in Alaska-specific legislation and from the Supreme Court in *Sturgeon*.

#### **Compliance With Other Laws, Executive Orders and Department Policy**

##### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The OIRA has determined that the final rule is a significant regulatory action as defined by Executive Order 12866.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process

must allow for public participation and an open exchange of ideas. The NPS has developed this rule in a manner consistent with these requirements.

##### *Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771)*

Enabling regulations are considered deregulatory under guidance implementing E.O. 13771 (M–17–21). This rule clarifies that activities on lands in Alaska which are not federally owned, including submerged lands under navigable waters, are not subject to the NPS’s ordinary regulatory authority.

##### *Regulatory Flexibility Act*

This rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The costs and benefits of a regulatory action are measured with respect to its existing baseline conditions. Regarding the applicability of NPS regulations within the external boundaries of National Park System units in Alaska, the baseline conditions will be unchanged by this rule. The Supreme Court settled this legal question when it announced the *Sturgeon* decision in March 2019. Compared to baseline conditions, this regulatory change will benefit the general public by clarifying regulatory language in 36 CFR describing where NPS regulations apply, specifically that fewer areas in Alaska are subject to NPS regulations. In addition, this action will not impose restrictions on local businesses in the form of fees, training, record keeping, or other measures that would increase costs. Given those findings, the agency certifies that this regulatory action will not impose a significant economic impact on a substantial number of small entities.

##### *Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2). This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

##### *Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. It addresses the use of and jurisdiction over lands and waters within the external boundaries of NPS units as determined by the U.S. Supreme Court in a March 2019 decision and imposes no requirements on other agencies or governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

##### *Takings (Executive Order 12630)*

This rule does not effect a taking of private property or otherwise have takings implications under Executive Order 12630. A takings implication assessment is not required.

##### *Federalism (Executive Order 13132)*

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This rule clarifies that the NPS may not regulate non-public lands within the external boundaries of NPS units in Alaska. It has no outside effects on other areas. A Federalism summary impact statement is not required.

##### *Civil Justice Reform (Executive Order 12988)*

This rule complies with the requirements of Executive Order 12988. This rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

##### *Tribal Consultation (Executive Order 13175 and Department Policy)*

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes and Alaska Native corporations through a commitment to consultation and recognition of their right to self-governance and tribal sovereignty. The NPS has evaluated this rule under the criteria in Executive Order 13175 and under the Department’s Tribal consultation policy and has determined that consultation is not required because the rule will have no substantial direct

effect on federally recognized Tribes or Alaska Native corporations.

#### *Paperwork Reduction Act*

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required. The NPS may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the rule is covered by a categorical exclusion. The NPS has determined the rule is categorically excluded under 43 CFR 46.210(i) which applies to “policies, directives, regulations, and guidelines; That are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” This rule is legal in nature. The *Sturgeon* decision has governed how the NPS administers lands and waters in Alaska since it was issued in March 2019. This rule will have no legal effect beyond what was announced by the Court. It will revise NPS regulations to be consistent with the decision and make no additional changes. The NPS has determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

#### *Effects on the Energy Supply (Executive Order 13211)*

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

#### **List of Subjects**

##### *36 CFR Part 1*

National parks, Penalties, Reporting and recordkeeping requirements, Signs and symbols.

##### *36 CFR Part 13*

Alaska, National Parks, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the National Park Service amends 36 CFR parts 1 and 13 as set forth below:

## **PART 1—GENERAL PROVISIONS**

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

**Authority:** 54 U.S.C. 100101, 100751, 320102.

■ 2. Amend § 1.2 by revising paragraph (a)(3) and adding paragraph (f) to read as follows:

### **§ 1.2 Applicability and scope.**

(a) \* \* \*

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and, except in Alaska, without regard to the ownership of submerged lands, tidelands, or lowlands;

(f) In Alaska, unless otherwise provided, only the public lands (federally owned lands) within Park area boundaries are deemed a part of that Park area, and non-public lands (including state, Native, and other non-federally owned lands, including submerged lands and the waters flowing over them) shall not be regulated as part of the National Park System.

## **PART 13—NATIONAL PARK SYSTEM UNITS IN ALASKA**

■ 3. The authority citation for part 13 is revised to read as follows:

**Authority:** 16 U.S.C. 3101 *et seq.*; 54 U.S.C. 100101, 100751, 320102; Sec. 13.1204 also issued under Pub. L. 104-333, Sec. 1035, 110 Stat. 4240, November 12, 1996.

■ 4. In § 13.1, add a definition of “Federally owned lands” in alphabetical order and revise the definition of “Park areas” to read as follows:

### **§ 13.1 Definitions.**

\* \* \* \* \*

*Federally owned lands* means lands, waters, and interests therein the title to which is in the United States, and does not include those land interests tentatively approved to the State of Alaska; or conveyed by an interim conveyance to a Native corporation.

\* \* \* \* \*

*Park areas* means federally owned lands administered by the National Park Service in Alaska.

\* \* \* \* \*

■ 5. Amend § 13.2 by revising paragraph (a) and removing paragraph (f) to read as follows:

### **§ 13.2 Applicability and Scope.**

(a) The regulations contained in part 13 are prescribed for the proper use and management of park areas in Alaska and supersede any inconsistent provisions of the general regulations of this chapter, which apply only on federally owned lands within the boundaries of any park area in Alaska.

\* \* \* \* \*

■ 6. Amend § 13.430 by revising paragraph (a)(1) as follows:

### **§ 13.430 Determination of resident zones.**

(a) \* \* \*

(1) The area within a national park or monument and any lands surrounded by a national park or monument that are not federally owned; and

\* \* \* \* \*

**George Wallace,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2020-24899 Filed 11-13-20; 8:45 am]

**BILLING CODE 4312-52-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R07-OAR-2020-0439; FRL-10016-37-Region 7]**

### **Air Plan Approval; Missouri; Removal of Control of Emission From Solvent Cleanup Operations**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to approve a revision to the State Implementation Plan (SIP) submitted by the State of Missouri on January 15, 2019, and supplemented by letter on July 11, 2019. In the proposal, EPA proposed removal of a rule related to the control of emissions from solvent cleanup operations in the St. Louis, Missouri area from its SIP. This removal does not have an adverse effect on air quality. The EPA’s approval of this rule revision is in accordance with the requirements of the Clean Air Act (CAA).

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

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R07-OAR-2020-0439. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly

available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov> or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

**FOR FURTHER INFORMATION CONTACT:** David Peter, Environmental Protection Agency, Region 7 Office, Air Permitting and Standards Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551-7397; email address: [peter.david@epa.gov](mailto:peter.david@epa.gov).

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

## Table of Contents

- I. What is being addressed in this document?
- II. Have the requirements for approval of a SIP revision been met?
- III. What action is the EPA taking?
- IV. Incorporation by reference
- V. Statutory and executive order reviews

### I. What is being addressed in this document?

The EPA is approving the removal of 10 Code of State Regulation (CSR) 10–5.455, *Control of Emission from Solvent Cleanup Operations*, from the Missouri SIP.

As explained in detail in EPA’s proposed rule, Missouri has demonstrated that removal of 10 CSR 10–5.455 will not interfere with attainment of the NAAQS, reasonable further progress<sup>1</sup> or any other applicable requirement of the CAA because the only three sources subject to the rule are no longer subject and the removal of the rule from the SIP will not cause VOC emissions to increase. (85 FR 56193, September 11, 2020). The EPA solicited but did not receive any comments on this proposed rule. Therefore, the EPA is finalizing its proposal to remove 10 CSR 10–5.455 from the SIP.

<sup>1</sup> RFP is not applicable to the St. Louis Area because for marginal ozone nonattainment areas, such as the St. Louis Area, the specific requirements of section 182(a) apply in lieu of the attainment planning requirements that would otherwise apply under section 172(c), including the attainment demonstration and reasonably available control measures (RACM) under section 172(c)(1), reasonable further progress (RFP) under section 172(c)(2), and contingency measures under section 172(c)(9).

### II. Have the requirements for approval of a SIP revision been met?

The State submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from May 15, 2018, to August 2, 2018, and received twelve comments from the EPA that related to Missouri’s lack of an adequate demonstration that the rule could be removed from the SIP in accordance with section 110(l) of the CAA, whether the rule applied to new sources and other implications related to rescinding the rule. Missouri’s July 11, 2019 letter and December 3, 2018 response to comments on the state rescission rulemaking addressed the EPA’s comments. In addition, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

### III. What action is the EPA Taking?

The EPA is taking final action to approve Missouri’s request to remove 10 CSR 10–5.455 from the SIP.

### IV. Incorporation by Reference

In this document, the EPA is amending regulatory text that includes incorporation by reference. As described in the amendments to 40 CFR part 52 set forth below, the EPA is removing provisions of the EPA-Approved Missouri Regulation from the Missouri State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51.

### V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory

action because SIP approvals are exempted under Executive Order 12866.

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
  - Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
  - Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
  - Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
  - Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
  - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
  - Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; and
  - Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).
- The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 24, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 30, 2020.

**James Gulliford,**

*Regional Administrator, Region 7.*

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as set forth below:

#### PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

#### Subpart—AA Missouri

##### § 52.1320 [Amended]

- 2. In § 52.1320, the table in paragraph (c) is amended by removing the entry “10–5.455” under the heading “Chapter 5—Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area”.

[FR Doc. 2020–24470 Filed 11–13–20; 8:45 am]

**BILLING CODE 6560–50–P**

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 52

[EPA–HQ–OAR–2020–0485; FRL–10016–24–OAR]

RIN 2060–AU95

#### Findings of Failure To Submit State Implementation Plan Revisions in Response to the 2016 Oil and Natural Gas Industry Control Techniques Guidelines for the 2008 Ozone National Ambient Air Quality Standards (NAAQS) and for States in the Ozone Transport Region

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final action.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to find that five states failed to submit State Implementation Plan (SIP) revisions required by the Clean Air Act (CAA) in a timely manner to address reasonably available control technology (RACT) requirements associated with the 2016 Oil and Natural Gas Industry Control Techniques Guidelines (CTG) for reducing volatile organic compounds (VOC) in certain nonattainment areas for the 2008 ozone National Ambient Air Quality Standards (NAAQS) and in states in the ozone transport region (OTR). The states that failed to submit the required SIP revisions to address the CTG-related RACT requirements are California, Connecticut, New York, Pennsylvania, and Texas. This action triggers certain CAA deadlines for the EPA to impose sanctions if a state does not submit a complete SIP addressing the outstanding requirements and for the EPA to promulgate a Federal Implementation Plan (FIP) if the EPA does not approve the state’s SIP revision.

**DATES:** This action is effective on December 16, 2020.

**FOR FURTHER INFORMATION CONTACT:** General questions concerning this document should be addressed to C. W. Stackhouse, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code: C539–01, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; by telephone (919) 541–5208; or by email at [stackhouse.butch@epa.gov](mailto:stackhouse.butch@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

A. How is the preamble organized?

##### Table of Contents

I. General Information

- A. How is the preamble organized?
- B. Notice and Comment Under the Administrative Procedure Act (APA)
- C. How can I get copies of this document and other related information?
- D. Where do I go if I have specific state questions?
- II. Background
- III. Consequences of Findings of Failure to Submit
- IV. Findings of Failure To Submit for States That Failed To Make a Nonattainment Area SIP Submittal and/or Ozone Transport Region SIP Submittal
- V. Environmental Justice Considerations
- VI. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory Review
  - B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
  - C. Paperwork Reduction Act (PRA)
  - D. Regulatory Flexibility Act (RFA)
  - E. Unfunded Mandates Reform Act of 1995 (UMRA)
  - F. Executive Order 13132: Federalism
  - G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  - H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
  - I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
  - J. National Technology Transfer and Advancement Act (NTTAA)
  - K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority and Low Income Populations
  - L. Congressional Review Act (CRA)
  - M. Judicial Review

#### B. Notice and Comment Under the Administrative Procedure Act (APA)

Section 553 of the APA, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedures are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for making this final agency action without prior proposal and opportunity for comment because no significant EPA judgment is involved in making findings of failure to submit SIPs, or elements of SIPs, required by the CAA, where states have made no submissions to meet the requirement. Thus, notice and public procedures are unnecessary to take this action. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

C. How can I get copies of this document and other related information?

The EPA has established a docket for this action under Docket ID No. EPA–



HQ-OAR-2020-0485. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA Docket Center, EPA/DC, William Jefferson Clinton Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to

the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. The telephone number for the Public Reading Room is (202) 566-1744 and the telephone number for the Office of Air and Radiation Docket and Information Center is (202) 566-1742. For further information on EPA Docket

Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

*D. Where do I go if I have specific state questions?*

For questions related to specific states mentioned in this document, please contact the appropriate EPA Regional Office:

Regional offices	States
EPA Region 1: Mr. John Rogan, Chief, Air Quality Branch, EPA Region 1, 1 Congress Street, Suite 1100, Boston, MA 02203. <a href="mailto:rogan.john@epa.gov">rogan.john@epa.gov</a> .	Connecticut.
EPA Region 2: Mr. Kirk Wieber, Chief, Air Program Branch, EPA Region 2, 290 Broadway, New York, NY 10007. <a href="mailto:wieber.kirk@epa.gov">wieber.kirk@epa.gov</a> .	New York.
EPA Region 3: Ms. Susan Spielberger, Associate Director, Office of Air Program Planning, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103. <a href="mailto:spielberger.susan@epa.gov">spielberger.susan@epa.gov</a> .	Pennsylvania.
EPA Region 6: Mr. Guy Donaldson, Chief, State Planning and Implementation Branch, EPA Region 6, 1201 Elm Street, Suite 500, Dallas, TX 75270. <a href="mailto:donaldson.guy@epa.gov">donaldson.guy@epa.gov</a> .	Texas.
EPA Region 9: Ms. Doris Lo, Chief, Air Planning Office, EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105. <a href="mailto:lo.doris@epa.gov">lo.doris@epa.gov</a> .	California.

**II. Background**

On March 27, 2008, the EPA revised the NAAQS for ozone to establish new 8-hour standards.<sup>1</sup> In that action, the EPA promulgated identical revised primary and secondary ozone standards, designed to protect public health and welfare, of 0.075 parts per million (ppm). Those standards are met when the 3-year average of the annual fourth highest daily maximum 8-hour average ozone concentration is less than or equal to 0.075 ppm.<sup>2</sup>

Promulgation of revised NAAQS triggers a requirement for the EPA to designate areas of the country as nonattainment, attainment, or unclassifiable for the standards; for the ozone NAAQS, this also involves classifying any nonattainment areas at the time of initial area designation.<sup>3</sup> Ozone nonattainment areas are classified based on the severity of their ambient ozone levels (as determined based on an area’s “design value,” which represents air quality in the area for the most recent 3 years). The possible classifications for ozone nonattainment areas are Marginal, Moderate, Serious, Severe, and Extreme.<sup>4</sup> Nonattainment areas with a “lower” classification (e.g., Marginal) have ozone levels that are closer to the standards than areas with a “higher” classification (e.g., Severe).<sup>5</sup>

On May 21 and June 11, 2012, respectively, the EPA issued two separate rules which cumulatively designated 46 areas throughout the country as nonattainment for the 2008 ozone NAAQS, effective July 20, 2012, and established classifications for the designated nonattainment areas.<sup>6</sup> Areas designated nonattainment for the ozone NAAQS are subject to the general nonattainment area planning requirements of CAA section 172 and also to the ozone-specific planning requirements of CAA section 182. States in an OTR are subject to the requirements outlined in CAA section 184.<sup>7</sup> CAA section 172(c)(1) provides that SIPs for nonattainment areas must include reasonably available control technology (RACT), including RACT for existing sources of emissions. CAA section 182(b)(2)(A) requires states in which a nonattainment area classified as Moderate is located to amend their SIP “to include provisions to require the implementation of [RACT] . . . with respect to . . . [e]ach category of VOC sources in the area covered by a CTG document . . .” CAA sections 182(c) through (e) apply this requirement to states with designated ozone nonattainment areas classified as Serious, Severe, or Extreme. CAA section 184(b) provides that states in the OTR must submit a SIP revision

addressing RACT with respect to all sources of VOCs in the OTR covered by a CTG document.

On October 27, 2016, the EPA announced a final CTG document for reducing VOC emissions from existing oil and natural gas industry equipment and processes.<sup>8</sup> As stated in that announcement, “[s]ection 182(b)(2)(A) of the CAA requires that for areas designated nonattainment for an ozone [NAAQS]. . . and classified as Moderate [or above], states must revise their SIP to include provisions to implement RACT for each category of VOC sources covered by a CTG document.” *Id.* “The CAA also imposes the same requirement on states in Ozone Transport Regions.” *Id.* The EPA provided a two-year period starting from October 27, 2016, for states to submit SIP revisions addressing RACT for VOC sources covered by the CTG (i.e., SIP submissions were due from affected states to the EPA by October 27, 2018). On March 9, 2018, for reasons explained in the **Federal Register** (83 FR 10478), the EPA proposed to withdraw the CTG. However, the EPA did not finalize the proposal to withdraw the CTG. The EPA announced in the U.S. Office of Management and Budget’s Spring 2020 Unified Agenda and Regulatory Plan that “the CTG will remain in place as published on October 27, 2016.”<sup>9</sup>

Therefore, in response to the 2016 oil and natural gas industry CTG, RACT SIP revisions were due for EPA review and approval from states with

<sup>6</sup> 77 FR 30088 (May 21, 2012) and 77 FR 34221 (June 11, 2012).

<sup>7</sup> CAA section 184(a) establishes a single OTR comprised of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia.

<sup>8</sup> 81 FR 74798 (October 27, 2016).

<sup>9</sup> See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=2060-AT76> (last accessed October 14, 2020).

<sup>1</sup> 73 FR 16436 (March 27, 2008).

<sup>2</sup> 40 CFR 50.15.

<sup>3</sup> CAA sections 107(d)(1) and 181(a)(1).

<sup>4</sup> CAA section 181(a)(1).

<sup>5</sup> See 40 CFR 51.1103 for the design value thresholds for each classification for the 2008 ozone NAAQS.

nonattainment areas classified as Moderate or higher for the 2008 ozone NAAQS (a total of 25 SIP revisions for 21 nonattainment areas, some of which are multistate nonattainment areas), as well as the 12 states and the District of Columbia that comprise the OTR. Nonattainment areas and/or states subject to this RACT SIP requirement without any oil and natural gas sources covered by the CTG in their jurisdictions were required to make a SIP submission that could be comprised

of a “negative declaration” stating as much. Pursuant to CAA section 110(k)(1)(B), the EPA must determine no later than 6 months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established pursuant to CAA section 110(k)(1)(A). These criteria are set forth at 40 CFR part 51, appendix V. The EPA refers to the determination that a state has not submitted a SIP submission that

meets the minimum completeness criteria as a “finding of failure to submit.”

The following Table 1 provides the names of states with nonattainment areas and/or OTR states that this action finds failed to submit the SIP revision required for the CTG for reducing VOC emissions from existing oil and natural gas industry equipment and processes as of the date of this action.

TABLE 1—STATES AND/OR NONATTAINMENT AREAS INCLUDED IN FINDINGS OF FAILURE TO SUBMIT REQUIRED SIP REVISIONS TO ADDRESS THE 2016 OIL AND NATURAL GAS INDUSTRY CTG FOR THE 2008 OZONE NAAQS

State	Nonattainment area/OTR state	Classification	EPA region
CA	San Diego County nonattainment area	Serious	9
CT	Greater Connecticut nonattainment area	Serious	1
CT	CT portion of New York-N New Jersey-Long Island nonattainment area	Serious	1
CT	CT—OTR state	OTR	1
NY	NY portion of New York-N New Jersey-Long Island nonattainment area	Serious	2
NY	NY—OTR state	OTR	2
PA	PA—OTR state	OTR	3
TX	Dallas-Fort Worth nonattainment area	Serious	6
TX	Houston-Galveston-Brazoria nonattainment area	Serious	6

**III. Consequences of Findings of Failure To Submit**

If the EPA finds that a state has failed to make the required SIP submittal or that a submitted SIP is incomplete, then CAA section 179(a) establishes specific consequences, after a period of time, including the imposition of mandatory sanctions for the affected area or state (as appropriate in the case of the OTR). Additionally, such a finding triggers an obligation under CAA section 110(c) for the EPA to promulgate a FIP no later than 2 years after issuance of the finding of failure to submit if the affected state has not submitted, and the EPA has not approved, the required SIP submittal.

If the EPA has not affirmatively determined that a state has made the required complete SIP submittal for an area or OTR state within 18 months of the effective date of this action, then, pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b)(2) will apply in the affected nonattainment area or OTR state. If the EPA has not affirmatively determined that the state has made the required complete SIP submittal within 6 months after the offset sanction is imposed, then the highway funding sanction will apply in the affected nonattainment area, in accordance with CAA section 179(b)(1) and 40 CFR 52.31.<sup>10</sup> The sanctions will

not take effect if, within 18 months after the effective date of these findings, the EPA affirmatively determines that the state has made a complete SIP submittal addressing the deficiency for which the finding was made. Additionally, if the state makes the required SIP submittal and the EPA takes final action to approve the submittal within 2 years of the effective date of these findings, the EPA is not required to promulgate a FIP for the affected nonattainment area or OTR state.

**IV. Findings of Failure To Submit for States That Failed To Make a Nonattainment Area and/or Ozone Transport Region SIP Submittal**

Based on a review of SIP submittals received and deemed complete as of the date of signature of this action, the EPA finds that the states listed in Table 1 above failed to submit the 2016 Oil and Gas CTG RACT SIP revisions required under subpart 2 of part D of Title I of the CAA and that were due no later than October 27, 2018, for the listed nonattainment areas and OTR states.

**V. Environmental Justice Considerations**

The EPA believes that the human health or environmental risks addressed by this action will not have disproportionately high or adverse human health or environmental effects

on minority, low-income, or indigenous populations because it does not directly affect the level of protection provided to human health or the environment under the 2008 ozone NAAQS. The purpose of this action is to make findings that the named states failed to provide the identified SIP submissions to the EPA that are required per the CAA. As such, this action does not directly affect the level of protection provided for human health or the environment. Moreover, it is intended that the actions and deadlines resulting from this document will in fact lead to greater protection for U.S. citizens, including minority, low-income, or indigenous populations, by ensuring that states meet their statutory obligation to develop and submit SIPs to ensure that areas make progress toward reducing ozone pollution.

**VI. Statutory and Executive Order Reviews**

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

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

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

This action is not an Executive Order 13771 regulatory action because this

<sup>10</sup> For the OTR states, such highway sanctions would only apply in nonattainment areas. If the OTR state does not contain any nonattainment

areas, then the highway sanctions would not apply in that state.

action is not significant under Executive Order 12866

#### C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA. This final action does not establish any new information collection requirement apart from what is already required by law. This action relates to the requirement in the CAA for states to submit SIPs under sections 172, 182, and 184 which address the statutory requirements that apply to areas designated as nonattainment for the ozone NAAQS and to states within the Ozone Transport Region, respectively.

#### D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action is a finding that the named states have not made the necessary SIP submission for certain nonattainment areas and/or states in the OTR to meet the requirements of part D of Title I of the CAA.

#### E. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain any unfunded mandate as described in UMRA 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

#### F. Executive Order 13132: Federalism

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

#### G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action finds that several states have failed to submit SIP revisions that satisfy the nonattainment area planning requirements under sections 172 and 182 of the CAA, and/or the OTR requirements under section 184 of the CAA. No tribe is subject to the requirement to submit an implementation plan under section 172 or under subpart 2 of part D of Title I of the CAA. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it is a finding that several states failed to submit SIP revisions that satisfy the nonattainment area planning requirements under sections 172 and 182 of the CAA, and/or the OTR requirements under Section 184, and does not directly or disproportionately affect children.

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

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

#### J. National Technology Transfer and Advancement Act (NTTAA)

This action does not involve technical standards.

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

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. In finding that several states have failed to submit SIP revisions that satisfy the nonattainment area planning requirements under sections 172 and 182 of the CAA, and/or the OTR requirements under section 184 of the CAA, this action does not directly affect the level of protection provided to human health or the environment.

#### L. Congressional Review Act (CRA)

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

#### M. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by the EPA under the CAA. This section provides, in part, that petitions

for review must be filed in the United States Court of Appeals for the District of Columbia Circuit if (i) the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) such action is locally or regionally applicable, but “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.”

This final action is nationally applicable. To the extent a court finds this final action to be locally or regionally applicable, the EPA finds that this action is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1). This final action consists of findings of failure to submit required SIPs from five states with nonattainment areas and/or in the OTR, located in five of the 10 EPA Regions, and in four different Federal judicial circuits. This final action is also based on a common core of factual findings concerning the receipt and completeness of the relevant SIP submittals. For these reasons, this final action is nationally applicable or, alternatively, to the extent a court finds this action to be locally or regionally applicable, the Administrator has determined that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the **Federal Register**. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of the action for the purposes of judicial review, nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such rule or action.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedures, Air pollution control, Approval and promulgation of implementation plans, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Anne L. Austin,

Principal Deputy Assistant Administrator.

[FR Doc. 2020–24488 Filed 11–13–20; 8:45 am]

BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 62**

[EPA–R06–OAR–2020–0357; FRL–10016–22–Region 6]

**Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants; Arkansas, New Mexico, and Albuquerque-Bernalillo County, New Mexico; Control of Emissions From Existing Commercial and Industrial Solid Waste Incineration Units****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is notifying the public that we have received CAA section 111(d)/129 negative declarations from Arkansas, New Mexico, and Albuquerque-Bernalillo County, New Mexico, for existing incinerators subject to the Commercial and Industrial Solid Waste Incineration units (CISWI) emission guidelines (EG). These negative declarations certify that incinerators subject to CISWI EG and the requirements of sections 111(d) and 129 of the CAA do not exist within the jurisdictions of Arkansas, New Mexico, and Albuquerque-Bernalillo County. The EPA is accepting the negative declarations and amending the CFR in accordance with the requirements of the CAA.

**DATES:** This rule is effective on December 16, 2020.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2020–0357. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Janna Roberts, EPA Region 6 Office, Air and Radiation Division—State Planning and Implementation Branch, 1201 Elm Street, Suite 500, Dallas, TX 75270, (214) 665–6532, [roberts.janna@epa.gov](mailto:roberts.janna@epa.gov). Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the

public to reduce the risk of transmitting COVID–19. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

**SUPPLEMENTARY INFORMATION:**

Throughout this document “we,” “us,” and “our” means the EPA.

**I. Background**

The background for this action is discussed in detail in our August 11, 2020, proposal (85 FR 48485). In that document we proposed to accept the negative declarations for incinerators subject to the CISWI EG from the Arkansas Department of Environmental Quality (ADEQ), New Mexico Environment Department (NMED), and City of Albuquerque Environmental Health Department (AEHD), and to amend the CFR in accordance with the requirements of the CAA.

We received one comment on our proposal. We have determined that this comment is not relevant to this rulemaking and no further response is required.

**II. Final Action**

The EPA is amending 40 CFR part 62 to reflect receipt of the negative declaration letters from ADEQ, NMED and AEHD certifying that there are no existing incinerators subject to the CISWI EG subject to 40 CFR part 60, subpart DDDD, in in their respective jurisdictions in accordance with 40 CFR 60.2510, 40 CFR 60.2530, 40 CFR 60.23(b), 40 CFR 62.06, and sections 111(d) and 129 of the CAA.

If a designated facility is later found within the mentioned jurisdictions after publication of the final action, then the overlooked facility will become subject to the requirements of the federal plan for that designated facility, including the compliance schedule. The federal plan will no longer apply if we subsequently receive and approve the section 111(d)/129 plan from the jurisdiction with the overlooked facility.

**III. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a CAA section 111(d)/129 submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7411(d); 42 U.S.C. 7429; 40 CFR part 60, subparts B and DDDD; and 40 CFR part 62, subpart A. With regard to negative declarations for designated facilities received by the EPA from states, the EPA’s role is to notify the public of the receipt of such negative declarations and revise 40 CFR part 62 accordingly. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because this action is not significant under Executive Order 12866;

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

This rule also does not have Tribal implications because it will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

**List of Subjects in 40 CFR Part 62**

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: October 29, 2020.

**Kenley McQueen,**

*Regional Administrator, Region 6.*

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

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

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

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

**Subpart E—Arkansas**

■ 2. Add an undesignated center heading and § 62.867 to read as follows:

**Emissions From Existing Commercial and Industrial Solid Waste Incineration Units**

**§ 62.867 Identification of plan—negative declaration.**

Letter from the Arkansas Department of Environmental Quality dated April 26, 2017, certifying that there are no incinerators subject to the commercial and industrial solid waste incineration (CISWI) Emission Guidelines, under 40 CFR part 60, subpart DDDD, within its jurisdiction.

**Subpart GG—New Mexico**

■ 3. Revise § 62.7890 to read as follows:

**§ 62.7890 Identification of sources—negative declarations.**

Letters from the New Mexico Environment Department and the City of Albuquerque Environmental Health Department dated June 15, 2020, and March 4, 2020, respectively, certifying that there are no incinerators subject to the commercial and industrial solid waste incineration (CISWI) Emission Guidelines, under 40 CFR part 60, subpart DDDD, within their respective jurisdictions in the State of New Mexico.

[FR Doc. 2020–24386 Filed 11–13–20; 8:45 am]

BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 180**

[EPA–HQ–OPP–2019–0384; FRL–10012–78]

**Indoxacarb; Pesticide Tolerances**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for residues of the insecticide indoxacarb in or on Almond, hulls at 8 parts per million (ppm) and Nut, tree, group 14–12 at 0.08 ppm. FMC Corporation requested tolerances for these commodities under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective November 16, 2020. Objections and requests for hearings must be received on or before January 15, 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–2019–0384, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

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

**FOR FURTHER INFORMATION CONTACT:** Marietta Echeverria, Acting Director, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: [RDfRNNotices@epa.gov](mailto:RDfRNNotices@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](http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl).

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

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2019–0384 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 15, 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–2019–0384, 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 February 11, 2020 (85 FR 7708) (FRL-10005-02), 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 9F8774) by FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104. The petition requested that 40 CFR 180.564 be amended by establishing tolerances for residues of the insecticide indoxacarb, [(S)-methyl 7-chloro-2,5-dihydro-2-[(methoxycarbonyl)[4-(trifluoromethoxy)phenyl]amino]carbonyl]indeno[1,2-e][1,3,4]oxadiazine-4a(3H)-carboxylate], and its R-enantiomer [(R)-methyl 7-chloro-2,5-dihydro-2-[(methoxycarbonyl)[4-(trifluoromethoxy)phenyl]amino]carbonyl]indeno[1,2-e][1,3,4]oxadiazine-4a(3H)-carboxylate], in or on Almond, hulls at 9 parts per million (ppm) and Nut, tree, group 14-12 at 0.07 ppm. That document referenced a summary of the petition prepared by FMC Corporation, the registrant, which is available in the docket, <http://www.regulations.gov>. No public comments were received in response to the notice of filing.

Based upon review of the data supporting the petition and in accordance with its authority under FFDCA section 408(d)(4)(A)(i), EPA is establishing tolerances that vary from what the petitioners sought. The reasons for these changes are explained in detail in Unit IV.C.

## III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of the 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 the 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 the 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 therein, 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 indoxacarb in or on almond, hulls and nut, tree, group 14-12.

In the **Federal Register** on December 8, 2017 (82 FR 57860) (FRL-9970-39), EPA published a final rule establishing a tolerance for residues of the insecticide indoxacarb in or on corn, field, forage; corn, field, grain; and corn, field, stover based on the Agency’s determination that aggregate exposure to indoxacarb is safe for the U.S. general population, including infants and children. Because certain elements of EPA’s assessment of exposures and risks associated with indoxacarb have not changed since the 2017 rule was published, EPA is incorporating the following portions of the 2017 rule as part of this rulemaking: the toxicological profile and points of departure/levels of concern.

### A. Exposure Assessment

EPA has updated the exposure assessments of indoxacarb to estimate exposures that will result from the current and proposed new uses of indoxacarb in or on almond, hulls and nut, tree, group 14-12, as described below. Based on the current and proposed uses of indoxacarb, exposures can occur both from dietary sources (food + water) and in residential settings. An updated 2020 drinking water assessment utilized a total residue modeling approach to account for the environmental fate and transport of indoxacarb plus its degradation products of concern. Notwithstanding the updated 2020 drinking water assessment, the exposure estimates generated in the 2017 drinking water assessment are protective of the estimates generated from the proposed use of indoxacarb on tree nuts. Surface water estimated drinking water concentrations (EDWCs) were lower than the corresponding ground water EDWCs (acute EDWC of 131 parts per billion (ppb) and a chronic EDWC of 123 ppb), which were used in the partially refined acute probabilistic and chronic dietary exposure assessments of indoxacarb, respectively. In addition, for food commodities, residue

distribution files were constructed from field trial residues for the probabilistic acute dietary exposure assessment as appropriate, and average residues were computed for blended commodities and for the chronic dietary exposure assessment.

An updated occupational and residential exposure assessment found no residential handler risk estimates of concern and there are no proposed changes to the use pattern which will impact the residential exposure or aggregate assessments for indoxacarb. For the currently registered products of indoxacarb: (1) Residential handler inhalation MOEs are  $\geq 92$  (LOC = 30) and are not of concern; and (2) there is potential for residential post-application exposure for individuals entering an environment previously treated with indoxacarb and/or contact with treated pets; however, residential post-application MOEs are  $\geq 170$  (LOC = 100) and are not of concern.

### B. Safety Factor for Infants and Children

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

EPA determined reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x because: (1) The hazard and exposure databases are complete; (2) there is no susceptibility in fetuses or offspring in any of the *in utero* or postnatal toxicity studies; (3) there are no residual uncertainties with regard to pre- and/or postnatal toxicity; (4) the acute neurotoxicity, subchronic neurotoxicity, and developmental neurotoxicity studies are available and all endpoints used in this risk assessment are protective of neurotoxic effects; and (5) exposure estimates will not underestimate actual exposures.

### C. Aggregate Risks and Determination of Safety

For aggregate risk assessment, risk estimates resulting from food, drinking water, and residential uses are combined. Acute, short- and

intermediate-term, and long-term (chronic) aggregate assessments were performed for indoxacarb. Partially refined acute probabilistic and chronic dietary exposure assessments were conducted for all current and proposed new uses of indoxacarb and were found to not be of concern at the 99.9th percentile for the U.S. general population and all population subgroups: 54% of the acute population adjusted dose (aPAD) for children 1 to 2 years old, the group with the highest exposure level; and 35% of the chronic population adjusted dose (cPAD) for all infants, the group with the highest exposure level. Moreover, there are no acute, short-, intermediate- or long-term (chronic) aggregate risk estimates of concern for adult or child aggregate exposures to indoxacarb as a result of the current and proposed new uses of indoxacarb. For children 1 to 2 years old, the group expected to be the most highly exposed, the short-term aggregate margin of exposure (MOE) is 120 and the intermediate-/long-term aggregate MOE is 260. Because EPA's LOC for indoxacarb is an MOE of 100 or below, these MOEs are not of concern.

Indoxacarb is classified as not likely to be carcinogenic to humans. Therefore, cancer risk is not a concern and cancer risks are not quantified.

Based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the U.S. general population, or to infants and children, from aggregate exposure to indoxacarb residues. More detailed information on the subject action to establish tolerances in or on almond, hulls and nut, tree, group 14–12 can be found at <http://www.regulations.gov> in the document entitled “Indoxacarb. Human Health Risk Assessment for Indoxacarb to Support the Proposed New Use on Almond Hulls and Tree Nut Group 14–12,” dated August 20, 2020. This document can be found in docket ID number EPA–HQ–OPP–2019–0384.

#### IV. Other Considerations

##### A. Analytical Enforcement Methodology

Several adequate methods are available for enforcing indoxacarb tolerances on both plant and livestock commodities. Because these methods do not distinguish the indoxacarb enantiomers, they give a total measure of indoxacarb concentration. For the enforcement of tolerances established on crops, two high-performance liquid chromatograph/ultraviolet detection (HPLC/UV) methods are available for use. The limits of quantitation (LOQs)

for these methods range from 0.01 to 0.05 ppm for a variety of plant commodities. A third gas chromatograph/mass-selective detection (GC/MSD), DuPont method AMR 3493–95 Supplement No. 4, is also available for the confirmation of residues in plants. In addition, a liquid chromatograph/mass spectrometer/mass spectrometer (LC/MS/MS) method has been developed and is considered an improvement to the previously approved enforcement method, Method DuPont–AMR–2712–93. Method DuPont–36189 has been determined to be adequate for enforcing tolerances established on crops and is reported to provide an LOQ of 0.01 ppm.

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

##### B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). Codex 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. Although EPA may establish a tolerance that is different from a Codex MRL, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established MRLs for residues of indoxacarb in or on almond hulls or tree nuts.

##### C. Revisions to Petitioned-For Tolerances

The petitioned-for tolerance levels are different from those being established by EPA. These differences are attributable to the petitioned-for levels not being consistent with Organization for Economic Cooperation and Development (OECD) rounding class practice. The almond, hulls tolerance level is somewhat lower than the petitioned-for level due to the level calculated with the OECD MRL calculation procedures. As a result, EPA is establishing a lower tolerance for almond hulls at 8 ppm based on the

FMC data, rather than the tolerance level of 9 ppm proposed by FMC Corporation.

A tolerance level of 0.07 ppm was proposed by FMC Corporation for the tree nut group. EPA is establishing a tolerance level for the tree nut group at 0.08 ppm based on the MRL calculated for pistachios. The submitted field trial data for the representative tree nut crops of almond and pecan also included a full dataset for pistachios, which yielded the highest MRL in comparison to the almond and pecan representative crop data. In this instance, EPA considers the pistachio data acceptable for setting the recommended crop group tolerance on tree nuts because pistachios are analogous to almonds and share the same weed and pest pressures, are grown in the same geographic regions as almonds, and are a leading tree nut production crop based on total acreage as reported in the 2017 USDA Census of Agriculture report.

#### V. Conclusion

Tolerances are established for residues of the insecticide indoxacarb in or on Almond, hulls at 8 parts per million (ppm) and Nut, tree group 14–12 at 0.08 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 16, 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 § 180.564 amend paragraph (a)(1) by designating the table as Table 1 paragraph (a)(1) and adding in alphabetical order to newly designated Table 1 to paragraph (a)(1) the entries “Almond, hulls” and “Nut, tree, group 14–12” to read as follows:

**§ 180.564 Indoxacarb; tolerances for residues.**

(a) \* \* \* (1) \* \* \*

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
* * * * *	*
Almond, hulls .....	8
* * * * *	*
Nut, tree, group 14–12 .....	0.08
* * * * *	*

\* \* \* \* \*  
 [FR Doc. 2020–23420 Filed 11–13–20; 8:45 am]

**BILLING CODE 6560–50–P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 30**

[FAC 2021–02; FAR Case 2020–003; Item I; Docket No. FAR–2020–0003, Sequence 1]

RIN 9000–AO06

**Federal Acquisition Regulation: Removal of FAR Appendix; Correction**

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule; correction.

**SUMMARY:** DoD, GSA, and NASA are issuing a correction to FAC 2021–02;

FAR Case 2020–003; Removal of FAR Appendix; Item I; which published in the **Federal Register** on October 23, 2020. This correction makes an editorial change to correct the amendatory language in the affected FAR section of part 30.

**DATES:** *Effective:* November 23, 2020.

**FOR FURTHER INFORMATION CONTACT:** Mr. Bryon Boyer, Procurement Analyst, at 817–850–5580 or by email at *bryon.boyer@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2021–02, FAR Case 2020–003; Correction.

**SUPPLEMENTARY INFORMATION:**

**Correction**

In FR Doc. 2020–21695, published in the **Federal Register** at 85 FR 67613, on October 23, 2020, make the following correction:

**30.202–7 [Corrected]**

■ On page 67614, in the third column, revise amendatory instruction number 24, to read as follows:

■ 24. Amend section 30.202–7 in paragraph (a)(1) introductory text by removing “(FAR Appendix)”.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

[FR Doc. 2020–24158 Filed 11–13–20; 8:45 am]

**BILLING CODE 6820–EP–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 273**

[Docket No. FRA–2019–0069; Notice No. 3]

RIN 2130–AC85

**Metrics and Minimum Standards for Intercity Passenger Rail Service**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.

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

**FOR FURTHER INFORMATION CONTACT:** Kristin Ferriter, Transportation Industry Analyst, telephone (202) 493–0197; or



Zeb Schorr, Assistant Chief Counsel, telephone (202) 493-6072.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents for Supplementary Information**

- I. Executive Summary
- II. Background
- III. Response to Comments on On-Time Performance and Train Delays
- IV. FRA Quarterly Reporting
- V. Section-by-Section Analysis of Comments and Revisions From the NPRM
- VI. Regulatory Impact and Notices
  - A. Executive Order 12866, Executive Order 13771, and DOT Regulatory Policies and Procedures
  - B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment
  - C. Paperwork Reduction Act
  - D. Federalism Implications
  - E. Environmental Impact
  - F. Executive Order 12898 (Environmental Justice)
  - G. Executive Order 13175 (Tribal Consultation)
  - H. Unfunded Mandates Reform Act of 1995
  - I. Energy Impact
  - J. Trade Impact

**I. Executive Summary**

*A. Overview of the Final Rule*

This final rule establishes metrics and minimum standards for measuring the performance and service quality of Amtrak’s intercity passenger train operations (Metrics and Standards). The Metrics and Standards are organized into four categories: On-time performance (OTP) and train delays,

customer service, financial, and public benefits. With respect to on-time performance and train delays, this final rule sets forth a customer on-time performance metric, defined as the percentage of all customers on an intercity passenger rail train who arrive at their detraining point no later than 15 minutes after their published scheduled arrival time, reported by train and by route. This final rule establishes a customer on-time performance minimum standard of 80 percent for any 2 consecutive calendar quarters, and sets forth when the standard begins to apply. In addition, this final rule includes the following related metrics: Ridership data, certified schedule, train delays, train delays per 10,000 train miles, station performance, and host running time.

*B. Procedural History*

By notice of proposed rulemaking (NPRM) published on March 31, 2020 (85 FR 17835), FRA proposed metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations. FRA held a telephonic public hearing on April 30, 2020. Written comments on the proposed rule were required to be submitted no later than June 1, 2020.

FRA received more than 320 comments, including comments from: Alabama State Port Authority, Alaska Railroad, American Association of State Highway and Transportation Officials, Association of American Railroads,

Association of Independent Passenger Rail Operators, BNSF Railway Company, California State Transportation Agency, Canadian National Railway Company, Canadian Pacific, Capitol Corridor Joint Powers Authority, CSX Transportation, Environmental Law and Policy Center, Metropolitan Transportation Authority, Midwest Interstate Passenger Rail Commission, New York State Department of Transportation (DOT), NJ Transit, Norfolk Southern Railway Company, North Carolina DOT, Rail Passengers Association, San Joaquin Regional Rail Commission, Southeastern Pennsylvania Transportation Authority, Southern Rail Commission, States for Passenger Rail Coalition, Surface Transportation Board (STB), Transportation for America, Union Pacific Railroad Company, Utah Rail Passengers Association, Virginia Department of Rail and Public Transportation, Virginia Railway Express, Washington State DOT, the Honorable U.S. Representative Sam Graves, the Honorable U.S. Representative Rick Crawford, and more than 290 other individuals. Comments are addressed in the preamble.

*C. Economic Analysis*

All costs of this final rule are expected to be incurred during the first year. The following table shows the total 10-year costs of this final rule.

**TOTAL 10-YEAR COSTS**

Category	Total cost (\$)	Annualized, 7 percent (\$)	Annualized, 3 percent (\$)
Cost of Meetings .....	473,473	67,412	55,505
Internal Staff Time (Preparation for Meetings) .....	296,991	42,285	34,816
Monthly Letters .....	50,328	7,166	5,900
Arbitration .....	714,030	101,662	83,706
Ridership Data .....	6,198	882	727
<b>Total .....</b>	<b>1,541,020</b>	<b>219,407</b>	<b>180,655</b>

This final rule may result in lower operational costs for Amtrak to the extent it results in improved OTP, which may reduce labor costs, fuel costs, and expenses related to passenger inconvenience, and provide benefits to riders from improved travel times and service quality. Due to the difficulty in quantifying future benefits to rail routes from improved OTP, combined with the inability to quantify the potential synergistic effects that improved OTP reliability could have across Amtrak’s network, FRA has not quantified any potential benefits from lower

operational costs or improved service that may result from the final rule.

**II. Background**

*A. PRIIA*

On October 16, 2008, President George W. Bush signed the Passenger Rail Investment and Improvement Act of 2008, Public Law 110-432, 122 Stat. 4907 (PRIIA) into law. Section 207 of PRIIA requires FRA and Amtrak to develop jointly new or improved metrics and minimum standards for measuring the performance and service

quality of intercity passenger train operations, including: Cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

Section 207 also calls for consultation with STB, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, and groups representing Amtrak passengers, as appropriate.

Section 207 further provides that the metrics, at a minimum, must include: The percentage of avoidable and fully allocated operating costs covered by

passenger revenues on each route; ridership per train mile operated; measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier; and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation. Section 207 requires Amtrak to provide reasonable access to FRA to carry out its duty under section 207.

Section 207 provides that the Federal Railroad Administrator must collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including: Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

Finally, section 207 provides that, to the extent practicable, Amtrak and its host rail carriers shall incorporate the Metrics and Standards into their access and service agreements (also referred to as operating agreements).

The Metrics and Standards also relate to section 213 of PRIIA (codified at 49 U.S.C. 24308(f)). Section 213 states that if the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 fails to meet those standards for 2 consecutive calendar quarters, STB may initiate an investigation. Under section 213, STB shall also initiate such an investigation upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service. Section 213 further describes STB's investigation and STB's related authority to identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train and to award damages and prescribe other relief.

#### B. 2010 Metrics and Standards

In March 2009, FRA published proposed Metrics and Standards, which were jointly developed with Amtrak. After receiving and considering comments, FRA published final Metrics and Standards in May 2010. However, the 2010 Metrics and Standards were subject to a legal challenge on the basis

that section 207 of PRIIA was unconstitutional. In 2016, the United States Court of Appeals for the District of Columbia Circuit found that paragraph (d) of section 207 was unconstitutional, and this holding had the effect, in part, of voiding the 2010 Metrics and Standards. Following additional litigation, that Court also found that paragraphs (a) through (c) of section 207 were constitutional and remained in effect (this decision became final upon the U.S. Supreme Court's denial of certiorari on June 3, 2019). As a result, in July 2019, FRA and Amtrak once again began the process of developing joint Metrics and Standards under section 207(a).

#### C. Stakeholder Consultation

Consistent with section 207(a), FRA and Amtrak consulted with many stakeholders to develop the Metrics and Standards.

Specifically, in August and September, 2019, FRA met individually with representatives of the following Class I railroads that host Amtrak trains: BNSF Railway, Canadian National Railway, Canadian Pacific Railway, CSX Transportation, Norfolk Southern Railway Company, and Union Pacific Railroad. On September 5, 2019, FRA and Amtrak met with representatives of the Rail Passengers Association. On September 10, 2019, FRA and Amtrak met with representatives of the Metro-North Railroad. On September 12, 2019, FRA and Amtrak met with representatives of the Transport Workers Union. On September 13, 2019, FRA and Amtrak met with Surface Transportation Board staff. On September 18, 2019, FRA and Amtrak convened a meeting with members of the State-Amtrak Intercity Passenger Rail Committee, whose members include: Caltrans, Capitol Corridor Joint Powers Authority, Connecticut DOT, Illinois DOT, Los Angeles-San Diego-San Luis Obispo Joint Powers Authority, Massachusetts DOT, Michigan DOT, Missouri DOT, New York State DOT, North Carolina DOT, Northern New England Passenger Rail Authority, Oklahoma DOT, Oregon DOT, Pennsylvania DOT, San Joaquin Joint Powers Authority, Texas DOT, Vermont Agency of Transportation, Virginia Department of Rail and Public Transportation, Washington State DOT, and Wisconsin DOT. On September 20, 2019, Amtrak met separately with representatives of the Union Pacific Railroad. On September 24, 2019, FRA and Amtrak met with representatives of the Vermont Railway. On November 15, 2019, Amtrak met separately with representatives of the BNSF Railway.

On November 19, 2019, in two different meetings, FRA met separately with, first, representatives of the International Association of Sheet Metal, Air, Rail, and Transportation Workers, Transportation Division, and, second, with members of the Surface Transportation Board.<sup>1</sup> FRA and Amtrak also sought input from other potentially interested entities who did not express interest in consulting at that time.<sup>2</sup>

After publishing the NPRM, FRA invited each of the stakeholders to meet again. As a result of this invitation, on April 23, 2020, FRA met via telephone with representatives of the following Class I railroads that host Amtrak trains: BNSF Railway; Canadian National Railway; Canadian Pacific Railway; CSX Transportation; Norfolk Southern Railway Company; and Union Pacific Railroad. Representatives of the Association of American Railroads and Amtrak also attended this meeting. On May 6, 2020, FRA met via telephone with representatives of the American Association of State Highway Transportation Officials, Capitol Corridor Joint Powers Authority, Connecticut DOT, California DOT, Illinois DOT, Michigan DOT, Missouri DOT, North Carolina DOT, New York State DOT, Northern New England Passenger Rail Authority, Oklahoma DOT, Oregon DOT, San Joaquin Joint Powers Authority, Vermont Agency of Transportation, Virginia Department of Rail and Public Transportation, Washington State DOT, Wisconsin DOT, State Amtrak Intercity Passenger Rail Committee, and States for Passenger Rail Coalition. Representatives of Amtrak also attended this meeting. Lastly, on May 8, 2020, FRA met with representatives of STB. Representatives of Amtrak also attended this meeting. FRA placed summaries of each of these meetings, including the presentation material, in the NPRM's rulemaking docket (FRA-2019-0069-0013, FRA-2019-0069-0022, and FRA-2019-0069-0028).

In addition, on June 17, 2020, FRA met individually via telephone with BNSF Railway, Canadian National Railway, CSX Transportation, Norfolk Southern Railway Company, and Union Pacific Railroad. Representatives of

<sup>1</sup> One commenter stated that FRA should have also consulted with heavy tonnage seaports with terminal and switching railroads. FRA notes that, while such specific consultation was not required by the statute, FRA had many in-depth meetings with Class I railroads who are well-versed in the issues related to providing rail service to seaports; indeed Class I railroad comments mirrored those from this commenter.

<sup>2</sup> FRA sought input from certain rail labor groups that did not express interest in consulting at the time.

Amtrak attended each of these meetings. On June 19, 2020, FRA met via telephone with Canadian Pacific Railway. Representatives of Amtrak attended this meeting. In these six meetings, FRA sought collaborative commitment to affirm or adjust the intercity passenger train schedules published for stations served across the railroad’s network, and continued discipline to maintaining schedules, in order to expand the growing data pool that would support any necessary schedule change. Subsequent FRA letters to these parties summarizing the discussion were placed in the NPRM’s rulemaking docket (FRA–2019–0069–0379). On July 31, 2020, FRA met collectively via telephone with Amtrak, BNSF Railway, Canadian National Railway, Canadian Pacific Railway, CSX Transportation, Norfolk Southern Railway Company, and Union Pacific Railroad regarding reaffirmation or reconciliation of Amtrak’s published train schedules. FRA’s subsequent letter to those parties summarizing the discussion was placed in the NPRM’s rulemaking docket (FRA–2019–0069–0382).

*D. Amtrak’s Role in the Metrics and Standards Rulemaking*

Beginning in July 2019, FRA and Amtrak began the process of developing the Metrics and Standards under section 207(a) of PRIIA. FRA and Amtrak held an executive kick-off meeting to initiate the effort, which was followed by a regular cadence of staff level meetings. As described above, FRA and Amtrak then conducted an extensive consultation process with many stakeholders to develop the Metrics and Standards. After the conclusion of the consultation process, FRA worked with Amtrak to develop the Metrics and Standards, which included extensive Amtrak input that was reflected in the Metrics and Standards NPRM. After publication of the NPRM, FRA met with various stakeholders (Class I railroads, States, and the STB) together with Amtrak, as described above. FRA then sought (and received) Amtrak’s input on the draft Metrics and Standards final rule, considered Amtrak’s input, and then, as the agency with rulemaking authority, FRA ultimately determined the contents of this final rule.

**III. Response to Comments on On-Time Performance and Train Delays**

*A. Customer On-Time Performance*

As proposed in the NPRM, this final rule measures the OTP element of intercity passenger train performance using a customer OTP metric, defined as the percentage of all customers on an intercity passenger rail train who arrive at their detraining point no later than 15 minutes after their published scheduled arrival time, reported by train and by route.<sup>3</sup> The customer OTP metric focuses on intercity passenger train performance as experienced by the customer. Customer OTP measures the on-time arrival of every intercity passenger customer, including those who detrain at intermediate stops along a route and those who ride the entire route.

The customer OTP metric is calculated as follows: The total number of customers on an intercity passenger rail train who arrive at their detraining point no later than 15 minutes after their published scheduled arrival time, divided by the total number of customers on the intercity passenger rail train.<sup>4</sup> For example:

$$\text{Customer OTP} = \frac{\text{Customers Arriving at Detraining Point No Later Than 15 Minutes After Scheduled Arrival Time}}{\text{Total Number of Customers}}$$

The following table provides a hypothetical customer OTP calculation for a single train on two separate days. The table provides the minutes late,

arrival status (“OT” for on-time, “LT” for late), total number of customer arrivals, and number of on-time customer arrivals, by station, for each

day of operation and the two days overall.

Station	Train 130(1)				Train 130(2)				Overall	
	Minutes Late	Status	Customer Arrivals	OT Customers	Minutes Late	Status	Customer Arrivals	OT Customers	Customer Arrivals	OT Customers
WAS	-	-	-	-	-	-	-	-	-	-
NCR	-3	OT	2	2	0	OT	4	4	6	6
BWI	3	OT	12	12	2	OT	7	7	19	19
BAL	1	OT	15	15	1	OT	9	9	24	24
ABE	5	OT	1	1	3	OT	0	0	1	1
WIL	5	OT	18	18	2	OT	13	13	31	31
PHL	1	OT	31	31	1	OT	38	38	69	69
TRE	2	OT	9	9	2	OT	16	16	25	25
MET	0	OT	14	14	-1	OT	19	19	33	33
EWR	2	OT	2	2	31	LT	3	0	5	2
NWK	4	OT	9	9	49	LT	10	0	19	9
NYP	2	OT	41	41	46	LT	37	0	78	41
<b>Total</b>			<b>154</b>	<b>154</b>			<b>156</b>	<b>106</b>	<b>310</b>	<b>260</b>
<b>Customer OTP</b>				<b>100%</b>				<b>68%</b>		<b>84%</b>

<sup>3</sup> This definition reflects a minor revision to the NPRM’s definition of customer OTP, which clarifies that early trains are counted as on-time. FRA made this revision in response to a comment seeking this clarification.

<sup>4</sup> There are several uncommon situations that can affect the calculation of customer OTP. Customers

on canceled trains (less than 4 hours advance notice) are counted as late customer arrivals at their ticketed station if service to their ticketed station is canceled. Customers that are carried beyond their ticketed off-point are included in the customer arrival count at their ticketed off-points. Re-accommodated customers not due to the suspension

of a train are excluded from the calculation for their original trip but would be counted for customer OTP for the rescheduled trip. Customers on bus bridges (transportation on buses for a portion of a regularly scheduled train route) are excluded from the calculation.

In this example, customer OTP is 100% on day 1, 68% on day 2, and 84% for the two days combined. Because the number of customers on this train is different by station and by day, the aggregate customer OTP over the period is not a simple average of the daily numbers.

As also proposed in the NPRM, this final rule establishes a minimum standard for customer OTP of 80 percent for any 2 consecutive calendar quarters. To promote clarity and compliance, the customer OTP standard is the only standard set forth in connection with the OTP and train delays metrics. FRA believes this single standard is the most effective way to achieve dedicated focus on improving on-time performance. FRA emphasizes that 80 percent is a minimum standard, and FRA expects some intercity passenger rail services will reliably achieve a higher standard of performance. The 80 percent customer OTP standard is consistent with the statutory requirement in 49 U.S.C. 24308(f)(1).

Lastly, the final rule includes a provision not proposed in the NPRM, which provides that the customer OTP standard shall apply to a train beginning on the first full calendar quarter after May 17, 2021. For example, if the final rule is published on December 10, 2020, 6 months after that date would be June 10, 2021, and the first full calendar quarter after that would run from July 1, 2021 to October 31, 2021. FRA also understands that in some instances the alignment of a train schedule with the customer OTP metric may require additional time. As such, if Amtrak and a host railroad do not agree on a new train schedule and the schedule is reported as a disputed schedule on or before May 17, 2021, then the customer OTP standard for the disputed schedule shall apply beginning on the second full calendar quarter after May 17, 2021. FRA added these provisions to the final rule to ensure host railroads and Amtrak have sufficient time to align their train schedules before FRA begins reporting the customer OTP metric data.

FRA received hundreds of comments on customer OTP. Some commenters supported the customer OTP metric and standard and some disapproved of it. Many commenters generally supported the use of a single metric to measure OTP and the use of a single OTP standard.

Several commenters stated that section 207 requires the OTP metric to show OTP by host railroad in routes with multiple host railroads. In support, these commenters cited language in section 207(a), which states that the metrics “at a minimum, shall include

. . . measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier . . . .” FRA disagrees. As further described below, PRIIA calls for measuring the intercity passenger train’s OTP performance, not the host railroad’s performance in hosting the intercity passenger train. Section 207, when viewed in its entirety, does not require distinguishing OTP by host railroad. Sec. 207(a) (Requiring the development of metrics and minimum standards “including on-time performance and minutes of delay . . . .”); § 207(b) (Requiring FRA quarterly reporting on intercity passenger train operations, “including . . . on-time performance and minutes of delay . . . .”). Indeed, other sections in PRIIA require an OTP metric that measures a train’s performance over an entire route, and not just route segments by host railroad. 49 U.S.C. 24710(a) and (b); *see also* 49 U.S.C. 24308(f)(1). Furthermore, an OTP metric that measures a host railroad’s performance would not depict the customer’s experience as passenger trains that arrive late at their destinations may be reported as “on-time.” Lastly, Congress emphasized the importance of measuring delays by host railroad as evidenced in section 213, which requires the STB to investigate whether and to what extent delays are due to causes that could reasonably be addressed by a host railroad. Thus, in compliance with section 207(a), this final rule does include train delay metrics that describe train performance on individual host railroads (*e.g.*, the host running time metric shows train performance over a host railroad as compared to the train’s scheduled running time, thereby distinguishing host railroads on multi-host railroad routes).

Regardless of whether the statute requires it, several commenters stated that the final rule should distinguish OTP by host railroad.<sup>5</sup> In support, these commenters noted that the OTP metric determines when a host railroad may be subjected to an STB investigation (and other delay metrics could not prevent the initiation of an investigation). In other words, these commenters expressed concern that a host railroad could be subject to an STB investigation and/or reputational harm even if its own performance did not cause the train to

<sup>5</sup> For example, one commenter stated that OTP on multi-host routes should be measured against the run time for each host railroad line segment (and not against the scheduled departure and arrival time at each station).

operate below the standard.<sup>6</sup> In related comments, commenters stated that the OTP calculation should exclude certain delays for which the host railroad was not responsible (*e.g.*, third party delays or Amtrak-responsible delays) and give host railroads in dense metro territories an “out-of-slot delay tolerance” in connection with the OTP calculation.

In this final rule, FRA’s approach to OTP follows the framework Congress set forth in PRIIA. Section 207 calls for measuring the intercity passenger train’s OTP performance, not the host railroad’s performance in hosting the intercity passenger train.<sup>7</sup> A host railroad-specific measurement of OTP, accounting for late handoffs, slot time adjustments, and other methods of relief, would result in a system that is misaligned with the customer experience: passenger trains that arrive late at their destinations but are reported as “on-time.” Other sections in PRIIA also require an OTP metric that measures a train’s performance over an entire route (that can be compared to other routes), and not just route segments by host railroad.<sup>8</sup> In addition, Congress specifically identified the OTP metric as a trigger for an STB investigation.<sup>9</sup> 49 U.S.C. 24308(f)(1).

In any event, the train performance metrics in this final rule do not penalize host railroads for train delays for which they are not responsible. As described below, the final rule’s train delays metric and host running time metric speak to the individual host railroad’s

<sup>6</sup> One commenter also stated that the customer OTP metric would harm the morale of the host railroad’s employees who take pride in achieving good OTP. FRA appreciates the commitment of all employees, at Amtrak and the host railroads, and understand they work hard in support of Amtrak trains.

<sup>7</sup> FRA’s quarterly reports do not exist solely to serve as a trigger for an STB investigation. These reports also provide information for policymakers and the public, consistent with the data reporting for other modes of transportation, such as air travel. *See* <https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports>.

<sup>8</sup> *See* 49 U.S.C. 24710(a) (Requiring Amtrak to use the section 207 performance metrics to evaluate annually the operating performance of each long-distance train); 49 U.S.C. 24710(b) (Requiring Amtrak to develop a performance improvement plan for its long-distance routes based on the data collected from the section 207 performance metrics, to include OTP); 49 U.S.C. 24308(f)(1) (Referring to the on-time performance of an “intercity passenger train”); *see also* *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 826 (8th Cir. 2017).

<sup>9</sup> FRA’s quarterly reports showing Amtrak’s performance under the OTP metric are relied upon to determine whether a train is below the standard. *See* *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 826 (8th Cir. 2017). Congress also assigned STB with the responsibility to determine whether and to what extent delays . . . are due to causes that could reasonably be addressed” by the host railroad or by Amtrak. 49 U.S.C. 24308(f)(1).

performance. One commenter stated that the NPRM's train delays metrics are likely to get little attention compared to the customer OTP metric. FRA strongly disagrees. While the customer OTP metric provides a train-level view of actual passenger train performance focused on the customer experience, the train delays metric and the host running time metric can help identify certain categories of delays, their frequency, and their duration, which are central inquiries to understanding and improving passenger train performance, as well as an STB investigation under 49 U.S.C. 24308(f).

In addition, that STB can initiate an investigation certainly does not mean that an investigation will be sought. As acknowledged by several commenters, an STB investigation results in resource expenditures for affected entities, and it has an uncertain outcome. A decision to initiate such an investigation is not made lightly. As a result, it is not reasonable to assume that every train below the minimum OTP standard would be investigated. Furthermore, it is also not reasonable to assume that an STB investigation would be sought against a host railroad where the train delays metric and the host running time metric data do not support an investigation. FRA is confident STB can identify delays for which host railroads are not responsible when armed with data from these metrics.

In lieu of a customer OTP metric, several commenters proposed a key stations OTP metric that would measure train performance at key stations on a host railroad.<sup>10</sup> The customer OTP metric measures train OTP for every passenger at every station (not just passengers at designated stations), recognizes the relative importance of reliability at stations serving more passengers, and provides flexibility if demand changes. In contrast, a key stations OTP metric fails to recognize the importance of customers who do not use a key station. Such a metric would have additional challenges, including how to identify key stations. For these reasons, FRA determined that the customer OTP metric is superior to a key stations OTP metric. With that said, the customer OTP metric resembles a key stations OTP metric because stations with many detraining passengers have greater influence on the train's customer OTP and serve as de

<sup>10</sup> Another commenter suggested a key stations OTP metric combined with changes to the Amtrak-host railroad operating agreement to preserve a similar contractual performance payment regime. As stated elsewhere in this final rule, this final rule does not prohibit Amtrak and a host railroad from revising their operating agreement.

facto key stations.<sup>11</sup> As discussed elsewhere in this final rule, FRA finds that, aside from predictable and broadly understood seasonal trends and short-term variability, the percentage of a train's detraining passengers at stations on a route is stable for purposes of calculating customer OTP; therefore, host railroads can identify key stations to maximize performance under the customer OTP metric.

Another commenter suggested that the existing, contractually negotiated Amtrak train performance provisions found in the host railroads' operating agreements with Amtrak are preferable to the customer OTP metric because the host railroads often perform well under those contract terms (whereas these same trains don't perform as well when measured by the customer OTP metric). The commenter stated that Amtrak and a host railroad should be allowed to develop and apply alternative OTP standards, such as the existing contractual performance provisions, or use mutually agreed upon times as a baseline to measure OTP. The commenter's proposal is counter to section 207's requirement to establish a metric to measure intercity passenger train performance, as it would result in many different measures of performance that would be, at best, difficult to understand and, at worst, entirely misleading. A single OTP metric and standard allows stakeholders to compare train performance, which may be important to evaluating connectivity information, among other things, and ensures all trains are held to the same standard.

Furthermore, FRA believes the OTP metric should measure train performance from the eyes of the customer. The customer OTP metric is meaningful, precisely because it is reflective of the passenger train's actual performance. The commenter's proposal would routinely produce the anomalous result stated elsewhere in this final rule of a passenger train that arrives late at stations yet has good "OTP." See *Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(a)—Canadian National Railway Company*, STB Docket No. FD 35743 at 10 (Aug. 9, 2019) ("In general, if an OTP metric only includes checkpoints at the final station and two or three select

<sup>11</sup> See *Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(a)—Canadian National Railway Company*, STB Docket No. FD 35743 at 11, FN 25 (Aug. 9, 2019) ("An OTP metric that measures the percentage of passengers that arrive at their destination stations on time could—in some circumstances—allow for greater host railroad operational flexibility and create an incentive structure more closely tied to the service delivery to the end consumer, the passenger.").

intermediate points, . . . , the metric does not measure performance in a way that captures whether a significant portion of Amtrak's passengers actually arrived at their selected destinations on time. Such a metric would be an unrepresentative measure of performance.").

Another commenter stated the final rule should adopt an all-stations OTP metric that would measure train performance at all stations on a route. Like an all-stations OTP metric, the customer OTP metric measures train performance at every station, and it also recognizes the importance of reliability at stations serving more passengers. Customer OTP also offers host railroads more flexibility in adjusting recovery time<sup>12</sup> based on passenger load versus recovery needed for every station stop.<sup>13</sup> For these reasons, FRA determined that the customer OTP metric is preferable to an all-stations OTP metric, and is adopting a customer OTP metric as proposed in the NPRM.

A commenter stated that FRA should have considered the impact of the customer OTP metric and standard on the host railroads' various operating agreements with Amtrak, including the performance incentive payments made under such agreements. FRA is not a party to these agreements, nor does FRA have knowledge of their details, as the parties consider the details of the agreements confidential business information, and have not shared them with FRA. More importantly, this final rule does not require a change to the performance incentive payment provisions in these operating agreements; Amtrak and the host railroads may continue to maintain those provisions as they see fit.

In addition, to the extent a host railroad is concerned with receiving lower performance incentive payments as a result of this final rule, this final rule does not prohibit a host railroad and Amtrak from revising the performance incentive payments to align better with the customer OTP metric and standard.<sup>14</sup> Indeed, section

<sup>12</sup> Recovery time means time added to a schedule to help a train "recover" to published schedule on-time operation in the event that it encounters delays.

<sup>13</sup> One commenter stated that under a customer OTP metric it is not reasonable to believe a host railroad would agree to a schedule that did not achieve OTP at all stations. Although Amtrak and a host railroad may agree on a schedule that reliably achieves OTP at all stations, the customer OTP metric provides greater flexibility to the parties by allowing them to focus on those stations with greater numbers of detraining passengers.

<sup>14</sup> As STB stated, "[i]t is not reasonable for an incentives and penalties system to have at its foundation a performance metric that fails to account for the OTP at stations central to the

207(c) provides that, to the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards into their access and service agreements (the operating agreements). *See also Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d at 826 (“The § 207 on-time-performance metric was, to the extent practicable, to be incorporated into Amtrak’s contracts with host railroads.”).

A commenter stated that because the customer OTP metric is based on passenger loads it may be an unstable metric (as it may vary on a daily basis). Another commenter stated that this instability would result in lengthening schedules. A commenter also stated that the aggregation of customer OTP data could produce distorted results showing a train service as more reliable or less reliable than is actually the case. And, another commenter stated that the customer OTP metric will likely result in false positives for trains that depart late from congested Amtrak terminals. FRA does not agree with these commenters that customer OTP will be unreliable for two reasons. First, Amtrak has provided some ridership data to host railroads and the ridership data metric in this final rule requires Amtrak to provide additional data to host railroads to allow them to understand and monitor passenger loads.<sup>15</sup> Second, while the actual number of detrainning passengers may change at a station over time, the percentage of passengers detrainning at a station is generally stable.<sup>16</sup> Based on FRA’s review of the non-public ridership data Amtrak made available to the host railroads,<sup>17</sup> FRA found little movement in a station’s relative volume of detrainning passengers. For example, there were 15,714 total passengers on Amtrak train #391 (on the Illini/Saluki route) in the fourth quarter of 2019, and 10,481 total passengers in the first quarter of 2020, a difference of 5,233 passengers or 33%. Passengers detrainning at Champaign-

Urbana, IL represented 47.8% of the total passengers on the train in the fourth quarter 2019, and 50.4% of total passengers in the first quarter 2020. Despite this variation in ridership, Champaign-Urbana ranked as the highest volume station for detrainning passengers for these two quarters compared to all other stations on the route. Similarly, Carbondale, IL ranks as the second highest volume station for detrainning passengers, with 27.1% of the total passengers on the train in the fourth quarter 2019, and 25.6% of total passengers in the first quarter 2020. The relative importance of the station (*i.e.*, the station rank) along the route seldom changes despite fluctuation in the percentage of detrainning passengers. As stated above, if carefully analyzed, the ridership data will allow host railroads to identify de facto “key stations” to concentrate performance to ensure most passengers arrive at their destination on-time (thereby meeting the 80% standard).

A commenter stated that host railroads do not have adequate notice of the customer OTP metric because the metric is based on the number of detrainning passengers at a station, which the host railroads would receive after the fact. As noted above, there is generally not much change in proportional ridership by station by route (real-time ridership data is of limited utility), and host railroads already received a year of performance data on May 18, 2020. Furthermore, as described below, this final rule includes a ridership data metric that, in part, requires Amtrak to provide ridership data to host railroads. In addition, the final rule provides that the customer OTP standard shall apply to a train beginning, at the earliest, on the first full calendar quarter after May 17, 2021. Amtrak and the host railroads will also have at least a further five months to evaluate two years of relevant ridership data to work towards certifying train schedules, consistent with the data sharing requirement in this final rule. This commenter further suggested an alternative OTP metric that measures OTP by the train’s arrival at designated check-points (similar to the approach used in the commenter’s operating agreement with Amtrak), which it alleged would provide adequate notice. For the reasons stated above, FRA disagrees with this approach and believes that the OTP standard should be based on the passenger experience.

A commenter stated that a single OTP metric may fail to address certain State-supported trains that have negotiated local expectations of performance with a host railroad and that currently serve

passengers reliably above the 80 percent OTP standard. Similarly, another commenter stated that where an existing partnership exists between a State and a railroad, such as a service outcome agreement, the OTP metric and standard should be used to inform and complement that agreement, rather than to supersede it. As stated, the 80 percent customer OTP standard is a minimum standard. FRA expects many services to operate more reliably and this final rule is not intended to obstruct the unique performance arrangements that may exist between host railroads and States.

Some commenters expressed concern that the customer OTP metric would delay commuter rail trains sharing the right-of-way with Amtrak trains due to Amtrak trains “waiting for time” (*i.e.*, when a train arrives early to a station and waits until its scheduled departure time) at intermediate stations. A commenter stated that such an action in high density territory could create a net reduction in rail line capacity. Similarly, other commenters stated that aligning schedules to a customer OTP metric enlarges an Amtrak train’s dispatch footprint by redistributing recovery time across intermediate stations, which threatens overall network fluidity, decreases the host railroad’s ability to manage slow orders, and will result in longer schedules. FRA disagrees. First, delays waiting for time at intermediate stations can be foreclosed by an accurate schedule. Second, adjusting train schedules to align with the customer OTP standard does not mean that recovery time must be added for each station. Recovery time should, for example, be included across a schedule to protect performance at larger volume stations, locations where passenger trains can wait clear of main tracks, where stations are farther apart, or where trains are more likely to incur operational delays. However, spreading existing recovery time linearly across a schedule would be inefficient and would be more likely to result in trains waiting at stations for departure times if a train performed well on a given segment that included additional, unnecessary recovery time. Furthermore, in the case of capacity impacts great enough to warrant schedule change, reductions of time to remove these waits would be in both parties’ favor. Third, Amtrak trains on many routes avoid large numbers of station stops in districts already well served by commuter operations. Lastly, Amtrak trains should not be given more time between stations in commuter train territory than the commuter trains themselves. In these types of territories

passenger experience for a significant portion of Amtrak passengers.” *Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(a)—Canadian National Railway Company*, STB Docket No. FD 35743 at 10 (Aug. 9, 2019).

<sup>15</sup> The percentage of detrainning passengers to each station on a route can be calculated from the information Amtrak is currently providing to host railroads for their internal use. *See* FRA–2019–0069–0295. This data provides quarterly detrainning totals by station by train.

<sup>16</sup> Station rank in absolute terms may also be a helpful tool for schedule planning in connection with the customer OTP metric.

<sup>17</sup> While Amtrak does not make this ridership data publicly available, Amtrak shared this data with relevant host railroads. *See* FRA–2019–0069–0295. Amtrak also consented to this minimal public disclosure of ridership data to provide this illustrative example.

there should be little slack time written into the schedule, consistent with standard railroad operating best practices. For all these reasons, FRA is confident that the professional railroaders at Amtrak and the host railroads, whose daily job it is to develop train schedules, can account for the issues raised by these commenters.

Another commenter suggested that the customer OTP metric penalizes trains that perform well according to the performance provisions in their Amtrak-host railroad bilateral operating agreement and is not consistent with the intent of section 207. In support, the commenter, a host railroad, stated that it receives payments under its contract with Amtrak for the performance of trains operating on its right-of-way, but is concerned these same trains will not perform well as measured by a customer OTP metric. FRA disagrees. Put simply, a measure that is not focused on when a passenger train arrives at a station is not measuring the on-time performance of the passenger train. FRA encourages Amtrak and the host railroads to work toward aligning the bilateral operating agreements with the customer OTP metric and standard to ensure performance is measured, and appropriately incentivized, in a consistent manner. *See* PRIIA § 207(c).

A commenter sought clarity regarding whether the customer OTP metric is measured by the actual number of passengers detraining at a station, or by the number of tickets that Amtrak sells to a specific arrival station. Amtrak measures detraining passengers by the number of passengers actually traveling on the train, as determined by conductor ticket collections via electronic ticket scanning for a specific arrival station. Passengers who have reserved a seat, but elect not to travel, are not reflected in passenger counts. Another commenter wondered whether it is possible for Amtrak to calculate customer OTP accurately where Amtrak customers share tickets in metro areas with commuter passenger railroads (e.g., in Los Angeles with Metrolink commuter rail services). Most passengers traveling on Amtrak under a cross-honor arrangement with a commuter rail operator are included in the customer OTP calculation (in most cases, the conductor records the origin and destination station for the cross-honor rider as they board). Amtrak maintains cross-honor agreements with several commuter passenger railroads across the country, and riders traveling under those arrangements represent 2.4% of total Amtrak ridership. Approximately two-thirds of these cross-honor passengers are included in

Amtrak detraining counts, including Metrolink and Virginia Railway Express cross-honors.

A commenter stated a concern that, under the customer OTP metric, Amtrak passengers on cancelled trains would be counted as late customer arrivals at their ticketed station if service to their ticketed station is cancelled. In this case, a passenger on a train that has had their ticket scanned and the service to their ticketed station canceled on less than four hours advance notice is counted as a late customer arrival at their ticketed station by design, as it reflects the customer's experience.<sup>18</sup> In Amtrak fiscal year 2019, the number of passengers impacted by en route cancellations to their detraining stations was 0.04% of Amtrak ridership (14,439 impacted passengers divided by 32,519,241 total passengers).

A commenter stated that the customer OTP metric should be reported by train only, and not by train and by route. However, it is important to maintain route reporting because the customer is less likely to know what train number they are on, and are more likely to know the route they travel.

Lastly, a commenter stated that the customer OTP metric and standard should consider the fluidity of the entire network in determining whether a host railroad has given an Amtrak train preference. Preference under 49 U.S.C. 24308(c) is determined by STB, not FRA. *See* 49 U.S.C. 24308(c) and (f)(2). The commenter also stated that the customer OTP metric should consider non-Amtrak passengers, in addition to Amtrak passengers. As described further below, FRA developed the metrics for Amtrak intercity passenger train operations, which is consistent with section 207.

<sup>18</sup> In Amtrak's system, a cancellation with less than four hours advance notice represents an unplanned en route event. Amtrak established the four-hour benchmark to recognize that a cancellation with less than four hours advance notice would not give the customer sufficient time to make alternative travel arrangements. The four-hour benchmark is the same used for several other measures of Amtrak performance. The cancellation need not include the entire train or trip such as in an emergency detour situation, where selected stations may be bypassed (and passengers bussed to their original detraining location) but the train continues to its final destination. Passengers who are required to take a bus bridge to their final destination as a result of an unplanned cancellation are counted as late. Amtrak makes every effort to get these passengers to their desired destination, typically by bus or by re-accommodation on another train. Implementing these alternative travel plans due to an en route event nearly always results in passengers arriving late to their final destination. They are therefore counted as late to their detraining station and are included as such in customer OTP calculations.

## B. Train Schedules

While the NPRM did not propose any metrics related to train schedules, FRA received many comments about train schedules. Some commenters stated that the final rule should require Amtrak and a host railroad to certify that a train's schedule aligns with the customer OTP metric and standard before the customer OTP standard takes effect. STB, for example, supported requiring properly aligned schedules before an OTP standard takes effect. In support, commenters stated that many of Amtrak's existing schedules are not a meaningful benchmark for measuring customer OTP because they were not designed for a customer OTP metric, and they are outdated and unrealistic. As a result, these commenters stated, the use of the customer OTP metric to measure Amtrak schedules would produce misleading train performance data, and may result in unnecessary STB litigation.

Further, some commenters stated that it would be challenging to renegotiate some schedules due to disagreements about train scheduling and challenges with existing schedules, among other reasons. Several commenters stated that the final rule should provide an initial six-month period for Amtrak and the host railroads to certify schedules, and should extend this period for the pendency of any dispute resolution process. Commenters also stated that the final rule should incorporate a dispute resolution process to address schedules in dispute. Several commenters also stated that the dispute resolution process should automatically certify a schedule if the host railroad refused to participate and, conversely, should withhold certification if Amtrak refused to participate. Some commenters stated that the final rule should include a schedule recertification process to ensure ongoing schedule validity.

FRA generally agrees with many of these observations (although not all). FRA agrees that Amtrak and the host railroads should align schedules with the customer OTP metric.<sup>19</sup> Where a train's OTP is measured against the train schedule provided to the public, the train's schedule should be aligned with the OTP measure used to evaluate the train's performance. Historically,

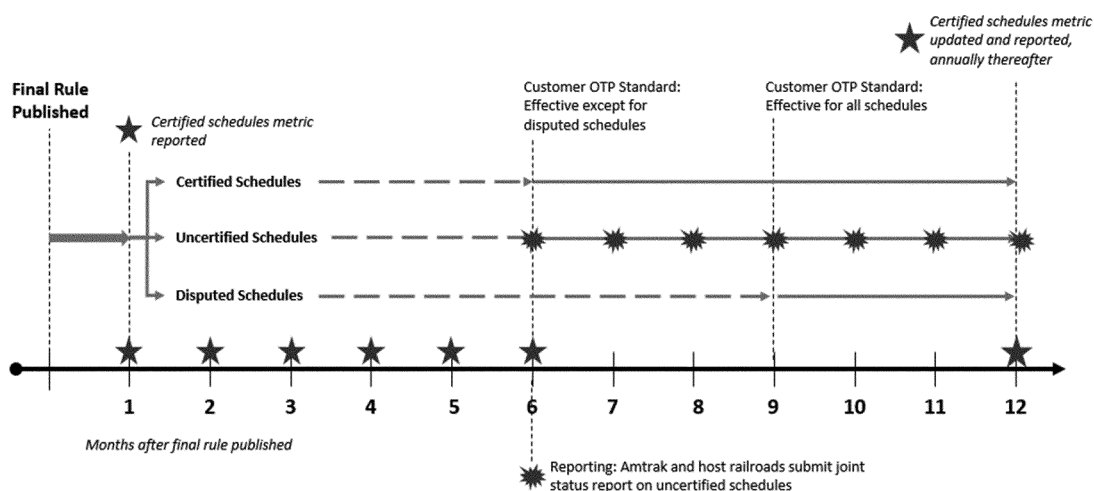
<sup>19</sup> An OTP metric, in part, can inform the formulation of a train schedule. For example, a customer OTP metric may encourage a schedule with more recovery time at those stations with more de-boarding passengers, while an endpoint OTP metric may encourage a schedule with more recovery time at the endpoints of a line segment.

Amtrak's published train schedules have not been designed with a customer OTP metric in mind. Accordingly, this final rule: Establishes a certified schedule metric that addresses alignment with the customer OTP metric and standard; provides more time for Amtrak and the host railroads to negotiate schedules; and allows for a dispute resolution process if the parties disagree.<sup>20</sup>

The certified schedule metric first requires Amtrak to report the number of certified schedules, uncertified schedules, and disputed schedules, by train, by route, and by host railroad.<sup>21</sup> This information is reported monthly for six months, at 12 months, and yearly

thereafter. Second, the final rule provides more time to negotiate schedules by delaying application of the customer OTP standard until the first full calendar quarter six months after publication of the final rule. Third, the final rule encourages the parties to certify schedules timely and to resolve disagreements by further delaying application of the OTP standard when a non-binding dispute resolution process is engaged. Specifically, if a train schedule is reported as a disputed schedule during the first six months, then the customer OTP standard does not apply until the second full calendar quarter following those six months.<sup>22</sup> Fourth, the certified schedule metric

further encourages the parties to certify schedules by requiring Amtrak and a host railroad to transmit monthly letters signed by their chief executive officers to Congress (and others) when they have an uncertified schedule after six months.<sup>23</sup> These letters will make policymakers aware of the status of the train schedule,<sup>24</sup> and help ensure that a sense of urgency is maintained by the parties to resolve the disagreement. Lastly, the certified schedule metric recognizes that ongoing coordination between Amtrak and a host railroad is needed as certified schedules are impacted by future events.<sup>25</sup> The graphic below provides an overview of the certified schedule metric process.



A commenter stated that a schedule dispute resolution process should allow for both non-binding and binding dispute resolution (and should not require binding dispute resolution only). Here, the final rule does not require Amtrak or a host railroad to

engage in a dispute resolution process, nor does the final rule attempt to prescribe the process the parties use if they do choose to engage a dispute resolution process. However, the final rule only affords delay of the customer OTP standard beyond six months for

engagement of a non-binding dispute resolution process.<sup>26</sup> The resolution of a schedule disagreement must be achieved as quickly as possible. The final rule encourages Amtrak and host railroads who are serious about finding common ground on a schedule to

<sup>20</sup> A certified schedule metric is consistent with section 207's direction to measure on-time performance, as the schedule is a benchmark of train performance.

<sup>21</sup> Although the certified schedule metric is reported by host railroad (excluding switching and terminal railroads), FRA encourages all the host railroads for a route to work together in aligning the train schedule.

<sup>22</sup> The final rule defines the term disputed schedule to mean a published train schedule for which a specific change is sought: (1) That is the only subject of a non-binding dispute resolution process led by a neutral third-party and involving Amtrak and one or more host railroads; (2) that is the only subject of a non-binding dispute resolution process led by a neutral third-party that has been initiated by one or more host railroads and Amtrak has not consented to participate in the process within 30 calendar days; or (3) that is the only subject of a non-binding dispute resolution process led by a neutral third-party that has been initiated by Amtrak and the host railroad has not consented to participate in the process within 30 calendar days. The written decision resulting from a non-

binding dispute resolution process is admissible in Surface Transportation Board investigations under 49 U.S.C. 24308(f). If a published train schedule is reported as a disputed schedule under subsection (c)(1), then it remains a disputed schedule until designated as a certified schedule.

<sup>23</sup> If a train schedule is reported as an uncertified schedule at six months, twelve months, or yearly thereafter, then Amtrak and the host railroad must transmit a joint letter and status update, signed by their respective chief executive officers, to each U.S. Senator and U.S. Representative whose district is served by the train, in addition to several other government offices. This joint letter and status update must identify the Amtrak published train schedule(s) at issue and the plan and expectation date to resolve the disagreement(s), among other details.

<sup>24</sup> In addition, FRA will post such joint letters on its website.

<sup>25</sup> FRA recognizes the importance of reviewing schedules periodically to ensure their integrity. However, the customer OTP standard would continue to apply during a schedule review period. In addition, the customer OTP standard will apply

to any new Amtrak train service initiated after application of the customer OTP standard (and that train will be subject to the certified schedule metric).

<sup>26</sup> The final rule only affords delay of the customer OTP standard beyond six months for disputed schedules. After the six-month period, the customer OTP standard applies to both certified schedules and uncertified schedules. There may be a scenario where one host railroad for a train has a disputed schedule (to which the customer OTP standard is not yet applied) and another host railroad for that train has either a certified schedule or an uncertified schedule. As the customer OTP metric is reported by train (and by route), in this situation, FRA will not include customer OTP metric data in the quarterly report for that train during the time when there is a disputed schedule (to which the customer OTP standard is not yet applied) for some portion of the train's route. FRA encourages Amtrak and all of the host railroads of a train to work together when evaluating the published train schedules.



engage in a dispute resolution process if they are unable to reach agreement amongst themselves.<sup>27</sup> While non-binding, the written decision resulting from a non-binding dispute resolution process may facilitate resolution and may also assist the Surface Transportation Board in a 49 U.S.C. 24308(f) investigation. While parties may seek binding dispute resolution, this final rule does not include that process given the broad array of impacts that may occur from a schedule required by arbitration, such as, among other things, significant additional operating expenses or revenue losses (for Amtrak and its partners), commercially infeasible times of operation or duration, and conflicting schedules on multi-host railroad routes.

Some commenters stated it would be unfair to apply a customer OTP standard to a schedule that is not aligned with the customer OTP metric (because the metric could produce misleading train performance data that could ultimately result in an STB investigation).<sup>28</sup> A commenter also stated that Amtrak has no incentive to adjust its schedules, and other commenters expressed concern about lengthening schedules. FRA understands that Amtrak and host railroads have some competing interests. This final rule balances those interests consistent with section 207. As explained, the final rule encourages the parties to agree on certified schedules while not explicitly requiring them. In addition, a host railroad or Amtrak may initiate a timely non-binding dispute resolution process (regardless of whether the other party agrees to participate in that process), which would temporarily delay application of the OTP standard to a train. The non-binding dispute resolution process will produce a written decision that will inform Amtrak and a host railroad in aligning the schedule with the customer OTP metric. The final rule empowers Amtrak and the host railroads to resolve schedule disputes without being overly prescriptive (and without government involvement that could hamper the

parties' ability to engage in confidential discussions, among other things). Section 207 does not require schedule certification and, indeed, section 213 acknowledges that STB investigations may include STB review of the extent to which scheduling contributed to delay. 49 U.S.C. 24308(f)(1).

Many comments addressed the NPRM's train schedule principles, which recommended, but did not require, alignment of train schedules with the customer OTP metric. Some commenters stated that the principles should be removed, others supported their inclusion, and still others suggested adding to the principles. This final rule does not include the train schedule principles. FRA determined these principles are no longer necessary given the final rule's inclusion of a certified schedule metric; the NPRM's train schedule principles would only serve to complicate the process of determining train schedules for Amtrak and the host railroads.

Several commenters stated that State sponsors of intercity passenger rail should be included in Amtrak and host railroad schedule alignment discussions. FRA agrees that State sponsors are important stakeholders in these discussions. Although the final rule does not require nor prohibit a State sponsor's involvement, FRA expects that a State sponsor may be invited to participate consistent with their existing agreement(s). Based on the comments received, FRA understands that Amtrak and many of the host railroads have existing agreements with State sponsors that relate to schedules. Those agreements remain in place and are not altered or negated by this final rule.

Commenters also stated that Amtrak schedule modifications should not compromise the standardized schedules Amtrak has agreed to with commuter agencies in dense commuting territories, as these existing schedules allow for the optimal use of capacity and ensure reliable operations for both Amtrak and commuter rail operations. Similarly, a commenter stated that Amtrak, host railroads, and commuter services must work cooperatively to update schedules in the interest of providing achievable OTP goals. FRA recognizes the important role commuter rail services play in the passenger rail network. This final rule does not prohibit commuter agency involvement in Amtrak-host railroad schedule discussions, and any Amtrak and/or host railroad agreements with commuter agencies remain in place and are not altered or negated by this final rule.

A commenter stated that there should be a test period for new schedules. With the application provisions for the OTP standard in this final rule, FRA believes Amtrak and the host railroads have sufficient time to test and negotiate train schedules. FRA will not dictate a process for negotiating schedules, but it expects both parties will use data-driven processes, such as modeling, simulation, and real-world testing to validate any proposed schedule changes.

One commenter stated that a new schedule aligned with the customer OTP metric should take into account the existing contractual performance payments that may exist between Amtrak and a host railroad under their operating agreement. It is unnecessary to require new schedules to account for contractual performance payments because any new schedule will be agreed to by Amtrak and the host railroad, and they may consider the implications of the schedule on future performance payments, and can work to adjust those payments to align with the new schedule.

A commenter stated that Amtrak must provide the same consideration to other host railroads that Amtrak grants itself on the Northeast Corridor (NEC) and adjust scheduled running times to accommodate infrastructure work as appropriate. The commenter stated that Amtrak regularly adjusts scheduled running times for its trains on the segments of the NEC that it maintains and dispatches but does not grant similar running-time adjustments to Amtrak trains traversing other host railroad territory on the NEC. Considerations for running time impact are more properly addressed in the operating agreement between the parties.

Lastly, a commenter stated that Amtrak must provide the percentage of recovery time per route segment. FRA sees limited value in this metric and it is not included in this final rule. Together, a host railroad and Amtrak can arrive at an efficient use of recovery time, which is an inherent element in any schedule. Once a schedule is completed, a host railroad will know how much recovery time exists on each line segment for each train and between which stations the recovery time has been placed.

### C. Train Delays

FRA recognizes that the customer OTP metric and standard should be accompanied by metrics that provide additional useful information about a train's performance. There are factors that contribute to poor OTP on a route

<sup>27</sup> The final rule does not dictate a specific process beyond that it is a non-binding dispute resolution process led by a neutral third-party. For example, the final rule does not address how the parties pay the fees and costs associated with such a process (although an equal share of such costs would be one reasonable approach), nor does the final rule address the number of arbitrators (although the associated costs for an arbitration in the final rule's section regarding economic impacts are based on a panel of three arbitrators).

<sup>28</sup> In a related comment, a commenter stated that Congress only intended for a limited number of Amtrak trains to be subject to an STB investigation. FRA is not aware of any language in section 207, or PRIIA, to support this interpretation.

that are not evident from measuring station arrival times alone. For example, an intercity passenger rail train dispatched by multiple hosts may experience delays on one host railroad but not on another host railroad. Because the customer OTP metric does not easily distinguish performance on individual host railroads (including Amtrak), this final rule also establishes metrics to measure train delays, station performance, and host running time, to provide more information about the customer experience, train performance on individual host railroads,<sup>29</sup> and the minutes and causes of delay.

#### 1. Train Delays

The NPRM proposed to define a train delays metric as the total minutes of delay for all Amtrak-responsible delays, host-responsible delays, and third-party delays, for the host railroad territory

<sup>29</sup> To the customer, there may be no discernable difference as to whether they are on one host railroad's territory or another's while traveling on a route. However, most intercity passenger rail routes involve one or more host railroads. This final rule establishes metrics that measure route-level performance reflecting the customer experience and that measure aspects of performance of the individual host railroads within the route segments that they control.

within each route.<sup>30</sup> The NPRM further proposed to define the terms "Amtrak-responsible delays," "host-responsible delays," and "third party delays."

Many commenters stated that the train delays metric should report delays by delay category (*i.e.*, Amtrak-responsible delays, host-responsible delays, and third party delays). Several commenters also stated that the train delays metric should measure Amtrak delays as operator and as host railroad, in total and separately. Some commenters also stated that the final rule should report delays by root cause and that, in instances where Amtrak and the host railroads disagree on the causes of delay, FRA should publish both findings. In addition, several commenters stated that Amtrak and the host railroad should work together on a regular basis to identify and agree on the delay data and the delay causes.

In response to comments on the NPRM, the final rule includes a revised train delays metric. First, the train delays metric in the final rule reports disputed delay minutes, which are those

<sup>30</sup> In response to a comment seeking clarification, the train delays metric measures the minutes of delay for each individual host railroad territory within a route.

non-Amtrak host responsible delays disputed by the host railroad and not resolved by Amtrak. This additional information captures host-responsible delays disputed by the host railroad pursuant to its operating agreement with Amtrak and not resolved by Amtrak. It is important to note that FRA views the host railroad's National Railroad Passenger Corporation (NRPC) operations officer as a critically important position at the host railroad that demands direct access to the host railroad's chief operations officer and other senior leadership.<sup>31</sup> In addition to reporting the number of disputed delay minutes, the final rule also provides that the train delays metric is reported by delay code by: Total minutes of delay; Amtrak-responsible delays; Amtrak's host-responsible delays; Amtrak's host-responsible delays and Amtrak-responsible delays, combined; non-Amtrak host-responsible delays; and third party delays. The table below is a sample train delay metric chart to further illustrate the metric.

<sup>31</sup> If the host railroad does not have an NRPC officer, then another officer with the appropriate expertise and authority at the host railroad would fulfill this responsibility.

Table: Sample Train Delay Metric Template												
Period Reported: July 1 - September 30, 20XX												
Note: The table below shows sample delay codes for illustrative purposes.												
Fiscal Year	Qtr	Route	Train Number	Segment Host Railroad	Amtrak-Responsible Delays (non-host)			Amtrak-Responsible Delays (host)			Total Minutes of Amtrak-Responsible Delay	
					Delay Code 1	Delay Code 2	Delay Code 3	Delay Code 4	Delay Code 5	Delay Code 6		
					(total mins.)	(total mins.)	(total mins.)	(total mins.)	(total mins.)	(total mins.)	(total mins.)	
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B								
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B								
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B								

Fiscal Year	Qtr	Route	Train Number	Segment Host Railroad	Host-Responsible Delays (non-Amtrak)			Total Minutes of Host-Responsible Delay	Disputed Delays
					Delay Code 7	Delay Code 8	Delay Code 9		
					(total mins.)	(total mins.)	(total mins.)	(total mins.)	(total mins.)
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B					
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B					
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B					

Fiscal Year	Qtr	Route	Train Number	Segment Host Railroad	Third Party Delay			Total Minutes of Third Party Delays
					Delay Code 7	Delay Code 8	Delay Code 9	
					(total mins.)	(total mins.)	(total mins.)	(total mins.)
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B				
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B				
20XX	4	Sample Route A	Sample Train 1	Sample Host Railroad B				

One commenter stated that all departure and arrival times at each Amtrak station should be automated so that manual data collections by Amtrak conductors are minimized or eliminated. FRA agrees that Amtrak should use automated methods to collect data to the greatest extent practicable. In fact, Amtrak currently uses an automated electronic delay reporting system based primarily on a GPS-based system that automatically logs arrival, departure, and passing times at stations and other locations, and calculates the number of minutes of delay above pure run time within each segment of an Amtrak route. See *Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(a)—Canadian National Railway Company*, STB Docket No. FD 35743 at 23 (Aug. 9, 2019).

Several commenters gave examples of types of delays that should not be designated as host-responsible delays, such as passenger delays to Amtrak trains while at a station, and other commenters expressed concern about Amtrak’s identification of root causes of delay. FRA understands that Amtrak and the host railroads may disagree on how to assign responsibility for any

particular delay. FRA also understands that some host railroads have processes and data systems in place through which they look closely at delay causes, and that other host railroads do not have such processes or systems and approach the issue in a different way. The train delays metric includes the reporting of disputed delays where Amtrak and the host railroad are unable to agree on a delay category pursuant to the existing process for delay attribution in the Amtrak-host railroad operating agreement.<sup>32</sup> The metric’s reporting of disputed delays ensures transparent reporting, while not prescribing an additional process for the parties to use to reach agreement or inserting FRA in the process to adjudicate disputes. FRA expects that Amtrak and the host railroad’s NRPC officer (or equivalent) will be in frequent communication about train delays.

Lastly, one commenter stated that in other FRA and Amtrak reports, delay metrics have not been published for segments that are less than 15 miles in

length. The commenter proposed that minutes of delay should be reported for each host railroad territory that exceeds 0.1 miles in length to ensure that delays on short segments (frequently near terminals) are also reflected, as these delays can have an outsized effect on customer OTP. FRA agrees. Amtrak collects delay data on all segments of a route regardless of segment length. The delay data for all segments are available to all host railroad partners via on-line access, and in some cases, automated data feeds. FRA’s quarterly reports will include delays for all segments of the route.

2. Station Performance

The NPRM proposed an average minutes late per late customer metric as the average minutes late that late customers arrive at their detraining stations, reported by route (excluding on-time customers that arrive within 15 minutes of their scheduled time). A commenter stated that this metric does not provide information about the location of problems causing the delay or how to fix them, and that it does not differentiate between the performance of individual host railroads. Another commenter proposed that this metric

<sup>32</sup> See *Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(a)—Canadian National Railway Company*, STB Docket No. FD 35743 at 23–24 (Aug. 9, 2019) (Describing the delay cause identification process under an existing operating agreement).

should reflect average minutes late of all customers (not just the late customers).

In response to these comments, FRA is renaming the metric as a station performance metric, and revising it to measure the number of detraining passengers, the number of late passengers, and the average minutes late that late customers arrive at their detraining stations, reported by route, by train, and by station. The average

minutes late per late customer calculation excludes on-time customers that arrive not later than 15 minutes after their scheduled time and reflects the severity of the delayed train, as experienced by the customer. To clarify, a customer who arrives at their detraining station 16 minutes late would be included in this calculation and would be recorded as 16 minutes late. The revised metric expands upon the

proposed metric by providing information on all passengers, not just late passengers, by route, train, and station. It will offer FRA, hosts, and Amtrak customers more information on the location of performance problems and allow them to calculate the customer OTP metric.

The table below is a sample station performance metric chart to further illustrate the metric.

**Table: Sample Station Performance Metric**  
**Period Reported: July 1 - September 30, 20XX**

Fiscal Year	Quarter	Route	Train	Station Code	Station	Number of Detraining Passengers	Number of Late Passengers	Avg. Min Late per Late Passenger
20XX	4	Northeast Regional	130	WAS	Washington, DC	-	-	-
20XX	4	Northeast Regional	130	NCR	New Carrollton, MD	713	17	17
20XX	4	Northeast Regional	130	BWI	Baltimore-Washington International Airport	1,842	129	16
20XX	4	Northeast Regional	130	BAL	Baltimore, MD	1,111	45	22
20XX	4	Northeast Regional	130	ABE	Aberdeen, MD	780	44	23
20XX	4	Northeast Regional	130	WIL	Wilmington, DE	1,470	119	19
20XX	4	Northeast Regional	130	PHL	Philadelphia, PA	4,444	81	32
20XX	4	Northeast Regional	130	TRE	Trenton, NJ	1,807	168	27
20XX	4	Northeast Regional	130	MET	Metropark, NJ	1,753	154	33
20XX	4	Northeast Regional	130	EWR	Newark International Airport	1,740	141	29
20XX	4	Northeast Regional	130	NWK	Newark, NJ	1,280	101	30
20XX	4	Northeast Regional	130	NYP	New York, NY	1,674	198	31

### 3. Host Running Time

The final rule establishes a host running time metric to measure the average actual running time and the median actual running time compared with the scheduled running time between the first and final reporting points for a host railroad segment set forth in the Amtrak schedule skeleton,<sup>33</sup> reported by route, by train, and by host railroad (excluding switching and terminal railroads). For a given host railroad, the scheduled running time is

defined as the scheduled duration of a train's travel on a host railroad, as set forth in the Amtrak schedule skeleton, and the actual running time is defined as the actual elapsed travel time of a train's travel on a host railroad, between the departure time at the first reporting point for a host railroad segment and the arrival time at the reporting point at the end of the host railroad segment. As delays may or may not cause a train to be late on its schedule, it is important to measure the performance of host railroads against the scheduled

operation. The host running time metric shows the performance of a host railroad against the time allowed for in the schedule and provides more insight into a host railroad's operating impact on OTP. This metric is an indication of which host railroads may be responsible for chronic performance below standard and which ones are not. The metric will not explain the cause of delays, nor will it assign responsibility for them.

The table below is a sample host running time metric chart to illustrate the metric.

<sup>33</sup> The final rule defines schedule skeleton to mean a schedule grid used by Amtrak and host railroads to communicate the public schedule of an Amtrak train and the schedule of operations of an Amtrak train on host railroads. Schedule skeletons

indicate, for each train, the: (a) Time of arrival at the point of entry to the rail lines of a host railroad, and time of departure from the point of exit from the rail lines of a host railroad; (b) dwell time at each station and servicing location on the rail lines

of a host railroad; and (c) pure running time, recovery time, and miscellaneous time within a segment.

**Table: Host Running Time Metric Chart**  
**Period Reported: July 1 - September 30, 20XX**

Fiscal Year	Quarter	Route	Train	Host	Scheduled Running Time	Average Actual Running Time	Median Actual Running Time
20XX	4	Capitol Limited	29	CSX	4:00	4:05	4:10
20XX	4	Capitol Limited	29	NS	3:00	2:55	3:00
20XX	4	Capitol Limited	30	NS	4:10	4:10	5:12
20XX	4	Capitol Limited	30	CSX	3:15	5:15	3:20

Several commenters stated that the NPRM did not distinguish between host railroads on multi-host railroad routes, and that delays on one host railroad can be carried over to a subsequent host railroad. FRA believes the host running time metric specifically addresses this concern by showing train performance over a host railroad as compared to the train’s scheduled running time, thereby distinguishing host railroads on multi-host railroad routes.

Lastly, two commenters also stated that a late, out-of-slot Amtrak train can itself cause additional delays on the receiving host railroad.<sup>34</sup> One commenter stated that the final rule should provide host railroads with an “out-of-slot delay tolerance” in calculating OTP that would account for Amtrak trains that arrive late to the host railroad and miss their scheduled slot. FRA disagrees. Amtrak trains that operate out-of-slot may pose operating issues in certain scheduled network areas where train operation distances are very short, dense, and tightly scheduled (*i.e.*, commuter train territory around major metropolitan areas). However, outside of that situation, effective communication between a host railroad and Amtrak regarding an impending delay is generally the key to mitigate the impact of an out-of-slot Amtrak train. Further, as stated elsewhere in this final rule, FRA believes the most meaningful measurement of OTP is based on the customer experience of actually arriving at their destination on time, not obscured by other tolerance or relief.

**4. Train Delays per 10,000 Train Miles**

The NPRM proposed a train delays per 10,000 train miles metric as the

minutes of delay per 10,000 train miles for all Amtrak-responsible and host-responsible delays, for the host railroad territory within each route. Several commenters stated that this metric is not informative as it does not provide data about the location of delays or how to fix them. One commenter stated that the metric can be helpful when comparing delays among different routes. The final rule includes this metric. Minutes of Amtrak-responsible delay and host-responsible delay have historically been normalized by 10,000 train miles to compare performance more easily on routes of varying length. This calculation is helpful when assessing an individual railroad’s performance on a route that has more than one host.

**D. Ridership Data**

Many commenters stated that the final rule must require Amtrak to provide host railroads with sufficient data to calculate and monitor customer OTP. Without this information, these commenters stated, host railroads would not be able to verify the accuracy of customer OTP data, monitor their performance, identify improvement opportunities, or take corrective action. Commenters requested ridership data, such as: Close to real-time access to daily, station-specific Amtrak ridership data, including late arriving customers and the degree of lateness; daily numbers of detaining passengers for each Amtrak train on a station-by-station basis; four years of historical ridership data; the data underlying the customer OTP metric calculation; relevant route data on performance and Amtrak customer travel; and Amtrak’s ridership projections.

During the NPRM’s comment period, Amtrak agreed to provide some ridership data to the host railroads. See FRA–2019–0069–0295. In response,

some commenters stated that this data was not sufficient because it was aggregated and did not show station-specific performance or the number of passengers detaining at each station.

In consideration of these comments, the final rule includes a ridership data metric. The ridership data metric is the number of host railroads to whom Amtrak has provided ridership data, reported by host railroad and by month. In addition, the ridership data metric requires that, not later than December 16, 2020, Amtrak must provide host railroad-specific ridership data to each host railroad for the preceding 24 months. Also, on the 15th day of every month following December 16, 2020, Amtrak must provide host railroad-specific ridership data to each host railroad for the preceding month. The final rule defines the term ridership data to mean, in a machine-readable format: The total number of passengers, by train and by day; the station-specific number of detaining passengers, reported by host railroad whose railroad right-of-way serves the station, by train, and by day; and the station-specific number of on-time passengers reported by host railroad whose railroad right-of-way serves the station, by train, and by day.

A commenter stated that ridership data should be available to the public. FRA’s quarterly reports will be publicly available. FRA also recognizes that the ridership data may include information that Amtrak views as confidential/competitively sensitive. Although this final rule requires Amtrak to provide ridership data to host railroads, Amtrak may impose reasonable conditions on the host railroad’s use of these data. With that said, at a minimum, the host railroad should be able to use these data in connection with negotiation, review, adjustment, or analysis of relevant Amtrak train schedules, or in connection with an STB proceeding

<sup>34</sup>FRA understands an out-of-slot train to be a train that arrives after the time the host railroad anticipated and planned for the train in its operating plan.

under 49 U.S.C. 24308(f) involving the host railroad.

The tables below are samples of ridership data to illustrate further the

format and data that Amtrak will share with host railroads under this metric

(however, this supporting data will not be publicly available).

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<b>Table: Sample Total Ridership by Train</b>			
<b>Route</b>	<b>Train</b>	<b>Date</b>	<b>Total Ridership</b>
Wolverine	350	9/1/20XX	124
Wolverine	350	9/2/20XX	128
Wolverine	350	9/3/20XX	250
Wolverine	350	9/4/20XX	409
Wolverine	350	9/5/20XX	258
Wolverine	350	9/6/20XX	373
Wolverine	350	9/7/20XX	236
Wolverine	350	9/8/20XX	237
Wolverine	350	9/9/20XX	246
Wolverine	350	9/10/20XX	497
Wolverine	350	9/11/20XX	345
Wolverine	350	9/12/20XX	194
Wolverine	350	9/13/20XX	100
Wolverine	350	9/14/20XX	205
Wolverine	350	9/15/20XX	360
Wolverine	350	9/16/20XX	106
Wolverine	350	9/17/20XX	10
Wolverine	350	9/18/20XX	348
Wolverine	350	9/19/20XX	464
Wolverine	350	9/20/20XX	283
Wolverine	350	9/21/20XX	405
Wolverine	350	9/22/20XX	241
Wolverine	350	9/23/20XX	330
Wolverine	350	9/24/20XX	243
Wolverine	350	9/25/20XX	266
Wolverine	350	9/26/20XX	396
Wolverine	350	9/27/20XX	349
Wolverine	350	9/28/20XX	280
Wolverine	350	9/29/20XX	102
Wolverine	350	9/30/20XX	164

**Table: Station Ridership, Detraining and On-Time Passengers, by Train, by Host, by Day**  
**Period Reported: September 1 - 30, 20XX**

Route	Train	Host	Station Code	Station	Date	Total Detraining Passengers	Total On-Time Passengers
Wolverine	350	NS	CHI	Chicago (Union Station), IL	9/1/20XX	-	-
Wolverine	350	NS	HMI	Hammond-Whiting, IN	9/1/20XX	8	8
Wolverine	350	Amtrak	MCI	Michigan City, IN	9/1/20XX	9	9
Wolverine	350	Amtrak	NBU	New Buffalo, MI	9/1/20XX	10	10
Wolverine	350	Amtrak	NLS	Niles, MI	9/1/20XX	39	0
Wolverine	350	Amtrak	DOA	Dowagiac, MI	9/1/20XX	28	28
Wolverine	350	MIDOT	KAL	Kalamazoo, MI	9/1/20XX	15	15
Wolverine	350	MIDOT	BTL	Battle Creek, MI	9/1/20XX	24	24
Wolverine	350	MIDOT	JXN	Jackson, MI	9/1/20XX	16	0
Wolverine	350	MIDOT	ARB	Ann Arbor, MI	9/1/20XX	30	30
Wolverine	350	MIDOT	DER	Dearborn, MI	9/1/20XX	53	53
Wolverine	350	CN	DET	Detroit, MI	9/1/20XX	49	49
Wolverine	350	CN	ROY	Royal Oak, MI	9/1/20XX	54	0
Wolverine	350	CN	TRM	Troy, MI	9/1/20XX	15	15
Wolverine	350	CN	PNT	Pontiac, MI	9/1/20XX	26	0
Wolverine	350	NS	CHI	Chicago (Union Station), IL	9/2/20XX	-	-
Wolverine	350	NS	HMI	Hammond-Whiting, IN	9/2/20XX	19	19
Wolverine	350	Amtrak	MCI	Michigan City, IN	9/2/20XX	21	21
Wolverine	350	Amtrak	NBU	New Buffalo, MI	9/2/20XX	17	17
Wolverine	350	Amtrak	NLS	Niles, MI	9/2/20XX	11	0
Wolverine	350	Amtrak	DOA	Dowagiac, MI	9/2/20XX	10	0
Wolverine	350	MIDOT	KAL	Kalamazoo, MI	9/2/20XX	13	13
Wolverine	350	MIDOT	BTL	Battle Creek, MI	9/2/20XX	37	0
Wolverine	350	MIDOT	JXN	Jackson, MI	9/2/20XX	33	0
Wolverine	350	MIDOT	ARB	Ann Arbor, MI	9/2/20XX	28	28
Wolverine	350	MIDOT	DER	Dearborn, MI	9/2/20XX	50	50
Wolverine	350	CN	DET	Detroit, MI	9/2/20XX	51	0
Wolverine	350	CN	ROY	Royal Oak, MI	9/2/20XX	11	11
Wolverine	350	CN	TRM	Troy, MI	9/2/20XX	34	34
Wolverine	350	CN	PNT	Pontiac, MI	9/2/20XX	10	10

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A commenter stated that Amtrak must share the ridership data with its State-supported route partners. FRA encourages Amtrak to share ridership data with its State-supported route partners; however, a requirement to share such data is not directly related to this rulemaking. Amtrak’s provision of data to its State partners should be consistent with existing agreements. State entities that provide payments to Amtrak under PRIIA section 209 currently have access to some of Amtrak’s online data systems, which include train delay information and ridership information.

Some commenters stated that the host railroad’s current lack of access to station-specific ridership data limited their ability to comment on the NPRM, and that the customer OTP metric would not provide host railroads adequate notice. As discussed, above, any OTP standard adopted in this final rule must be relevant to the actual passenger experience; the most relevant of which is whether a passenger arrived at the destination on time. As noted previously, FRA finds that, aside from predictable and broadly understood seasonal trends, the percentage of a train’s detraining passengers at stations

on a route is stable for purposes of calculating customer OTP. In addition, host railroads have received some additional ridership data and will receive more ridership data under this final rule.

A commenter stated that Amtrak should describe how it collects the ridership data and its passenger-counting methodology. As stated, Amtrak measures detraining passengers by the number of passengers actually traveling on the train, as determined by conductor ticket collections via electronic ticket scanning for a specific arrival station. Passengers who have

reserved a seat, but elect not to travel, are not reflected in passenger counts.

Lastly, a commenter stated that host railroads should be able to audit the ridership data provided by Amtrak. FRA determined the ridership data required by this final rule will allow a host railroad to calculate the customer OTP independently. In addition, Amtrak's reported ridership data is subject to verification by Amtrak's Office of the Inspector General.

#### IV. FRA Quarterly Reporting

Section 207(b) requires FRA to publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services. FRA's first quarterly report on intercity passenger train performance will cover the first full calendar quarter 3 months after the date of publication of the final rule in the **Federal Register**. For example, if the final rule is published on December 10, 2020, three months after that date would be March 10, 2021, and the first full calendar quarter after that would run from April 1, 2021 to June 30, 2021.

The first quarterly report will include data on the customer service metrics, the financial metrics, the public benefits metrics, the certified schedule metric, the ridership data metric, the train delays metric, and the train delays per 10,000 train miles metric, but will not include data on the customer OTP metric, the station performance metric, or the host running time metric. Beginning with the second quarterly report, FRA will report data on all of the final rule's metrics, unless a train schedule is a disputed schedule on or before May 17, 2021. In that circumstance, FRA will report customer OTP metric data for that particular train beginning with the second full calendar quarter after May 17, 2021. In addition, in that circumstance, FRA will also not report data for the station performance metric or the host running time metric in connection with the host railroad(s) party to the disputed schedule. Unless otherwise specified, FRA will update metrics on a quarterly basis.

#### V. Section-by-Section Analysis of Comments and Revisions From the NPRM

This section responds to public comments and identifies any changes made from the provisions as proposed in the NPRM. Provisions that received no comment, and are otherwise being

finalized as proposed, are not discussed again here. To review the complete section-by-section analysis in the NPRM, see 85 FR 20466.

##### Section 273.1 Purpose

This section provides that the final rule establishes metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.

A commenter sought clarity regarding non-Amtrak operators of intercity passenger rail trains and the metrics (and under what circumstances the STB may initiate an investigation of substandard performance). FRA developed the metrics for Amtrak intercity passenger train operations, which is consistent with section 207's many references to Amtrak, including: The development of the metrics; the entities to consult regarding the development of the metrics; specific metrics; FRA's access to information; and FRA's quarterly reports. This final rule does not apply to non-Amtrak operators of intercity passenger rail trains. Lastly, investigations of substandard performance under 49 U.S.C. 24308(f) are conducted by STB, and as such, STB alone determines when to initiate an investigation.

A commenter stated that FRA should put this rulemaking on hold and, together with the Federal Transit Administration and STB, convene a seminar with freight and passenger stakeholders to address comprehensively issues relating to the shared use of rail right-of-way. FRA appreciates the comment, and while such a meeting is outside the scope of this rulemaking, FRA is always working to advance rail policy and development, both on its own and in partnership with other federal agencies.

A commenter stated that the Metrics and Standards should not create a statutory preference for Amtrak over commuter operations or intercity passenger service operated by non-Amtrak carriers. Amtrak does have certain statutory rights regarding the use of facilities and preference over freight transportation in using a rail line, among other things. See, e.g., 49 U.S.C. 24308. The Metrics and Standards do not create any additional preference in law for Amtrak. Another commenter stated that FRA should identify actions that exhibit preference in the operating environment to facilitate identification of those actions that do not exhibit preference and should be the subject of enforcement. As an initial matter, STB is responsible for investigating substandard train performance under PRIIA section 213. Further, FRA

believes the metrics in this final rule provide sufficient information to assist in such an STB investigation.

A commenter also proposed that FRA research the development of an "assignable tax credit" for passenger and highway competitive intermodal freight routes to generate funding for rail infrastructure. FRA appreciates the comment; however, it is outside the scope of this rulemaking.

Lastly, several commenters expressed support for additional rail infrastructure funding. The metrics in this final rule may assist decision makers in identifying rail projects.

##### Section 273.3 Definitions

This final rule includes several new and revised definitions, which are described here.

This section defines the term "actual running time" to mean the actual elapsed travel time of a train's travel on a host railroad, between the departure time at the first reporting point for a host railroad segment and the arrival time at the reporting point at the end of the host railroad segment. This definition is new to the final rule and supports the host running time metric.

This section defines the term "adjusted operating expenses" to mean Amtrak's operating expenses adjusted to exclude certain Amtrak expenses that are not considered core to operating the business. The major exclusions are depreciation, capital project related expenditures not eligible for capitalization, non-cash portion of pension and post-retirement benefits, and Amtrak's Office of Inspector General expenses (which are separately appropriated). Adjusted operating expenses do not include any operating expenses for State-supported routes that are paid for separately by States. This definition is a revision of the definition proposed in the NPRM to clarify its intent in response to commenters.

This section defines the term "certified schedule" to mean a published train schedule that Amtrak and the host railroad jointly certify is aligned with the customer on-time performance metric and standard in § 273.5(a)(1) and (2). If a published train schedule is reported as a certified schedule under § 273.5(c)(1), then it cannot later be designated as an uncertified schedule. This definition is new to the final rule in support of certified schedule metric.

This section defines the term "disputed schedule" to mean a published train schedule for which a specific change is sought: (i) That is the only subject of a non-binding dispute resolution process led by a neutral



third-party and involving Amtrak and one or more host railroads; (ii) that is the only subject of a non-binding dispute resolution process led by a neutral third-party that has been initiated by one or more host railroads and Amtrak has not consented to participate in the process within 30 calendar days; or (iii) that is the only subject of a non-binding dispute resolution process led by a neutral third-party that has been initiated by Amtrak and the host railroad has not consented to participate in the process within 30 calendar days. The written decision resulting from a non-binding dispute resolution process is admissible in Surface Transportation Board investigations under 49 U.S.C. 24308(f). If a published train schedule is reported as a disputed schedule under § 273.5(c)(1), then it remains a disputed schedule until reported as a certified schedule. This definition is new to the final rule and supports the certified schedule metric.

This section defines the term “host railroad” to mean a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment. Amtrak is a host railroad of Amtrak trains and other trains operating over an Amtrak owned or controlled railroad line segment. For purposes of the certified schedule metric under § 273.5(c), Amtrak is not a host railroad. This definition is new to the final rule and supports several new and revised metrics.

This section defines the term “ridership data” to mean, in a machine-readable format: The total number of passengers, by train and by day; the station-specific number of detaining passengers, reported by host railroad whose railroad right-of-way serves the station, by train, and by day; and the station-specific number of on-time passengers reported by host railroad whose railroad right-of-way serves the station, by train, and by day. This definition is new to the final rule and supports the ridership data metric.

This section defines the term “scheduled running time” to mean the scheduled duration of a train’s travel on a host railroad, as set forth in the Amtrak schedule skeleton. This definition is new to the final rule and supports the host running time metric.

This section defines the term “schedule skeleton” to mean a schedule grid used by Amtrak and host railroads to communicate the public schedule of an Amtrak train and the schedule of operations of an Amtrak train on host railroads. This definition is new to the final rule and supports the host running time metric.

This section defines the term “uncertified schedule” to mean a published train schedule that has not been reported as a certified schedule or a disputed schedule under § 273.5(c)(1). This definition is new to the final rule and supports the certified schedule metric.

#### *Section 273.5 On-Time Performance and Train Delays*

Paragraph (a)(1) of this section provides that the customer on-time performance metric is the percentage of all customers on an intercity passenger rail train who arrive at their detraining point no later than 15 minutes after their published scheduled arrival time, reported by train and by route.

Paragraph (a)(2) of this section provides a minimum standard for customer on-time performance of 80 percent for any 2 consecutive calendar quarters. This standard is consistent with the statutory requirement in 49 U.S.C. 24308(f)(1).

Paragraph (a)(3)(i) of this section provides that, except as provided in paragraph (a)(3)(ii), the customer on-time performance standard shall apply to a train beginning on the first full calendar quarter after May 17, 2021.

Paragraph (a)(3)(ii) of this section provides that, if a train schedule is a disputed schedule on or before May 17, 2021, then the customer on-time performance standard for the disputed schedule shall apply beginning on the second full calendar quarter after May 17, 2021.

Paragraph (b) of this section provides that the ridership data metric is the number of host railroads to whom Amtrak has provided ridership data consistent with this paragraph (b), reported by host railroad and by month. Not later than December 16, 2020, Amtrak must provide host railroad-specific ridership data to each host railroad for the preceding 24 months. On the 15th day of every month following December 16, 2020, Amtrak must provide host railroad-specific ridership data to each host railroad for the preceding month.

Paragraph (c)(1) of this section provides that the certified schedule metric is the number of certified schedules, uncertified schedules, and disputed schedules, reported by train, by route, and by host railroad (excluding switching and terminal railroads), identified in a notice to the Federal Railroad Administrator by Amtrak monthly, for the first six months following publication of the final rule, and then annually on the anniversary of the final rule’s publication on November 16, 2020.

Paragraph (c)(2) of this section provides that, if a train schedule is reported as an uncertified schedule under paragraph (c)(1)(vi), (vii), or (viii), then Amtrak and the host railroad must transmit a joint letter and status report on the first of each month following the report, signed by their respective chief executive officers to each U.S. Senator and U.S. Representative whose district is served by the train, the Chairman and Ranking Member of the Committee on Transportation and Infrastructure of the House of Representatives, the Chairman and Ranking Member of the Committee on Commerce, Science, and Transportation of the Senate, the Chairman and Ranking Member of the Committee on Appropriations of the House of Representatives, the Chairman and Ranking Member of the Committee on Appropriations of the Senate, the Secretary of Transportation, and the Chairman of the Surface Transportation Board, which states: (i) The Amtrak train schedule(s) at issue; (ii) the specific components of the train schedule(s) on which Amtrak and host railroad cannot reach agreement; (iii) Amtrak’s position regarding the disagreed upon components of the train schedule(s); (iv) host railroad’s position regarding the disagreed upon components of the train schedule(s); and (v) Amtrak and the host railroad’s plan and expectation date to resolve the disagreement(s). The requirement to transmit this joint letter and status report ends for the train schedule at issue when the uncertified schedule becomes a certified schedule.

Paragraph (c)(3) of this section provides that, when conditions have changed that impact a certified schedule, Amtrak or a host railroad may seek to modify the certified schedule. The customer on-time performance standard in subsection (a)(2) remains in effect during the schedule negotiation process.

Paragraph (d) of this section provides that the train delays metric is the minutes of delay for all Amtrak-responsible delays, host-responsible delays, and third party delays, for the host railroad territory within each route. The train delays metric is reported by delay code by: Total minutes of delay; Amtrak-responsible delays; Amtrak’s host-responsible delays; Amtrak’s host responsible delays and Amtrak-responsible delays, combined; non-Amtrak host-responsible delays; and third party delays. The train delays metric is also reported by the number of non-Amtrak host-responsible delay minutes disputed by host railroad and not resolved by Amtrak.

Paragraph (e) of this section provides that the train delays per 10,000 train miles metric is the minutes of delay per 10,000 train miles for all Amtrak-responsible and host-responsible delays, for the host railroad territory within each route. Paragraph (f) of this section provides that the station performance metric is the number of detraining passengers, the number of late passengers, and the average minutes late that late customers arrive at their detraining stations, reported by route, by train, and by station. The average minutes late per late customer calculation excludes on-time customers that arrive within 15 minutes of their scheduled time. A customer who arrives at their detraining station 16 minutes late would be included in this calculation and would be recorded as 16 minutes late.

Paragraph (g) of this section provides that the host running time metric is the average actual running time and the median actual running time compared with the scheduled running time between the first and final reporting points for a host railroad set forth in the Amtrak schedule skeleton, reported by route, by train, and by host railroad (excluding switching and terminal railroads).

#### Section 273.7 Customer Service

Paragraph (a) of this section provides that the customer satisfaction metric is the percent of respondents to Amtrak's customer satisfaction survey who provided a score of 70 percent or greater for their "overall satisfaction" on a 100 point scale for their most recent trip, by route, shown both adjusted for performance and unadjusted. Amtrak's customer satisfaction survey is a market-research survey that measures more than fifty specific service attributes that cover the entire customer journey. It should be noted that Amtrak can change the customer satisfaction survey, and such changes could in turn impact the information reported for the customer service metrics. However, in the event Amtrak changes the survey, the new survey would continue to seek information in connection with the customer satisfaction metrics required in this final rule (a survey change would just modify how the survey solicits this information). FRA will publish information about Amtrak's survey (including the survey questions and methodology) annually as an appendix to the quarterly report.

Several commenters provided feedback on Amtrak's customer satisfaction survey, including stating that the survey: Does not address accessibility concerns for disabled or

elderly passengers (e.g., at the boarding station, on board the train, and at the destination station); and does not address ticket-purchase methods (e.g., phone, in-person agent, or website). First, as discussed above, Amtrak may change the customer satisfaction survey in the future. FRA understands that Amtrak is evaluating these suggestions and is committed to working with stakeholders to address these comments in future survey updates and/or by regularly providing related information on accessibility for disabled and elderly passengers that it collects already. A commenter also stated that Amtrak should offer additional contact methods for passengers to complete the customer satisfaction survey, such as postal mail and telephone. However, most Americans have access to the internet and there would be a substantial additional cost to providing surveys by postal mail or telephone with a corresponding limited benefit to the statistical sample of respondents.<sup>35</sup>

A commenter stated that the survey should directly ask whether the customer was satisfied with the train's on-time performance. The Amtrak CSI Survey, which FRA included in docket number FRA-2019-0069-0004 for reference, does have a question asking respondents to rate their satisfaction with the reliability or on-time performance of the train on which they traveled. A commenter stated that the survey should include questions about customer/passenger interactions with Amtrak customer relations to evaluate this customer-facing service. FRA understands that Amtrak is evaluating this suggestion.

A commenter stated that a net promoter score or a median survey response should be used instead of the customer satisfaction survey. As noted, Amtrak may change the customer satisfaction survey. With that said, FRA considered several approaches to measuring customer service, including the net promoter score, but determined that the customer satisfaction survey offers an accurate assessment of the customer experience. Specifically, the customer satisfaction metric measures the percentage of respondents who provided a score of 70 percent or greater for their overall satisfaction. The use of 70 percent as the threshold is based on Amtrak's analysis of the relationship between customer satisfaction and the likelihood of future travel. As reported by Amtrak, the historical data suggests

that customers who rate their overall satisfaction as 70 percent or greater are likely to travel on Amtrak again. In addition, Amtrak reports it adheres to industry best practices and solicits feedback from a random selection of riders, with a sample size of survey responses far greater than industry minimum standards. Lastly, FRA further understands that Amtrak distributes email surveys from a centralized database to ensure that employees are unable to provide surveys to targeted customers.

Amtrak adjusts overall satisfaction score performance by removing passengers who arrive at their destinations on State-supported and long-distance routes excessively late (30 minutes late for State-supported routes and 120 minutes for long-distance routes) from the system-wide calculation. Typically, on these routes, many of the major causes of passenger lateness are beyond Amtrak's control. By removing these customer responses from the calculations, most of the impact from these significantly late customers (whose responses may be overly influenced by the train's late arrival) is removed. Both the performance adjusted and non-performance adjusted overall satisfaction scores will be reported under this final rule to reflect the responses of all Amtrak customers.

A commenter stated that there should be a performance adjusted customer service metric and a separate non-performance adjusted customer service metric. FRA revised the final rule to clearly state that the customer satisfaction metric will be shown both adjusted for performance and not adjusted for performance. A commenter stated that the customer satisfaction metric should also be adjusted to show customer satisfaction surveys in which the excessive delays are Amtrak-related. FRA does not believe this would provide useful information. The intent of the customer satisfaction metric is to understand the experience of customers and measure "overall satisfaction," not to determine the impacts of delay responsibility. Information on minutes of delay by category, responsible party, route and host territory, including Amtrak-responsible delays, are reported by other metrics in this final rule.

A commenter stated that the definition of excessively late should be changed to match the definition of late used in the customer OTP metric. However, aligning these two definitions would render the customer service metric less meaningful by significantly decreasing the number of survey responses included in the performance

<sup>35</sup> In 2016, the U.S. Census reported that eighty-one percent of American households had a broadband internet subscription. See <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf>.

adjusted customer service score (on some routes, more than 70 percent of current customers would be excluded). FRA determined reporting both performance adjusted and non-performance adjusted customer service scores best provides a full and accurate view of customer satisfaction while also accounting for the impact of poor performance on customers' scores.

Several commenters stated that there should be additional customer service metrics with quantitative measurements not based on a survey score regarding: Mishandled bags; denied boardings; consumer complaints; riders needing assistance; riders using mobility-enhancing devices; and riders who paid for their tickets in cash. As a counterpoint, one commenter noted that including customer service metrics with quantitative measurements may require significant time and cost to build specific monitoring systems. FRA agrees that the cost to implement these metrics is unduly burdensome in cases where Amtrak does not already collect the data. In addition, FRA did not include a mishandled bags metric in the final rule because, unlike air and bus travel, Amtrak reported that the majority of intercity rail passengers handle their own bags. FRA believes the additional cost to collect this information is not warranted as Amtrak does not already collect the data on a routine basis. FRA did not include a denied boardings metric because the final rule's missed connections metric offers a broader measurement of customers who do not travel on their originally ticketed itinerary. FRA did not include a consumer complaints metric in the final rule because the customer satisfaction survey offers a more comprehensive quantitative measurement of customer satisfaction for the overall trip, as well as specific attributes of the experience, as compared to the number of complaints received. FRA did not include metrics about riders needing assistance, riders using mobility-enhancing devices, and riders who paid for their tickets in cash because, while these metrics may provide information about the customers Amtrak serves, these metrics do not measure the quality of service provided.

Finally, a commenter stated that all customer service metrics should be reported on a quarterly basis. FRA agrees and the final rule establishes quarterly reporting of all customer service metrics.

Paragraph (b) of this section provides that the Amtrak personnel metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of Amtrak

personnel on their most recent trip, by route.

Paragraph (c) of this section provides that the information given metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of information provided by Amtrak on their most recent trip, by route.

Paragraph (d) of this section provides that the on-board comfort metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of on-board comfort on their most recent trip, by route.

Paragraph (e) of this section provides that the on-board cleanliness metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of on-board cleanliness on their most recent trip, by route.

Paragraph (f) of this section provides that the on-board food service metric is the average score from respondents to the Amtrak customer satisfaction survey for their review of on-board food service on their most recent trip, by route.

#### *Section 273.9 Financial*

Paragraph (a) of this section provides that the cost recovery metric is Amtrak's adjusted operating revenue divided by Amtrak's adjusted operating expense. This metric is reported at the corporate level/system-wide and for each route and is reported in constant dollars of the reporting year based on the Office of Management and Budget's gross domestic product chain deflator.

A commenter stated that the definition of the cost recovery metric presumes that Amtrak is responsible for all operating expenses over State-supported routes, which does not accurately represent the cost of service delivery routes where States cover the cost of some of the component services. FRA acknowledges that some States have separate arrangements to pay for operating expenses that are not reflected in Amtrak's adjusted operating expenses. Section 273.3 of the final rule includes a revised definition of the term "adjusted operating expenses" to clarify that the cost recovery metric does not include operating expenses for State-supported routes paid for separately by States.

Paragraph (b) of this section provides that the avoidable operating costs covered by passenger revenue metric is the percent of avoidable operating costs divided by passenger revenue for each route, shown with and without State operating payments. Each route's operating costs can be separated into three components: Frequency variable costs, route variable costs, and system/

fixed costs. Avoidable operating costs are the sum of frequency and route variable costs. Frequency variable costs are costs that vary based on short-term decisions to adjust a route's schedule or frequency, not as a result of long-term decisions to add or eliminate a service permanently. Frequency variable costs typically occur directly and immediately with the service change. Frequency variable costs may include train and engine crew labor, on-board service labor, fuel and power, commissary provisions, specific yard operations, connecting motor coaches, and station staffing expenses.

Route variable costs are costs that vary based on long-term decisions to add or eliminate service and have a broader impact. Route variable costs typically require a separate management action to achieve a change in cost. Route variable costs may include car and locomotive maintenance turnaround, on-board passenger technology, commissary operations, direct advertising, specific reservations and call centers costs, station facility operations, station technology, maintenance of way, block and tower operations, regional/local police, and insurance expenses. These costs do not vary with individual train frequencies but may vary if service is increased or reduced on a larger scale. For example, costs for food and beverages stocked on a train would be avoidable if a single train were cancelled, but the commissary supporting the route would continue operations if other trains remained. Route variable costs attempt to capture the potential costs that would vary if the entire route were suspended or eliminated and the commissary supporting it no longer operated. Over time, or with a large enough expansion or reduction in service, the shared costs would be expected to change.

System/fixed costs are not likely to vary with smaller service changes and would not change if a single route were added or eliminated. System/fixed costs may include marketing and distribution, national police, environmental and safety, and general and administrative expenses.

Adding frequency variable and route variable costs to calculate avoidable operating costs does not make any distinction between short- and long-term avoidable costs, but results in a single avoidable cost figure for a single route at a future time. This approach represents a maximum saving, or cost avoided, and may be lower depending on the specific context of each individual route. The results of this approach are limited to the costs avoided if a single service is

permanently eliminated. If multiple routes are eliminated, it is likely that some fixed costs will also decrease. Corporate-wide costs such as general and administrative expenses may shrink to reflect the size of the smaller business. In the event an actual elimination in service is contemplated, a detailed planning analysis would be required, considering the location of the route and the facilities that serve it, to determine the cost impacts.

The metric reflects avoidable operating costs as a percentage of passenger revenue, which, when shown at the route level, provides information about cost recovery, or the ability of the route to cover avoidable operating costs with revenue generated. States or other sponsoring entities also provide operating payments to Amtrak to provide service for trains on State-supported routes, which is classified as passenger revenue. To understand better the impact of these State payments, the metric avoidable operating costs covered by passenger revenue is calculated in two ways: First, as a percent dividing avoidable operating costs by passenger revenue, and second, as a percent dividing avoidable operating costs by passenger revenue without State operating payments.

One commenter stated general support for segregating State operating payments from passenger revenue for this metric (and for the fully allocated core operating costs covered by the passenger revenue metric). Another commenter stated that the avoidable operating costs and the fully allocated core operating costs covered by the passenger revenue metric should be reported by the specific sub-categories listed in the definition of passenger revenue. FRA disagrees. The final rule establishes metrics that report passenger revenue as a percent of avoidable costs and, separately, as a percent of fully allocated costs per route. Consistent with section 207, these metrics do not show the actual amount of revenue generated, but rather set forth a ratio of revenue to cost. In addition, the purpose of representing passenger revenue with and without State operating payments is to understand better the impact of State payments on route financial performance.

A commenter stated that the proposed avoidable cost metric is deficient and that the final rule should instead include a short-term avoidable cost metric, a long-term avoidable cost metric, and a long-term average infrastructure cost metric. FRA believes the avoidable cost metric is appropriate. Section 207 requires a metric that measures “the percentage of avoidable

and fully allocated operating costs covered by passenger revenues on each route . . . .” The statute does not specify the time horizon of the metric or differentiate between short-term and long-term avoidable costs. The commenter also asserted that the proposed definition of avoidable costs includes some costs that may not be fully avoidable for a single route because they are shared among multiple routes. Although some costs are shared, FRA believes that these costs are avoidable, as over time they will scale to the size of the service provided. The commenter also proposed definitions of long-term avoidable costs and long-term average infrastructure costs that equate them with above-the-rail costs and below-the-rail costs, respectively. However, these proposed definitions do not align with the way Amtrak is organized as a business or the way that it allocates costs across its service lines and routes. In addition, the commenter proposed that the long-term avoidable cost definition include off-book equipment interest and depreciation expenses, but as equipment is shared across Amtrak’s network, these costs likely are not avoidable because equipment may be used on other routes.

Paragraph (c) of this section provides that the fully allocated core operating costs covered by the passenger revenue metric is the percent of fully allocated core operating costs divided by passenger revenue for each route, shown with and without State operating payments. Fully allocated core operating costs include the fully-loaded share of overhead-type costs that pertain to more than one route or to the company as a whole. Costs are limited to “core” expenses (*i.e.*, related to the provision of intercity passenger trains) to match expenses with passenger revenue. Several commenters stated general support for this metric, especially when reported alongside the avoidable operating costs covered by the passenger revenue metric.

Paragraph (d) of this section provides that the average ridership metric is the number of passenger-miles divided by train-miles for each route. This metric measures the average number of passengers on each of the route’s trains. One commenter proposed that FRA also report an additional ridership metric to reflect total passengers by route alongside the passenger-miles per train-miles metric for convenience in comparing ridership data in FRA’s quarterly report. FRA agrees, and the final rule includes such an additional metric in paragraph (e).

Paragraph (e) of this section provides that the total ridership metric is the total

number of passengers on Amtrak trains, reported by route.

The definitions of terms in section 273.9 are only intended to apply to this final rule and the Amtrak financial reporting herein.

#### *Section 273.11 Public Benefits*

Paragraph (a) of this section provides that the connectivity metric is the percent of passengers connecting to and from other Amtrak routes, updated on an annual basis. The metric reports passengers making connections between the Northeast Corridor, State-supported, and long distances routes, or any combination thereof. Under this metric, a connection means a passenger arriving on one train and connecting to a departing train within 23 hours. Section 207 of PRIIA specifies that the metrics shall include “measures of connectivity with other routes in all regions currently receiving Amtrak service” for long distance routes. The connectivity metric provides connectivity information for the entire Amtrak network, including by route for long distance routes. One commenter expressed support for the connectivity metric, stating that it would give States more granular data with which to adjust schedules and build more regional-scale service.

Paragraph (b) of this section provides that the missed connections metric is the percent of passengers connecting to/from other Amtrak routes who missed connections due to a late arrival from another Amtrak train, reported by route and updated on an annual basis. A missed connection, particularly in a location with only one daily train, can result in a significant impact to the customer. A commenter stated that FRA should revise the missed connections metric to include the financial impact of missed connections and to report the results more frequently than once per year. FRA does not have the economic data to quantify the total financial impact of missed connections, and acquiring such data and methodologies would be challenging and burdensome, as FRA does not believe these data are readily available.

Paragraph (c) of this section provides that the community access metric is the percent of Amtrak passenger-trips to and from not well-served communities, updated on an annual basis. While one commenter expressed general support for this metric, another commenter stated that the community access metric does not adequately measure transportation needs because it does not identify communities that do not have access to intercity passenger rail or airports, nor does it address the convenience of train arrival times at

rural stations. However, section 207(a) requires “measures of . . . the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.” The final rule’s definition of not well-served communities identifies rural communities that are not well-served by other intercity transportation modes (air and bus), but that do have regularly scheduled intercity passenger rail service, using distance from airports or station stops as a proxy for access. FRA recognizes the importance of understanding how to improve intercity passenger rail service to these communities, and views the current metric as an initial step in identifying the communities and analyzing their current use of Amtrak service. In addition, Amtrak is required to consider the transportation needs of not well-served communities in their route and service planning decisions. *Fixing America’s Surface Transportation Act*, Public Law 114–94, 11206 (2015); 49 U.S.C. 24101, note.

Paragraph (d) of this section provides that the service availability metric is the total number of daily Amtrak trains per 100,000 residents in a metropolitan statistical area (MSA) for each of the top 100 MSAs in the United States, shown in total and adjusted for time of day, updated on an annual basis. Many MSAs are served regularly by Amtrak trains, but during inconvenient travel times. The metric, as adjusted for time of day, shows only those trains that arrive or depart between 5:00 a.m. and 11:00 p.m.

A commenter stated that there should be two economic and station development metrics to measure the annual total economic value to communities served by the intercity passenger rail service, accounting for factors such as labor, value-added benefits, and increased tax revenue, and to report that value as a ratio to the investment made in a route. The commenter also stated that these metrics should be based on an economic model developed by the Rail Passengers Association for such a purpose. FRA declines to include these metrics in this final rule. The final rule addresses service quality metrics that measure the actual provision of rail service. Although important, economic and station development metrics are indirectly related to intercity passenger rail service. In addition, measures of economic and development activity often require detailed information on local market conditions, and as such, are not well-suited for national metrics and may rely too heavily on general

assumptions. Finally, these metrics would impose a significant burden on FRA to identify the appropriate data, obtain and track the detailed economic data, as well as to develop modeling capabilities.

A commenter stated that there should be an overlapping corridors metric to measure the number and economic value of passenger trips dependent upon intermediate connections on long-distance corridors. The commenter stated that the data for this metric could be gathered using the commenter’s proposed economic and station development metric, with underlying community economic data updated annually, as well as the connections data from the final rule’s missed connections metric. FRA declines to include this metric in the final rule. The missed connections metric is the percent of passengers connecting to/from other Amtrak routes who missed connections due to a late arrival from another Amtrak train, reported by route and updated on an annual basis. The reported data from the missed connections metric would not comprehensively identify intermediate connections on long-distance corridors. FRA selected metrics to measure the public benefit of intercity rail across all services and routes for the entire nation; this commenter’s proposed metric would focus exclusively on long-distance routes. In addition, and as noted above, the proposed economic and station development metric would impose a significant burden on FRA to identify the appropriate data, obtain and track the detailed economic data, as well as to develop modeling capabilities.

A commenter stated that there should be a normalized route performance metric, reported quarterly, which would measure route performance for all routes on a per-passenger-mile basis and on a passengers-per-departure from each originating station basis. FRA declines to include this metric in the final rule and believes presenting the route-level information without any normalization is the most straight-forward method. The final rule does include a route-level ridership metric (the number of passenger miles divided by train-miles), which is consistent with section 207. Parties seeking additional information about Amtrak’s operating statistics may also view Amtrak’s monthly performance report, which includes seat miles and passenger miles by route.

Several commenters expressed general support for metrics that would measure the public benefit of passenger rail service. One commenter stated that the public benefits metrics listed in

paragraphs (a) through (d) should be reported by route and updated quarterly, on a rolling previous 12-month basis. FRA recognizes the value of providing data more frequently to measure performance and to identify trends; however, the metrics listed in paragraphs (a) through (d) require significant effort to compile and calculate, and as such, the final rule provides that these metrics will be updated annually.

## VI. Regulatory Impact and Notices

### A. Executive Order (E.O.) 12866, E.O. 13771, and DOT Regulatory Policies and Procedures

This final rule is a significant regulatory action within the meaning of Executive Order 12866 and DOT regulatory policies and procedures.<sup>36</sup> Although the economic effects of this regulatory action would not exceed the \$100 million annual threshold defined by Executive Order 12866, the rule is significant because of the substantial public interest in this rulemaking. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ‘major rule’, as defined by 5 U.S.C. 804(2). Additionally, this final rule is considered an E.O. 13771 regulatory action. FRA has provided an assessment of the costs and cost savings expected to result from implementation of this final rule.

The Metrics and Standards measure the performance and service quality of intercity passenger train operations as required by section 207 of PRISA. The Metrics and Standards are generally organized into four categories: On-time performance and train delays, customer service, financial, and public benefits.

Other than the OTP and train delays metrics, the Metrics and Standards in this final rule will not pose an additional burden on Amtrak or host railroads. Data such as customer satisfaction and financial information are currently collected by Amtrak and submitted to FRA on a quarterly basis. Other data, such as train delays and on-time performance, are already shared between Amtrak, host railroads, and State partners under their various agreements, and the parties have established protocols for data collection, distribution, and reconciliation. While the final rule establishes a new data-sharing requirement to assist with calculating the customer OTP metric (specifically, ridership data), this information is already collected by

<sup>36</sup> See 5 CFR part 5.

Amtrak. FRA expects that Amtrak will develop additional procedures for sharing the data, but once established, this data sharing will not burden Amtrak's routine operations. Lastly, as a result of the final rule's customer OTP metric and certified schedule metric, Amtrak and host railroads may adjust Amtrak's published train schedules to align them with the customer OTP metric. As part of that effort, Amtrak and host railroads may meet to discuss and agree upon schedule modifications to the published train schedules.

FRA received several comments addressing the NPRM's cost estimates. A commenter stated that the NPRM did not consider the impacts on commerce and a host railroad's operations and network fluidity. A commenter stated that a customer OTP metric enlarges an Amtrak train's dispatch footprint (*i.e.*, it would cause the Amtrak train to take up additional capacity on the rail line) by redistributing recovery time across intermediate stations, which threatens overall network fluidity, among other things. A commenter also stated that FRA did not consider payments made under the Amtrak-host railroad operating agreement (stating that the host railroad would receive less performance payments under the existing operating agreement).

With respect to operational impacts, as discussed above, delays waiting for time at intermediate stations can be foreclosed by an accurate schedule, and adjusting train schedules to align with the customer OTP metric does not mean that recovery time will be added for each station. In the case of capacity impacts great enough to warrant schedule change, reductions of time to remove these waits would be in both parties' interests. In addition, with respect to impacts on commerce

specifically, Congress has accounted for such impacts by providing that STB's enforcement of the preference requirement not "materially lessen the quality of freight transportation provided to shippers." 49 U.S.C. 24308(c).

With respect to operating agreement payments, as noted previously, FRA is not a party to these agreements, nor does FRA have knowledge of their details. More importantly, this final rule does not require a change to the performance payment provisions in these operating agreements; Amtrak and the host railroads may continue to maintain those provisions as they see fit. In addition, to the extent a host railroad is concerned with receiving lower performance payments as a result of this final rule, this final rule likewise does not prohibit a host railroad and Amtrak from revising the performance payments to align better with the customer OTP metric and standard. In fact, section 207(c) provides that, to the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards into their operating agreements. Also, performance payments, even if they change as a result of the final rule, would not change the estimate of costs due to the rule. Such payments represent transfers rather than economic costs or benefits.

One Class I host railroad stated that the NPRM's costs are too low and their railroad alone would require more than 10 hours of meetings to discuss schedule revisions. Another commenter stated that the NPRM substantially underestimates the cost of attempting to negotiate schedule adjustments. Based on both comments, FRA has increased the estimate of meeting time and number of employees present at those

meetings. Additionally, FRA has substantially increased the estimated time spent on preparations for those meetings.

For purposes of this analysis, FRA assumed that Amtrak and each of the host railroads will meet five times during the first year to discuss revising Amtrak's published train schedules. Amtrak currently has agreements with 31 host railroads. However, eight of these railroads are switching and terminal railroads that will not likely be involved in revising schedules, as Amtrak only operates over those railroads for short distances with very few, if any, stops. If there were discussions between Amtrak and any switching and terminal railroads, then it would be expected to occur during regularly scheduled meetings and would not add any additional burden.

For the other 23 host railroads, schedule discussions will add time to the current regular meetings held with Amtrak. FRA estimates that such schedule alignment discussions will require 40 hours of additional meeting time between Amtrak and each host railroad. FRA estimates that Amtrak and the host railroad will each have approximately three to six employees at the meetings. The following table shows the total cost of additional meetings between Amtrak and host railroads. Wage rates for this analysis are from the Surface Transportation Board.<sup>37</sup> Over the course of the first year, the total cost of all additional meetings is estimated to be \$473,473.

<sup>37</sup> 2019 STB wage rates: Group #100 (Executives, Officials, & Staff Assistants) Wage Rate: \$68.81 or \$120.42 with a 75% burden factor. Group #200 (Professional & Administrative) Wage Rate: \$44.27 or \$77.47 with a 75% burden factor. Group #500 (Transportation (Other than Train & Engine)) Wage Rate: \$40.27 or \$70.47 with a 75% burden factor.

Amtrak/Host Railroads Meeting Cost (2019 Dollars)						
Type of Employee	Number of Employees	Hours per Employee	Burdened Wage Rate (\$)	Total (\$)	Number of Disputed Routes	Total Cost for All Disputed Routes (\$)
	a	b	c	d = a * b * c	e	f = d * e
<b>Amtrak Meeting with Class I Railroads</b>						
Group #100	2	40	120.42	9,633		
Group #200	4	40	77.47	12,396		
<b>Total</b>				<b>22,029</b>	<b>6</b>	<b>132,174</b>
<b>Class I Railroads Meeting with Amtrak</b>						
Group #100	1	40	120.42	4,817		
Group #200	3	40	77.47	9,297		
Group #500	2	40	70.47	5,638		
<b>Total</b>				<b>19,751</b>	<b>6</b>	<b>118,507</b>
<b>Amtrak Meeting with Non-Class I Railroads</b>						
Group #100	2	16	120.42	3,853		
Group #200	4	16	77.47	4,958		
<b>Total</b>				<b>8,812</b>	<b>17</b>	<b>149,797</b>
<b>Non-Class I Railroads Meeting with Amtrak</b>						
Group #100	1	16	120.42	1,927		
Group #200	1	16	77.47	1,240		
Group #500	1	16	70.47	1,128		
<b>Total</b>				<b>4,294</b>	<b>17</b>	<b>72,995</b>
<b>Total Cost of All Meetings</b>						<b>473,473</b>
Note: Totals may not sum due to rounding, in this and subsequent tables.						
Wage Rates are from STB, 2019:						
Group #100 (Executives, Officials, & Staff Assistants) Wage Rate: \$68.81 or \$120.42 with a 75% burden factor.						
Group #200 (Professional & Administrative) Wage Rate: \$44.27 or \$77.47 with a 75% burden factor.						
Group #500 (Transportation (Other than Train & Engine)) Wage Rate: \$40.27 or \$70.47 with a 75% burden factor.						

Further, to prepare for these meetings, Amtrak and the 23 host railroads will need to perform the necessary groundwork, such as historical data analysis of schedules and train performance, as well as analysis of current and future operations, to

determine how train schedules should be adjusted. The cost for host railroads preparing for meetings will vary depending on the complexity of the route. FRA estimates that Class I host railroads will have more extensive discussions than non-

Class I host railroads, based largely on the greater amount of route miles hosted. The following table shows the estimated costs of preparing for meetings. Amtrak and host railroads will spend \$296,991 over the first year to prepare for meetings.

Amtrak Staff Time and Internal Scheduling						
Type of Employee	Number of Employees	Burdened Wage Rate (\$)	Hours per Employee	Total Cost (\$)	Number of Class I Host Railroads	Total Cost for Class I Railroads (\$)
	a	b	c	e = a * b * c	f	g = e * f
<b>Amtrak Staff Time (For All Routes)</b>						
Group #200	4	77.47	200	61,978		
<b>Class I Railroads Staff Time</b>						
Group #200	3	77.47	60	13,945		
Group #500	2	70.47	60	8,457		
<b>Total Class I Railroads' Cost</b>				<b>22,402</b>	<b>6</b>	<b>134,411</b>
<b>Non-Class I Host Railroads' Staff Time</b>						
Group #200	1	77.47	40	3,099		
Group #500	1	70.47	40	2,819		
<b>Total Non-Class I Railroads' Cost</b>				<b>5,918</b>	<b>17</b>	<b>100,603</b>
<b>Total Cost of Staff Time for Amtrak and All Host Railroads</b>						<b>296,991</b>

In addition, this final rule requires Amtrak and a host railroad to transmit a monthly joint letter and status report, signed by their respective chief executive officers, to certain members of

Congress and other Federal Agencies, in the event a published train schedule is not certified or disputed by May 17, 2021. Preparing a letter will require staff time by Amtrak and a host railroad, as

well as briefings with the chief executive officers. Each letter is estimated to require \$656 in labor on Amtrak's part and \$1,022 on the host railroad's part. FRA estimates that five

routes will be uncertified in the first year; each of which will require six letters. The following table shows the

cost of the monthly letters. The total estimated cost to Amtrak and host

railroads for the monthly letters will be \$50,328.

Total Cost of Monthly Letters						
Employee	Hours per Employee	Burdened Wage Rate (\$)	Total Labor Cost (\$)	Number of Letters	Number of Routes	Total Cost (\$)
	a	b	c = a * b	d	e	f = c * d * e
<b>Amtrak</b>						
Amtrak VP	0.5	120.42	60			
Jr. Attorney	2	120.42	241			
Staff Analyst	2	77.47	155			
CEO	0.5	399.64	200			
<b>Total Amtrak Cost</b>			<b>656</b>	<b>6</b>	<b>5</b>	<b>19,674</b>
<b>Host Railroads</b>						
VP	0.5	120.42	60			
Jr. Attorney	2	120.42	241			
Staff Analyst	2	77.47	155			
CEO	0.5	1,131.61	566			
<b>Total Host Railroad Cost</b>			<b>1,022</b>	<b>6</b>	<b>5</b>	<b>30,654</b>
<b>Total Cost (Amtrak and Host Railroads)</b>						<b>50,328</b>

Due to this final rule, some railroads will likely initiate a non-binding dispute resolution process to resolve scheduling disputes. Based on an analysis by FRA subject matter experts, FRA estimates that approximately eight

routes will be the subject of such a non-binding dispute resolution process. The total cost of such a non-binding dispute resolution process per route is approximately \$52,200, and includes arbitration fees and compensation for

the arbitrators. The arbitration fees include administrative fees,<sup>38</sup> arbitrator travel fees, and the rental fee for the hearing room. The table below shows the estimated costs for arbitration fees.

Arbitration Fees			
Category	Cost (\$)	Number of Disputed Routes	Total Cost for All Routes (\$)
	a	b	c = a * b
Arbitrator Standard Administrative Fees	17,500		
Hearing Room Rental	1,500		
Travel	2,000		
<b>Total</b>	<b>21,000</b>	<b>8</b>	<b>168,000</b>

The compensation paid to the arbitrator includes time spent by each arbitrator to prepare for the hearing,

attend the hearing, and review the hearing after completion. The table

below shows the costs for arbitrator compensation.

<sup>38</sup> Source: American Arbitration Association. See "Undetermined Monetary Claims" Standard Fee

Schedule at [https://www.adr.org/sites/default/files/Commercial\\_Arbitration\\_Fee\\_Schedule\\_1.pdf](https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf)



Arbitrator Compensation						
Type of Employee	Number of Employees	Burdened Wage Rate (\$)	Hours per Employee	Total Cost (\$)	Number of Disputed Routes	Total Cost for All Routes (\$)
	a	b	c	d = a * b * c	e	f = d * e
Arbitrator (pre-hearing staff time)	3	300	16	14,400		
Arbitrator (day of hearing)	3	400	8	9,600		
Arbitrator (post-hearing staff time)	3	300	8	7,200		
<b>Total Arbitrator Compensation</b>				<b>31,200</b>	<b>8</b>	<b>249,600</b>

The cost paid to the arbitrator for their fees would likely be split between Amtrak and the host railroad. The total estimated cost paid for the non-binding dispute resolution process for all eight

routes will be \$417,600, which includes arbitrator fees and compensation.

In addition to the cost of the non-binding dispute resolution process, Amtrak and a host railroad will need to spend time: Preparing documents in

connection with the non-binding dispute resolution process; briefing within their organization; and attending the hearing. The table below shows the total cost of staff time for Amtrak and host railroads.

Total Cost of Staff Time, Amtrak and Host Railroads					
Employee	Hours per Employee	Wage Rate (\$)	Total Cost (\$)	Number of Disputed Routes	Total Cost for All Routes (\$)
	a	b	c = a * b	d	e = c * d
<b>Amtrak Staff Time</b>					
Attorney	56	120.42	6,743		
Train operation (VP)	12	120.42	1,445		
Train operation analyst	56	77.47	4,338		
<b>Total Amtrak Cost</b>			<b>12,527</b>	<b>8</b>	<b>100,215</b>
<b>Host Railroads' Staff Time</b>					
Employee	Total Time (Hours)	Wage Rate (\$)	Total Cost (\$)		
Attorney	56	120.42	6,743		
Train operation (VP)	12	120.42	1,445		
Train operation analyst	56	77.47	4,338		
<b>Total Host Railroads' Staff Time</b>			<b>12,527</b>	<b>8</b>	<b>100,215</b>

FRA assumes that employees from the host railroads and Amtrak will incur

some travel costs associated with the hearing. The table below shows the

expected cost of travel related to the hearing.

Total Travel Cost, Amtrak and Host Railroads					
Employee	Number of Employees	Travel Cost, per Employee (\$)	Total Cost per Disputed Route (\$)	Number of Disputed Routes	Total Cost for All Routes (\$)
	a	b	c = a * b	d	e = c * d
Amtrak Employees	3	2,000	6,000		
Host Railroads' Employees	3	2,000	6,000		
<b>Total Cost</b>			<b>12,000</b>	<b>8</b>	<b>96,000</b>

The table below shows all estimated arbitration costs, including: Arbitration

fees, arbitrator compensation, and Amtrak and the host railroad's staff

compensation and travel costs. The total cost of arbitration will be \$714,030.

<b>Total Cost for Arbitration</b>	
<b>Category</b>	<b>Cost (\$)</b>
Arbitration Fees	168,000
Arbitrator Compensation	249,600
Amtrak Staff Time	100,215
Host Railroads' Staff Time	100,215
Railroads' Travel Costs	96,000
<b>Total Cost</b>	<b>714,030</b>

This final rule also requires Amtrak to share ridership data with each host railroad. Although systems are already

in place for sharing of data, it will require additional time from an Amtrak employee to process the data and share

it in a usable format. The following table shows the estimated cost to prepare the ridership reports.

<b>Amtrak Cost to Develop Ridership Reports</b>			
<b>Type of Employee</b>	<b>Hours per Employee</b>	<b>Burdened Wage Rate (\$)</b>	<b>Total Labor Cost (\$)</b>
	<b>a</b>	<b>b</b>	<b>c = a * b</b>
Group #200	80	77.47	6,198
<b>Total</b>			<b>6,198</b>

All costs of this final rule are expected to be incurred during the first year, though FRA acknowledges that

conditions regarding a certified schedule may change. The following

table shows the total 10-year estimated costs of this final rule.

<b>Total 10-Year Costs</b>			
<b>Category</b>	<b>Total Cost (\$)</b>	<b>Annualized, 7 Percent (\$)</b>	<b>Annualized, 3 Percent (\$)</b>
Cost of Meetings	473,473	67,412	55,505
Internal Staff Time (Preparation for Meetings)	296,991	42,285	34,816
Monthly Letters	50,328	7,166	5,900
Arbitration	714,030	101,662	83,706
Ridership Data	6,198	882	727
<b>Total</b>	<b>1,541,020</b>	<b>219,407</b>	<b>180,655</b>

This final rule may result in lower operational costs for Amtrak, to the extent it results in improved OTP, which may reduce labor costs, fuel costs, and expenses related to passenger inconvenience, and provide benefits to riders from improved travel times and service quality. A commenter stated that improved OTP should have a significant effect on ridership, and would make a significant improvement on operational costs. Due to the difficulty in precisely quantifying future benefits to rail routes from improved OTP, combined with the

inability to quantify the potential synergistic effects that improved OTP reliability could have across Amtrak's network, FRA has not quantified any potential benefits from lower operational costs or improved service that may result from the final rule. FRA expects Amtrak and host railroads to structure schedules to achieve performance that meets this rule's OTP standard, thus avoiding the expense and uncertainty of an STB investigation under section 213.

#### *B. Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act of 1980 (RFA) (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the

proposed rule on small entities.” (5 U.S.C. 603(a)).

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Out of an abundance of caution, FRA prepared an initial regulatory flexibility analysis to accompany the NPRM, which noted no expected significant economic impact on a substantial number of small entities. FRA is now certifying that this final rule will not have a significant economic impact on a substantial number of small entities.

#### Description of Small Entities Impacted by the Final Rule

In consultation with the SBA, FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891 (May 9, 2003) (codified at appendix C to 49 CFR part 209). FRA is using this definition for the final rule.

This final rule impacts Amtrak and Amtrak’s host railroads. This rule establishes a customer OTP metric and a certified schedule metric, which will likely result in modifications to some of Amtrak’s published train schedules. Amtrak is not a small entity and the majority of the host railroads are Class I railroads or State Departments of Transportation, none of which are small entities. There are currently 12 host railroads that are small entities, including approximately 8 switching and terminal railroads and 4 short line or regional railroads.<sup>39</sup> There are approximately 695 class III railroads on the general system. Therefore, the 12 small entities potentially affected by this final rule are not considered a substantial number of small entities.

#### Economic Impact on Small Entities

FRA has determined that the economic impact on small entities will

<sup>39</sup>FRA received one comment from a Class III terminal railroad operating on track controlled by another railroad, expressing concern about being the subject of an STB investigation. However, it is FRA’s understanding that Amtrak does not currently operate over the right-of-way in question (and although the possibility of future Amtrak service may exist, such future service would be subject to the certified schedule metric in this final rule).

not be significant. This final rule does not require published train schedule modifications. However, FRA assumes that, as a result of the Metrics and Standards, Amtrak will engage with many host railroads to discuss modifications to the published train schedule to align the schedules with the customer OTP metric.

There are currently twelve host railroads that are small entities, including approximately eight switching and terminal railroads and four short line and regional railroads. The impact on those small entities are very minimal. The switching and terminal railroads are not likely burdened by this final rule because Amtrak only operates over those routes for short distances and has very few stops along those sections of track. Those railroads already meet with Amtrak on a periodic basis, so any discussions regarding their schedule will take place at that time. It is likely that no schedule adjustments are required along those routes.

Amtrak has limited stops along the routes of the four short line and regional railroads; therefore, published train schedule adjustments would be brief. Those railroads also already meet with Amtrak on a periodic basis and discussions regarding schedules can take place at that time. Such discussions may add a minimal amount of time to those meetings. However, published train schedule adjustments may not even be necessary for these railroads.

Other than the customer OTP metric, the final rule does not provide an additional burden on Amtrak or the host railroads. Amtrak already collects the data to support these new metrics; therefore, there is no additional burden.

#### Certification

Consistent with the findings in FRA’s initial regulatory flexibility analysis, the FRA Administrator hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

#### C. Paperwork Reduction Act

FRA is publishing a new information collection request in connection with this final rule in a separate notice. For information or a copy of the paperwork package submitted to OMB, contact Ms. Kim Toone, at 202–493–6132, or [Kim.Toone@dot.gov](mailto:Kim.Toone@dot.gov).

#### D. Federalism Implications

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the

development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that 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.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule under the principles and criteria contained in Executive Order 13132. This final rule could affect State and local governments to the extent that they sponsor, or exercise oversight of, intercity passenger rail service. Because this final rule is required by Federal statute, the consultation and funding requirements of Executive Order 13132 do not apply.

In sum, FRA has analyzed this final rule under the principles and criteria in Executive Order 13132. As explained above, FRA has determined this final rule has no federalism implications. Therefore, preparation of a federalism summary impact statement for this final rule is not required.

#### E. Environmental Impact

FRA has evaluated this final rule consistent with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), other environmental statutes, related regulatory requirements, and its NEPA implementing regulations at 23 CFR part 771. Under NEPA, categorical exclusions (CEs) are actions identified in an agency’s NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4. FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), “Promulgation of rules,

the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.”

In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review through the preparation of an EA or EIS. See 23 CFR 771.116(b). FRA has concluded that no unusual circumstances exist with respect to this regulation that would trigger the need for a more detailed environmental review. The purpose of this rulemaking is to establish metrics and standards to measure the performance and service quality of intercity passenger train operations. FRA does not anticipate any environmental impacts from this final rule and finds there are no unusual circumstances present in connection with this final rule.

A commenter stated that FRA should consider whether the rulemaking meets the requirements of a categorical exclusion under NEPA given the operational impacts on the host railroads. As discussed elsewhere in this final rule, any such operational impacts relate to, and should be resolved by, the development of new schedules. FRA expects Amtrak and the host railroads to account for these issues when they develop new schedules. Therefore, FRA finds that a categorical exclusion is appropriate here.

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties. See 16 U.S.C. 470. FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f). See *Department of Transportation Act of 1966*, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

#### *F. Executive Order 12898 (Environmental Justice)*

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (91 FR 27534 May 10, 2012) require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and

activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

#### *G. Executive Order 13175 (Tribal Consultation)*

FRA has evaluated this final rule under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The final rule will not have a substantial direct effect on one or more Indian tribes, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

#### *H. Unfunded Mandates Reform Act of 1995*

Under Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Unfunded Mandates Reform Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

#### *I. Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this final rule is not a “significant energy action” within the meaning of Executive Order 13211.

Executive Order 13783, “Promoting Energy Independence and Economic Growth,” requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with attention to oil, natural gas, coal, and nuclear energy resources. 82 FR 16093 (March 31, 2017). Executive Order 13783 defines “burden” to mean unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources. FRA has determined this final rule will not potentially burden the development or use of domestically produced energy resources.

#### *J. Trade Impact*

The Trade Agreements Act of 1979 (Pub. L. 96–39, 19 U.S.C. 2501 *et seq.*) prohibits Federal agencies from engaging in any standards setting or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. FRA has assessed the potential effect of this final rule on

foreign commerce and believes that its requirements are consistent with the Trade Agreements Act of 1979.

### List of Subjects in 49 CFR Part 273

Railroads, Transportation.

### The Rule

■ For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations, by adding part 273 to read as follows:

### PART 273—METRICS AND MINIMUM STANDARDS FOR INTERCITY PASSENGER TRAIN OPERATIONS

Sec.

273.1 Purpose.

273.3 Definitions.

273.5 On-time performance and train delays.

273.7 Customer service.

273.9 Financial.

273.11 Public benefits.

**Authority:** Sec. 207, Div. B, Pub. L. 110–432; 49 U.S.C. 24101, note; 49 U.S.C. 103(j); 49 CFR 1.81; 49 CFR 1.88; and 49 CFR 1.89.

#### § 273.1 Purpose.

The purpose of this part is to establish metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.

#### § 273.3 Definitions.

As used in this part—

*Actual running time* means the actual elapsed travel time of a train's travel on a host railroad, between the departure time at the first reporting point for a host railroad segment and the arrival time at the reporting point at the end of the host railroad segment.

*Adjusted operating expenses* means Amtrak's operating expenses adjusted to exclude certain Amtrak expenses that are not considered core to operating the business. The major exclusions are depreciation, capital project related expenditures not eligible for capitalization, non-cash portion of pension and post-retirement benefits, and Amtrak's Office of Inspector General expenses. Adjusted operating expenses do not include any operating expenses for State-supported routes that are paid for separately by States.

*Adjusted operating revenue* means Amtrak's operating revenue adjusted to exclude certain revenue that is associated with capital projects. The major exclusions are the amortization of State capital payments and capital project revenue related to expenses not eligible for capitalization.

*Amtrak* means the National Railroad Passenger Corporation.

*Amtrak's customer satisfaction survey* means a market-research survey that measures Amtrak's satisfaction score as measured by specific service attributes that cover the entire customer journey.

*Amtrak-responsible delays* means delays recorded by Amtrak, in accordance with Amtrak procedures, as Amtrak-responsible delays, including passenger-related delays at stations, Amtrak equipment failures, holding for connections, injuries, initial terminal delays, servicing delays, crew and system delays, and other miscellaneous Amtrak-responsible delays.

*Avoidable operating costs* means costs incurred by Amtrak to operate train service along a route that would no longer be incurred if the route were no longer operated.

*Certified schedule* means a published train schedule that Amtrak and the host railroad jointly certify is aligned with the customer on-time performance metric and standard in § 273.5(a)(1) and (2). If a published train schedule is reported as a certified schedule under § 273.5(c)(1), then it cannot later be designated as an uncertified schedule.

*Disputed schedule* means:

(1) A published train schedule for which a specific change is sought:

(i) That is the only subject of a non-binding dispute resolution process led by a neutral third-party and involving Amtrak and one or more host railroads;

(ii) That is the only subject of a non-binding dispute resolution process led by a neutral third-party that has been initiated by one or more host railroads and Amtrak has not consented to participate in the process within 30 calendar days; or

(iii) That is the only subject of a non-binding dispute resolution process led by a neutral third-party that has been initiated by Amtrak and the host railroad has not consented to participate in the process within 30 calendar days.

(2) The written decision resulting from a non-binding dispute resolution process is admissible in Surface Transportation Board investigations under 49 U.S.C. 24308(f). If a published train schedule is reported as a disputed schedule under § 273.5(c)(1), then it remains a disputed schedule until reported as a certified schedule.

*Fully allocated core operating costs* means Amtrak's total costs associated with operating an Amtrak route, including direct operating expenses, a portion of shared expenses, and a portion of corporate overhead expenses. Fully allocated core operating costs exclude ancillary and other expenses that are not directly reimbursed by passenger revenue to match revenues with expenses.

*Host railroad* means a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment. Amtrak is a host railroad of Amtrak trains and other trains operating over an Amtrak owned or controlled railroad line segment. For purposes of the certified schedule metric under § 273.5(c), Amtrak is not a host railroad.

*Host-responsible delays* means delays recorded by Amtrak, in accordance with Amtrak procedures, as host-responsible delays, including freight train interference, slow orders, signals, routing, maintenance of way, commuter train interference, passenger train interference, catenary or wayside power system failure, and detours.

*Not well-served communities* means those rural communities: Within 25 miles of an intercity passenger rail station; more than 75 miles from a large airport; and more than 25 miles from any other airport with scheduled commercial service or an intercity bus stop.

*Passenger revenue* means intercity passenger rail revenue generated from passenger train operations, including ticket revenue, food and beverage sales, operating payments collected from States or other sponsoring entities, special trains, and private car operations.

*Ridership data* means, in a machine-readable format: The total number of passengers, by train and by day; the station-specific number of detraining passengers, reported by host railroad whose railroad right-of-way serves the station, by train, and by day; and the station-specific number of on-time passengers reported by host railroad whose railroad right-of-way serves the station, by train, and by day.

*Scheduled running time* means the scheduled duration of a train's travel on a host railroad, as set forth in the Amtrak schedule skeleton.

*Schedule skeleton* means a schedule grid used by Amtrak and host railroads to communicate the public schedule of an Amtrak train and the schedule of operations of an Amtrak train on host railroads.

*Third party delays* means delays recorded by Amtrak, in accordance with Amtrak procedures, as third party delays, including bridge strikes, debris strikes, customs, drawbridge openings, police-related delays, trespassers, vehicle strikes, utility company delays, weather-related delays (including heat or cold orders, storms, floods/washouts, earthquake-related delays, slippery rail due to leaves, flash-flood warnings, wayside defect detector actuations caused by ice, and high-wind

restrictions), acts of God, or waiting for scheduled departure time.

*Uncertified schedule* means a published train schedule that has not been reported as a certified schedule or a disputed schedule under § 273.5(c)(1).

**§ 273.5 On-time performance and train delays.**

(a) *Customer on-time performance*—

(1) *Metric.* The customer on-time performance metric is the percentage of all customers on an intercity passenger rail train who arrive at their detraining point no later than 15 minutes after their published scheduled arrival time, reported by train and by route.

(2) *Standard.* The customer on-time performance minimum standard is 80 percent for any 2 consecutive calendar quarters.

(3) *Application.* (i) Except as provided in paragraph (a)(3)(ii) of this section, the customer on-time performance standard shall apply to a train beginning on the first full calendar quarter after May 17, 2021.

(ii) If a train schedule is a disputed schedule on or before May 17, 2021, then the customer on-time performance standard for the disputed schedule shall apply beginning on the second full calendar quarter after May 17, 2021.

(b) *Ridership data.* The ridership data metric is the number of host railroads to whom Amtrak has provided ridership data consistent with this paragraph (b), reported by host railroad and by month. Not later than December 16, 2020, Amtrak must provide host railroad-specific ridership data to each host railroad for the preceding 24 months. On the 15th day of every month following December 16, 2020, Amtrak must provide host railroad-specific ridership data to each host railroad for the preceding month.

(c) *Certified schedule*—(1) *Metric.* The certified schedule metric is the number of certified schedules, uncertified schedules, and disputed schedules, reported by train, by route, and by host railroad (excluding switching and terminal railroads), identified in a notice to the Federal Railroad Administrator by Amtrak:

- (i) On December 16, 2020;
- (ii) On January 19, 2021;
- (iii) On February 16, 2021;
- (iv) On March 16, 2021;
- (v) On April 16, 2021;
- (vi) On May 17, 2021;
- (vii) On November 16, 2021; and
- (viii) Every 12 months after November 16, 2021.

(2) *Reporting.* If a train schedule is reported as an uncertified schedule under paragraph (c)(1)(vi), (vii), or (viii) of this section, then Amtrak and the

host railroad must transmit a joint letter and status report on the first of each month following the report, signed by their respective chief executive officers to each U.S. Senator and U.S.

Representative whose district is served by the train, the Chairman and Ranking Member of the Committee on Transportation and Infrastructure of the House of Representatives, the Chairman and Ranking Member of the Committee on Commerce, Science, and Transportation of the Senate, the Chairman and Ranking Member of the Committee on Appropriations of the House of Representatives, the Chairman and Ranking Member of the Committee on Appropriations of the Senate, the Secretary of Transportation, and the Chairman of the Surface Transportation Board, which states:

(i) The Amtrak train schedule(s) at issue;

(ii) The specific components of the train schedule(s) on which Amtrak and host railroad cannot reach agreement;

(iii) Amtrak's position regarding the disagreed upon components of the train schedule(s);

(iv) Host railroad's position regarding the disagreed upon components of the train schedule(s); and

(v) Amtrak and the host railroad's plan and expectation date to resolve the disagreement(s). The requirement to transmit this joint letter and status report ends for the train schedule at issue when the uncertified schedule becomes a certified schedule.

(3) *Ongoing coordination between Amtrak and host railroads.* When conditions have changed that impact a certified schedule, Amtrak or a host railroad may seek to modify the certified schedule. The customer on-time performance standard in paragraph (a)(2) of this section remains in effect for the existing certified schedule, until a modified schedule is jointly certified.

(d) *Train delays.* The train delays metric is the minutes of delay for all Amtrak-responsible delays, host-responsible delays, and third party delays, for the host railroad territory within each route. The train delays metric is reported by delay code by: total minutes of delay; Amtrak-responsible delays; Amtrak's host-responsible delays; Amtrak's host responsible delays and Amtrak-responsible delays, combined; non-Amtrak host-responsible delays; and third party delays. The train delays metric is also reported by the number of non-Amtrak host-responsible delay minutes disputed by host railroad and not resolved by Amtrak.

(e) *Train delays per 10,000 train miles.* The train delays per 10,000 train

miles metric is the minutes of delay per 10,000 train miles for all Amtrak-responsible and host-responsible delays, for the host railroad territory within each route.

(f) *Station performance.* The station performance metric is the number of detraining passengers, the number of late passengers, and the average minutes late that late customers arrive at their detraining stations, reported by route, by train, and by station. The average minutes late per late customer calculation excludes on-time customers that arrive no later than 15 minutes after their scheduled time.

(g) *Host running time.* The host running time metric is the average actual running time and the median actual running time compared with the scheduled running time between the first and final reporting points for a host railroad set forth in the Amtrak schedule skeleton, reported by route, by train, and by host railroad (excluding switching and terminal railroads).

**§ 273.7 Customer service.**

(a) *Customer satisfaction.* The customer satisfaction metric is the percent of respondents to the Amtrak customer satisfaction survey who provided a score of 70 percent or greater for their "overall satisfaction" on a 100 point scale for their most recent trip, by route, shown both adjusted for performance and unadjusted.

(b) *Amtrak personnel.* The Amtrak personnel metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of Amtrak personnel on their most recent trip, by route.

(c) *Information given.* The information given metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of information provided by Amtrak on their most recent trip, by route.

(d) *On-board comfort.* The on-board comfort metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of on-board comfort on their most recent trip, by route.

(e) *On-board cleanliness.* The on-board cleanliness metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of on-board cleanliness on their most recent trip, by route.

(f) *On-board food service.* The on-board food service metric is the average score from respondents to the Amtrak customer satisfaction survey for their overall review of on-board food service on their most recent trip, by route.

**§ 273.9 Financial.**

(a) *Cost recovery.* The cost recovery metric is Amtrak's adjusted operating revenue divided by Amtrak's adjusted operating expense. This metric is reported at the corporate level/system-wide and for each route and is reported in constant dollars of the reporting year based on the Office of Management and Budget's gross domestic product chain deflator.

(b) *Avoidable operating costs covered by passenger revenue.* The avoidable operating costs covered by passenger revenue metric is the percent of avoidable operating costs divided by passenger revenue for each route, shown with and without State operating payments.

(c) *Fully allocated core operating costs covered by passenger revenue.* The fully allocated core operating costs covered by passenger revenue metric is the percent of fully allocated core operating costs divided by passenger revenue for each route, shown with and without State operating payments.

(d) *Average ridership.* The average ridership metric is the number of passenger-miles divided by train-mile for each route.

(e) *Total ridership.* The total ridership metric is the total number of passengers on Amtrak trains, reported by route.

**§ 273.11 Public benefits.**

(a) *Connectivity.* The connectivity metric is the percent of passengers connecting to and from other Amtrak routes, updated on an annual basis.

(b) *Missed connections.* The missed connections metric is the percent of passengers connecting to/from other Amtrak routes who missed connections due to a late arrival from another Amtrak train, reported by route and updated on an annual basis.

(c) *Community access.* The community access metric is the percent of Amtrak passenger-trips to and from not well-served communities, updated on an annual basis.

(d) *Service availability.* The service availability metric is the total number of daily Amtrak trains per 100,000 residents in a metropolitan statistical area (MSA) for each of the top 100 MSAs in the United States, shown in total and adjusted for time of day, updated on an annual basis.

Issued in Washington, DC.

**Gerald A. Reynolds,**  
Chief Counsel.

[FR Doc. 2020-25212 Filed 11-13-20; 8:45 am]

BILLING CODE 4910-06-P

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 660**

[Docket No. 200610-0156; RTID 0648-XA570]

**Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2020 Tribal Fishery Allocations for Pacific Whiting; Reapportionment Between Tribal and Non-Tribal Sectors**

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

**ACTION:** Inseason reapportionment of tribal Pacific whiting allocation.

**SUMMARY:** This document announces the reapportionment of 40,000 metric tons of Pacific whiting from the tribal allocation to the non-tribal commercial fishery sectors via automatic action on September 16, 2020. This reapportionment is to allow full utilization of the Pacific whiting resource.

**DATES:** The reapportionment of Pacific whiting went into effect at 12 p.m. local time, September 16, 2020, and is effective through December 31, 2020. Comments will be accepted through December 1, 2020.

**ADDRESSES:** You may submit comments, identified by NOAA-NMFS-2020-0027 by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at [www.regulations.gov/docket?D=NOAA-NMFS-2020-0027](http://www.regulations.gov/docket?D=NOAA-NMFS-2020-0027). Click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- *Mail:* Barry A. Thom, Regional Administrator, West Coast Region, NMFS, 1201 NE Lloyd Center Blvd., Suite #1100, Portland, OR 97232, Attn: Stacey Miller.

*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 a part of the public record. 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). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

**Electronic Access**

This notice is accessible online at the Office of the Federal Register's website at <https://www.federalregister.gov/>. Background information and documents are available at the NMFS West Coast Region website at <https://www.fisheries.noaa.gov/species/pacific-whiting#management>.

**FOR FURTHER INFORMATION CONTACT:**

Stacey Miller (West Coast Region, NMFS), phone: 503-231-6290 or email: [Stacey.Miller@noaa.gov](mailto:Stacey.Miller@noaa.gov).

**SUPPLEMENTARY INFORMATION:****Background***Pacific Whiting*

Pacific whiting (*Merluccius productus*) is a very productive species with highly variable recruitment (the biomass of fish that mature and enter the fishery each year) and a relatively short life span compared to other groundfish species. Pacific whiting has the largest annual allowable harvest levels (by volume) of the more than 90 groundfish species managed under the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California. The coastwide Pacific whiting stock is managed jointly by the United States and Canada, and mature Pacific whiting are commonly available to vessels operating in U.S. waters from April through December. Background on the stock assessment, and the establishment of the 2020 Total Allowable Catch (TAC), for Pacific whiting was provided in the final rule for the 2020 Pacific whiting harvest specifications, published June 18, 2020 (85 FR 36803). Pacific whiting is allocated to the Pacific Coast treaty tribes (tribal fishery) and to three non-tribal commercial sectors: The catcher/processor cooperative (C/P Coop), the mothership cooperative (MS Coop), and the Shorebased Individual Fishery Quota (IFQ) Program.

This notice announces the reapportionment of 40,000 metric tons (mt) of Pacific whiting from the tribal allocation to the non-tribal commercial sectors on September 16, 2020. Regulations at 50 CFR 660.131(h) contain provisions that allow the Regional Administrator to reapportion Pacific whiting from the tribal allocation, specified at 50 CFR 660.50, that will not be harvested by the end of the fishing year to other sectors.

*Pacific Whiting Reapportionment*

For 2020, the Pacific Coast treaty tribes were allocated 74,342 mt of Pacific whiting. The best available information on September 16, 2020, indicated that at least 40,000 mt of the tribal allocation would not be harvested by December 31, 2020. As required under the 2017 Endangered Species Act (ESA) Section 7(a)(2) biological opinion on the effects of the Pacific Coast Groundfish Fishery Management Plan on listed salmonids, NMFS considered the number and bycatch rate of Chinook salmon taken by the Pacific whiting fishery sectors prior to reapportionment. Based on the best available information

in early September 2020, NMFS determined there was little risk that the reapportionment would cause the Pacific whiting sector fisheries to exceed the guideline limit of 11,000 Chinook salmon under current regulations and practices. In early September, incidental take of Chinook salmon by the non-tribal sector was 15 percent of the guideline limit. While the incidental take of Chinook salmon was higher compared to the same period in the previous year, the total take this year is still well below the guideline limit.

To allow for increased utilization of the resource, on September 16, 2020, NMFS reapportioned 40,000 mt from

the Tribal sector to the Shorebased IFQ Program, C/P Coop, and MS Coop in proportion to each sector's original allocation. Reapportioning this amount is expected to allow for greater attainment of the TAC while not limiting tribal harvest opportunities for the remainder of the year. NMFS provided notice of the reapportionment on September 16, 2020, via emails sent directly to fishing businesses and individuals. Reapportionment was effective the same day as the notice.

The amounts of Pacific whiting available for 2020 before and after the reapportionment are described in the table below.

TABLE 1—2020 PACIFIC WHITING ALLOCATIONS

Sector	Initial 2020 allocation (mt)	Final 2020 allocation (mt)
Tribal .....	74,342	34,342
C/P Coop .....	118,649	132,249
MS Coop .....	83,752	93,352
Shorebased IFQ Program .....	146,567	163,367

**Classification**

NOAA's Assistant Administrator for Fisheries (AA) finds that good cause exists for this notification to be issued without affording prior notice and opportunity for public comment pursuant to 5 U.S.C. 553(b)(B), because such notification would be impracticable and contrary to the public interest. As previously noted, NMFS provided actual notice of the reapportionment to fishery participants at the time of the action. Prior notice and opportunity for public comment on this reapportionment was impracticable because NMFS had insufficient time to provide prior notice between the time the information about the progress of the fishery needed to make this determination became available and the time at which fishery modifications had to be implemented in order to allow fishery participants access to the available fish during the remainder of the fishing season. For the same reasons, the AA also finds good cause to waive the 30-day delay in effectiveness for these actions, required under 5 U.S.C. 553(d)(3).

These actions are authorized by §§ 660.55(i), 660.60(d) and 660.131(h) and are exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 7001 *et seq.*

Dated: November 10, 2020.

**Jennifer M. Wallace,**  
*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
 [FR Doc. 2020-25229 Filed 11-13-20; 8:45 am]  
**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 665**

**[Docket No. 201109-0298]**

**RIN 0648-BJ94**

**Pacific Island Fisheries; Interim Measures for American Samoa Bottomfish**

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

**ACTION:** Temporary rule; interim measures.

**SUMMARY:** This temporary rule implements an interim catch limit (ICL) of 13,000 lb of American Samoa bottomfish for fishing years 2020 and 2021 during the effective period of the rule. NMFS will monitor catches, and if the fishery reaches the ICL within a fishing year, we will close the fishery in Federal waters through the end of the fishing year, or through the end of the effective period of this rule, whichever

comes first. These interim management measures are necessary to reduce overfishing of American Samoa bottomfish while minimizing socio-economic impacts to fishing communities. This temporary rule supports the long-term sustainability of American Samoa bottomfish.

**DATES:** Effective November 16, 2020, through May 17, 2021.

**ADDRESSES:** Copies of the Fishery Ecosystem Plan for the American Samoa Archipelago (FEP) are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808-522-8220, or [www.wpcouncil.org](http://www.wpcouncil.org).

NMFS prepared an environmental assessment (EA) that describes the potential impacts on the human environment that could result from this temporary rule. The EA and other supporting documents are available from [www.regulations.gov/docket?D=NOAA-NMFS-2020-0099](http://www.regulations.gov/docket?D=NOAA-NMFS-2020-0099).

**FOR FURTHER INFORMATION CONTACT:** Brett Schumacher, NMFS PIR Sustainable Fisheries, 808-725-5185.

**SUPPLEMENTARY INFORMATION:** NMFS and the Western Pacific Fishery Management Council (Council) manage the bottomfish fishery in the U.S. Exclusive Economic Zone (Federal waters) around American Samoa under the FEP and the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Most of the



management measures for the fishery are found at 50 CFR 665.

In 2019, the NMFS Pacific Islands Fisheries Science Center (PIFSC) completed a benchmark stock assessment that indicated that the multi-species bottomfish stock complex in American Samoa is overfished and experiencing overfishing. Consistent with Magnuson-Stevens Act sections 304(e)(6) and 305(c), the Council requested that NMFS implement an interim measure to reduce overfishing of the stock while the Council develops management measures required by section 304(e)(3). This temporary rule implements an interim catch limit (ICL) of 13,000 lb of American Samoa bottomfish for the fishing year. We originally proposed the rule would be effective only during fishing year 2020. This final rule revises the proposed effective period of this measure so that it will remain in effect for 180 days or until replaced, consistent with Magnuson-Stevens Act section 305(c), to ensure that the measure is continuous with any subsequent extension. Thus, the catch limit of 13,000 lb will apply for fishing year 2020, and for fishing year 2021 until the measure expires or is replaced.

As an in-season accountability measure, if NMFS projects that the fishery will reach the ICL, we would close the fishery in Federal waters through the end of the fishing year in which the ICL is reached, or the end of the effective period of this rule, whichever comes first. To maintain consistency with the timeframe of catch projections from the stock assessment and the bottomfish fishing year (January–December), NMFS will monitor catches of bottomfish management unit species (MUS) made in both territorial and Federal waters during the fishing year and will count the combined catch toward the ICL for that year. Under the interim measure, overfishing will be reduced relative to the status quo, and socio-economic impacts to the community will be minimized relative to measures that would have ended overfishing immediately.

You may find additional background information on this action in the preamble to the proposed temporary rule published on September 11, 2020 (85 FR 56208).

#### Comments and Response

On September 11, 2020, NMFS published a proposed rule, an EA, and regulatory impact review for public comment (85 FR 56208). The comment period ended September 28, 2020. NMFS received comments from three

individuals, the American Samoa Department of Marine and Wildlife Resources (DMWR) and the Western Pacific Fishery Management Council, and responds below.

*Comment 1:* The temporary catch limit and accountability measures are reasonable to balance the need to reduce overfishing while minimizing the impact to economic, cultural, and subsistence fishing. One of the regulatory conditions for implementing interim measures is that following the recommendations for ending overfishing immediately would be “expected to result in severe social and/or economic impacts.” This condition is met, and is evidenced by the comments made by American Samoan fishermen and council members at public Council meetings, which indicated that even the higher ICL of 13,000 lb would inhibit subsistence fishing. Their comments also indicated that the potential closure of the Federal offshore banks as a result of reaching the 13,000 lb ICL would further inhibit subsistence fishing and cultural practices due to the lack of access to “important fishing grounds for deep-water snappers that are critical for cultural ceremonies.” Overall, the proposed rule would have positive impacts on American Samoa bottomfish stocks, while not completely inhibiting the livelihood of American Samoan fishermen and residents.

*Response:* NMFS agrees.

*Comment 2:* The calculation methods used to assess the condition of the bottomfish stocks are not accurate, and new methods are needed to monitor fish catches and collect fishery data, including a self-reporting device developed by the Council.

*Response:* The methods and data used to assess the condition of the American Samoa bottomfish fishery and to develop the interim measure are the best available scientific and commercial information on the status of the stocks. The 2019 benchmark stock assessment completed by NMFS PIFSC used all available information about the fishery and applied the overfishing status determination criteria established in the FEP to evaluate stock status, and all components of the assessment were evaluated and analyzed for applicability and appropriateness for use. Moreover, consistent with the Magnuson-Stevens Act and regulations at 50 CFR 600.315 for scientific information, the assessment was independently peer reviewed through the Western Pacific Stock Assessment Review (WPSAR) process, which found that the results and conclusions were reliable and useful for management purposes based on information available at the time.

Fishermen’s concerns regarding the stock assessment methodologies and reliability of the fisheries data were presented and discussed at the October 2019 meeting of the Council’s Scientific and Statistical Committee (SSC) in Honolulu, Hawaii, and October 2019 Council meeting in Pago Pago, American Samoa. The SSC and Council, nonetheless, accepted the stock assessment as providing the best scientific information available for management purposes. Accordingly, in January 2020, PIFSC determined the 2019 assessment is the best scientific information available for the fishery.

NMFS recognizes that the Council is exploring new and other methodologies to improve fisheries data in American Samoa and other U.S. territories. As part of a coordinated approach to improve fisheries information, NMFS, in collaboration with the Council, DMWR, and other resource management agencies have developed a Marine Recreational Implementation Plan for the Pacific Islands Region (MRIP-PIR). This plan identifies priority needs and actions associated with understanding and management of the non-commercial fishery in the state/territorial and Federal waters in 2018–2022. These include:

1. A programmatic review of the Territory creel surveys;
2. Full funding for the surveys that meets the minimum survey standards for Hawaii, American Samoa, and the Mariana Archipelago, including expansion of spatial and temporal surveys, and additional technical support for data entry and database management;
3. Improved timeliness of non-commercial catch estimates;
4. Development of an algorithm that extracts the non-commercial component of the total creel survey catch estimates; and
5. Development of mobile data entry system to support near-real time reporting.

*Comment 3:* The DMWR noted that the previous stock assessment before the current one indicated that bottomfish stocks were healthy, and questioned how the fishery can be subject to overfishing and overfished with low numbers of fishery participants. The DMWR does not feel that the assessment accurately captured the nature of the fishery, and requested that NMFS re-examine the assessment methodology, including whether the DMWR data collection systems are appropriate for such methods.

*Response:* The previous assessment completed by PIFSC in 2016 was replaced by a new benchmark

assessment in 2019. Several changes relative to the previous assessment were incorporated into the 2019 benchmark assessment. These include using new species lists, calculating the percentage of catch reported at the family or species-group level and believed to contain bottomfish management unit species, filtering catch per unit effort (CPUE) based on gear, standardizing the CPUE for covariates that may affect the catch rate, removing independently-estimated maximum sustainable yield values from the model fitting process, and including an improved production model parameterization. An independent panel of fisheries scientists reviewed the 2019 assessment and concluded that it is superior to the previous assessment. PIFSC, the Council and its SSC concluded that the 2019 assessment represents the best scientific information available for the American Samoa bottomfish fishery. The DMWR has not identified any superior information that NMFS failed to consider when it determined the stock assessment was the best scientific information available, so based on the best scientific information available NMFS determined that the fishery is subject to overfishing and is overfished, and developed the interim measure to reduce overfishing while the Council develops and NMFS implements long-term management measures to end overfishing and rebuild the stock. For the next assessment, NMFS anticipates that MRIP-PIR will improve fishery data to allow consideration of alternative methods for assessing the condition of the fishery. See also response to Comment 2.

*Comment 4:* The DMWR believes that the 13,000 lb ICL is too low for American Samoa fishermen to subsist, and does not support closing Federal waters to bottomfish fishing, especially the productive offshore banks, which the DMWR asserts are important fishing grounds for deepwater snappers that are critical for American Samoan cultural ceremonies and fa'alavelave. Instead, they propose that DMWR develop a territorial bottomfish management plan in coordination with NMFS that includes data workshops to fully understand the fishery and incorporates cultural aspects of the fishery. They also requested flexibility in the national guidelines.

*Response:* The best scientific information available indicates that the fishery is subject to overfishing and is overfished. This temporary action, which includes a potential closure of Federal waters to prevent the fishery from exceeding the limit, is needed to reduce overfishing while the Council

and NMFS develop a plan that ends overfishing and rebuilds the stock. NMFS expects that the level of catch under this temporary action will still allow American Samoan bottomfish fishermen to continue to provide enough fish for subsistence, cultural, and religious purposes. Overall, the interim action provides a balance between the statutory requirement to reduce overfishing and the needs of the fishery and dependent communities for continued access to bottomfish. NMFS is committed to working with DMWR and the Council to address the condition of the fishery, which may include consideration of a bottomfish management plan for territorial waters. See also response to Comments 1–3.

*Comment 5:* The DMWR also requested that NMFS examine whether changes in the priority species of management and other aspects of the analysis have changed the status of the fishery.

*Response:* The 2019 assessment evaluated species that remained as management unit species after the ecosystem reclassification action. The WPSAR panel investigated the impact of changes in the management unit species and found that it did not have significant effects on the assessment results. The panel concluded that changes in the assessment were improvements over the previous assessment, which supported the determination that the assessment is the best scientific information available for management.

*Comment 6:* The Council expressed general support for the action, but noted concerns about the data used in the 2019 stock assessment, how the WPSAR review addressed data uncertainty, and suggested options for improving data used for future assessments.

*Response:* The data used for the assessment comes from two programs conducted by the DMWR in collaboration with the NMFS Western Pacific Fisheries Information Network (WPacFIN): Creel surveys and the commercial purchase database program. The stock assessment authors considered, but rejected, using other data sources, such as the WPacFIN biosampling program and the Federal permit logbook dataset, due to insufficient years of data or low reporting rates. The SSC expressed concern about the reliability of data from the creel surveys and commercial dealer program, but did not identify a superior data source. Thus, the data relied on for the assessment are considered the best scientific information available. Moreover, the assessment was reviewed by an

independent panel of experts under the WPSAR process and the SSC, and was endorsed by these groups and NMFS as the best scientific information available. NMFS looks forward to working with the Council and the DMWR to develop a long-term plan to end overfishing and rebuild the stock. See also responses to Comments 1–4.

*Comment 7:* Implementation of the interim measure will be challenging, given that the majority of fishing activity is believed to take place in territorial waters, and that existing monitoring was not designed for in-season tracking. The Council is working with the DMWR to develop a Territorial Bottomfish Fishery Management Plan, which would allow parallel management of the bottomfish management unit species between territorial and Federal waters.

*Response:* NMFS will work with DMWR to encourage timely processing of data, and will track all catches in Federal and territorial waters toward any applicable limit when data are provided to NMFS. While NMFS cannot implement a closure in territorial waters, we will still monitor and account for catch that comes from territorial waters. NMFS agrees that the efficacy of the measure could be improved if the Territory implemented parallel management. See also response to Comment 8.

*Comment 8:* There should be an additional proposal to monitor species of fish, especially those that have been over-fished, in territorial waters to gain a better estimate for catch limits, and to assess the costs and benefits regarding economics and biological sustainability.

*Response:* The creel surveys and commercial receipt program conducted by DMWR in collaboration with NMFS collect fisheries data in both territorial and Federal waters, so current management already includes the suggested measures. The information is used in stock assessments that evaluate the effects of fishing and management on the bottomfish stock as a whole, and are also used to assess potential social, cultural, and economic impacts in the EA.

*Comment 9:* While a catch limit is appropriate for American Samoa bottomfish for the remainder of 2020, the limit of 13,000 lb may be inappropriate because, although this number may be regulated in Federal waters, most (85%) bottomfish live in territorial waters, which are unregulated by the NMFS.

*Response:* The bottomfish stock in American Samoa is assessed as a single unit across the archipelago, including territorial and Federal waters. Similarly,

the 13,000 lb catch limit covers bottomfish in both areas. NMFS will monitor catch in territorial and Federal waters relative to the 13,000 lb ICL, but does not have jurisdiction to restrict catch in territorial waters. NMFS agrees that the efficacy of the measure could be improved if the Territory implemented parallel management.

*Comment 10:* The effects of overfishing need to be mitigated, especially for a species that has previously been recorded to experience overfishing.

*Response:* NMFS agrees that the effects of overfishing need to be mitigated, and developed this rule to accomplish that goal. We note, however, that previous stock assessments did not conclude that the stock is experiencing overfishing; the current overfishing status was first determined by NMFS in 2020.

#### Changes From the Proposed Rule

The proposed rule would have been effective during fishing year 2020 only. This final rule is effective for 180 days. We are making this change under Section 305(c) of the Magnuson-Stevens Act so that this rule is effective for 180 days, or until replaced, to ensure that the measure is continuous with any subsequent extension.

#### Classification

NMFS is issuing this temporary rule pursuant to section 304(e)(6) and section 305(c) of the Magnuson-Stevens Act, which provide specific authority for implementing this action to address overfishing in response to a request from the Council. The NMFS Assistant Administrator has determined that this temporary rule is consistent with the FEP, the Magnuson-Stevens Act, and other applicable law.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. NMFS did not receive any comments regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

#### Administrative Procedure Act

The Assistant Administrator Fisheries, NOAA (AA) finds it is contrary to the public interest to provide for a 30-day delay in effectiveness of this temporary rule. The need to implement the interim rule in a timely manner to reduce overfishing constitutes “good cause” under authority contained in 5 U.S.C. 553(d)(3) to make the rule effective immediately upon publication in the **Federal Register**. The fishery is experiencing overfishing, and management measures are needed to reduce catch to mitigate immediate effects of fishing on the stock and long-term effects on the fishing community while the stock is rebuilding. Specifically, the temporary action needs to be implemented immediately to establish thresholds that would minimize adverse biological effects to the stock and adverse long-term socioeconomic effects to fishermen and communities that utilize bottomfish in American Samoa.

This final rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

#### List of Subjects in 50 CFR Part 665

Accountability measure, American Samoa, Bottomfish, Fisheries, Fishing, Interim catch limit, Pacific Islands.

Dated: November 10, 2020.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 665 as follows:

#### PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for 50 CFR part 665 continues to read as follows:

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

■ 2. Add § 665.102 to read as follows:

#### § 665.102 Bottomfish Interim Catch Limit.

(a) The interim catch limit for American Samoa bottomfish MUS for the fishing year is 13,000 lb.

(b) When the interim catch limit is projected to be reached, the Regional Administrator shall publish a document to that effect in the **Federal Register** and shall use other means to notify permit holders. The document will include an advisement that the fishery will be closed, beginning at a specified date that is not earlier than seven days after the date of filing the closure notice for public inspection at the Office of the Federal Register, through the end of the fishing year in which the interim catch limit is reached or the end of the effective period of this rule, whichever comes first.

(c) On and after the date the fishery is closed as specified in paragraph (b) of this section, fishing for and possession of American Samoa bottomfish MUS is prohibited in Federal waters around American Samoa, except as otherwise authorized by law.

(d) On and after the date the fishery is closed as specified in paragraph (b) of this section, possession, sale, offering for sale, and purchase of any American Samoa bottomfish MUS caught in Federal waters around American Samoa is prohibited.

■ 3. In § 665.103, stay the introductory paragraph, add paragraph (a) and add and reserve paragraph (b) to read as follows:

#### § 665.103 Prohibitions.

\* \* \* \* \*

(a) In addition to the general prohibitions specified in § 600.725 of this chapter and § 665.15, it is unlawful for any person to do any of the following:

(1) Fish for American Samoa bottomfish MUS or ECS, or seamount groundfish MUS using gear prohibited under § 665.104.

(2) Fish for, possess, sell, offer for sale, or purchase any American Samoa bottomfish MUS in a closed fishery, in violation of § 665.102.

(b) [Reserved]

[FR Doc. 2020–25200 Filed 11–13–20; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register

Vol. 85, No. 221

Monday, November 16, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 21 CFR Part 6

### 42 CFR Part 1, 404

### 45 CFR Part 6

[Docket No. HHS-OS-2020-0012]

RIN 0991-AC24

### Securing Updated and Necessary Statutory Evaluations Timely

**AGENCY:** Department of Health and Human Services (HHS).

**ACTION:** Proposed rule; public hearing.

**SUMMARY:** This document announces a public hearing to receive information and views on the Notice of Proposed Rulemaking (NPRM) entitled "Securing Updated and Necessary Statutory Evaluations Timely."

**DATES:** November 23, 2020, 10 a.m.–2 p.m. Eastern Time (ET). The ending time of this public hearing may change based on public interest. The most up-to-date information about the public hearing will be available on the HHS.gov website at <https://www.hhs.gov/regulations/comment-on-open-rules/index.html>.

**ADDRESSES:** This meeting will be held virtually by WebEx and teleconference.

The public can join the meeting by: (Audio Portion) Calling the conference phone number +1-415-527-5035 and providing the following information:

Meeting Number (access code): 199 934 0311

Meeting Password: jB4kisMJt47

**FOR FURTHER INFORMATION CONTACT:** James Lawrence, 200 Independence Avenue, SW Room 713F, Washington, DC 20201; or by email at [reviewnprm@hhs.gov](mailto:reviewnprm@hhs.gov); or by telephone at 1-877-696-6775.

**SUPPLEMENTARY INFORMATION:** To further comply with the Regulatory Flexibility Act and certain Executive Orders, as well as to ensure its regulations have

appropriate impacts, the U.S. Department of Health and Human Services (HHS) issued a notice of proposed rulemaking (NPRM) to set expiration dates for its regulations (subject to certain exceptions), unless the Department periodically assesses the regulations to determine if they are subject to the RFA, and if they are, performs a review that satisfies the criteria in the RFA.

The NPRM was published in the **Federal Register** on November 4, 2020. See 85 FR 70096, <https://www.govinfo.gov/content/pkg/FR-2020-11-04/pdf/2020-23888.pdf>. The public comment period closes on December 4, 2020, except that portions of the proposed rule amending 42 CFR parts 400–429 and parts 475–499 are due January 4, 2021.

The public hearing will be held during the public comment period. This hearing is to provide an open forum for the presentation of information and views concerning all aspects of the NPRM by interested persons.

In preparing a final regulation, the Secretary will consider the administrative record of this hearing along with all other written comments received during the comment period specified in the NPRM. Individuals or representatives of interested organizations are invited to participate in the public hearing in accordance with the schedule and procedures set forth below. Persons who wish to participate are requested to file a notice of participation with HHS on or before November 19, 2020. The notice should be emailed to [reviewnprm@hhs.gov](mailto:reviewnprm@hhs.gov) or mailed to James Lawrence, 200 Independence Avenue SW, Room 713F, Washington, DC 20201. To ensure timely handling, any outer envelope or the subject line of an email should be clearly marked "Review NPRM Hearing." The notice of participation should contain the interested person's name, address, email address, telephone number, any business or organizational affiliation of the person desiring to make a presentation, a brief summary of the presentation, and the approximate time requested for the presentation. Groups that have similar interests should consolidate their comments as part of one presentation. Time available for the hearing will be allocated among the persons who properly file notices of participation. If time permits, interested

parties attending the hearing who did not submit notices of participation in advance will be allowed to make an oral presentation at the conclusion of the hearing.

Persons who find that there is insufficient time to submit the required information in writing may give oral notice of participation by calling James Lawrence at 1-877-696-6775, no later than November 20, 2020.

After reviewing the notices of participation and accompanying information, HHS will schedule each appearance and notify each participant by mail, email, or telephone of the time allotted to the person(s) and the approximate time the person's oral presentation is scheduled to begin.

A summary of comments and a recording of the hearing will be made available for public inspection on the HHS.gov website, <https://www.hhs.gov/>, as soon as they have been prepared.

Dated: November 10, 2020.

**Alex M. Azar II,**

Secretary, Department of Health and Human Services.

[FR Doc. 2020-25246 Filed 11-12-20; 11:15 am]

**BILLING CODE 4150-26-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 721

[EPA-HQ-OPPT-2020-0513; FRL-10016-39]

RIN 2070-AB27

### Significant New Use Rules on Certain Chemical Substances (21-1.B)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for chemical substances which are the subject of premanufacture notices (PMNs). This action would require persons to notify EPA at least 90 days before commencing manufacture (defined by statute to include import) or processing of any of these chemical substances for an activity that is designated as a significant new use by this proposed rule. This action would further require that persons not

commence manufacture or processing for the significant new use until they have submitted a Significant New Use Notice (SNUN), and EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken any risk management actions as are required as a result of that determination.

**DATES:** Comments must be received on or before December 16, 2020.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2020-0513, using the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

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

**FOR FURTHER INFORMATION CONTACT:** For technical information contact: William Wysong, New Chemicals Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-4163; email address: [wysong.william@epa.gov](mailto:wysong.william@epa.gov).

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: [TSCA-Hotline@epa.gov](mailto:TSCA-Hotline@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

###### A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, process, or use the chemical substances contained in this proposed rule. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers or processors of one or more subject chemical substances (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This action may also affect certain entities through pre-existing import

certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import provisions. This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA, which would include the SNUR requirements should these proposed rules be finalized. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, pursuant to 40 CFR 721.20, any persons who export or intend to export a chemical substance that is the subject of this proposed rule on or after December 16, 2020 are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) and must comply with the export notification requirements in 40 CFR part 707, subpart D.

###### B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit CBI to EPA through [regulations.gov](https://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

##### II. Background

###### A. What action is the Agency taking?

EPA is proposing these SNURs under TSCA section 5(a)(2) for chemical substances which are the subjects of PMNs P-18-175 and P-19-38. These proposed SNURs would require persons who intend to manufacture or process any of these chemical substances for an activity that is designated as a significant new use to notify EPA at least 90 days before commencing that activity.

The record for these proposed SNURs, identified as docket ID number EPA-HQ-OPPT-2020-0513, includes information considered by the Agency in developing these proposed SNURs.

###### B. What is the Agency's authority for taking this action?

TSCA section 5(a)(2) (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including the four TSCA section 5(a)(2) factors listed in Unit III.

###### C. Do the SNUR general provisions apply?

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. Pursuant to 40 CFR 721.1(c), persons subject to these SNURs must comply with the same SNUN requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A) (15 U.S.C. 2604(a)(1)(A)). In particular, these requirements include the information submission requirements of TSCA sections 5(b) and 5(d)(1) (15 U.S.C. 2604(b) and 2604(d)(1)), the exemptions authorized by TSCA sections 5(h)(1), 5(h)(2), 5(h)(3), and 5(h)(5) and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA must either determine that the use is not likely to present an unreasonable risk of injury under the conditions of use for the chemical substance or take such regulatory action as is associated with an alternative determination before the manufacture or processing for the significant new use can commence. If EPA determines that the chemical substance is not likely to present an unreasonable risk, EPA is required under TSCA section 5(g) to make public, and submit for publication in the **Federal Register**, a statement of EPA's findings.

##### III. Significant New Use Determination

TSCA section 5(a)(2) states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.

- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In determining what would constitute a significant new use for the chemical substances that are the subject of these SNURs, EPA considered relevant information about the toxicity of the chemical substances, and potential human exposures and environmental releases that may be associated with the substances, in the context of the four bulleted TSCA section 5(a)(2) factors listed in this unit. During its review of these chemicals, EPA identified certain conditions of use that are not intended by the submitters, but reasonably foreseen to occur. EPA is proposing to designate those reasonably foreseen conditions of use as well as certain other circumstances of use as significant new uses.

#### IV. Substances Subject to This Proposed Rule

EPA is proposing significant new use and recordkeeping requirements be added to 40 CFR part 721, subpart E for the chemical substances identified in this unit. For each chemical substance, EPA provides the following information in this unit:

- PMN number.
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service (CAS) Registry number (if assigned for non-confidential chemical identities).
- Basis for the SNUR.
- Potentially useful information.
- CFR citation assigned in the regulatory text section of these proposed rules. The regulatory text section of these proposed rules specifies the activities designated as significant new uses. Certain new uses, including production volume limits and other uses designated in the proposed rules, may be claimed as CBI.

The chemical substances that are the subject of these proposed SNURs are undergoing premanufacture review. In addition to those conditions of use intended by the submitter, EPA has identified certain other reasonably foreseen conditions of use. EPA has preliminarily determined that the chemicals under their intended conditions of use are not likely to present an unreasonable risk. However, EPA has not assessed risks associated with the reasonably foreseen conditions of use for these chemicals. EPA is proposing to designate these reasonably foreseen conditions of use and other circumstances of use as significant new uses. As a result, those significant new uses cannot occur without first going

through a separate, subsequent EPA review and determination process associated with a SNUN.

The substances subject to these proposed rules are as follows:

PMN Number: P-18-175.

*Chemical name:* Formaldehyde, polymer with 4-(1,1-dimethylethyl)phenol and phenol, Bu ether.

*CAS number:* 2215936-67-5.

*Basis for action:* The PMN states that the use of the substance will be as a can coating for food and non-food contact. Based on the physical/chemical properties of the PMN substance and Structure Activity Relationships (SAR) analysis of test data on analogous substances, EPA has identified concerns for aquatic toxicity, serious eye damage, skin irritation, and specific target organ toxicity if the chemical is not used following the limitations noted. This proposed SNUR designates the following as “significant new uses” requiring further review by EPA:

- Release of the PMN substance resulting in surface water concentrations that exceed 1 ppb.

*Potentially useful information:* EPA has determined that certain information about the environmental and health effects of the PMN substance may be potentially useful if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of aquatic toxicity, eye irritation/corrosion, skin irritation/corrosion, and specific target organ toxicity testing would help characterize the potential environmental and health effects of the PMN substance.

*CFR citation:* 40 CFR 721.11566.

PMN Number: P-19-38.

*Chemical name:* Fatty acids, coco, iso-Bu esters.

*CAS number:* 91697-43-7.

*Basis for action:* The PMN states that the use of the substance will be as an ink carrier for the ceramic industries. Based on the physical/chemical properties of the PMN substance and SAR analysis of test data on analogous substances, EPA has identified concerns for aquatic toxicity if the chemical is not used following the limitations noted. This proposed SNUR designates the following as “significant new uses” requiring further review by EPA:

- Release of the PMN substance resulting in surface water concentrations that exceed 1 ppb.

*Potentially useful information:* EPA has determined that certain information about the environmental effects of the

PMN substance may be potentially useful if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of aquatic toxicity testing would help characterize the potential environmental effects of the PMN substance.

*CFR citation:* 40 CFR 721.11567.

#### V. Rationale and Objectives of the Proposed Rule

##### A. Rationale

During review of the PMNs submitted for the chemical substances that are the subject of these proposed SNURs and as further discussed in Unit IV., EPA identified certain other reasonably foreseen conditions of use, in addition to those conditions of use intended by the submitter. EPA has preliminarily determined that the chemical under the intended conditions of use is not likely to present an unreasonable risk. However, EPA has not assessed risks associated with the reasonably foreseen conditions of use. EPA is proposing to designate these conditions of use as well as certain other circumstances of use as significant new uses. As a result, those significant new uses cannot occur without going through a separate, subsequent EPA review and determination process associated with a SNUN.

##### B. Objectives

EPA is proposing these SNURs because the Agency wants:

- To have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing or processing a listed chemical substance for the described significant new use.
- To be obligated to make a determination under TSCA section 5(a)(3) regarding the use described in the SNUN, under the conditions of use. The Agency will either determine under TSCA section 5(a)(3)(C) that the chemical, under the conditions of use, is not likely to present an unreasonable risk, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator under the conditions of use, or make a determination under TSCA section 5(a)(3)(A) or (B) and take the required regulatory action associated with the determination, before manufacture or processing for the significant new use of the chemical substance can occur.
- To be able to complete its review and determination on each of the PMN substances, while deferring analysis on

the significant new uses proposed in these rules unless and until the Agency receives a SNUN.

Issuance of a proposed SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the internet at <https://www.epa.gov/tscainventory>.

#### VI. Applicability of the Proposed Rules to Uses Occurring Before the Effective Date of the Final Rule

To establish a significant new use, EPA must determine that the use is not ongoing. The chemical substances subject to this proposed rule were undergoing premanufacture review at the time of signature of this proposed rule and were not on the TSCA Inventory. In cases where EPA has not received a notice of commencement (NOC) and the chemical substance has not been added to the TSCA Inventory, no person may commence such activities without first submitting a PMN. Therefore, for the chemical substances subject to these proposed SNURs, EPA concludes that the proposed significant new uses are not ongoing.

EPA designates November 5, 2020 (date of web posting of this proposed rule) as the cutoff date for determining whether the new use is ongoing. The objective of EPA's approach is to ensure that a person cannot defeat a SNUR by initiating a significant new use before the effective date of the final rule.

Persons who begin commercial manufacture or processing of the chemical substances for a significant new use identified on or after that date would have to cease any such activity upon the effective date of the final rule. To resume their activities, these persons would have to first comply with all applicable SNUR notification requirements and EPA would have to take action under section 5 allowing manufacture or processing to proceed. In developing this proposed rule, EPA has recognized that, given EPA's general practice of posting proposed rules on its website a week or more in advance of **Federal Register** publication, this objective could be thwarted even before **Federal Register** publication of the proposed rule.

#### VII. Development and Submission of Information

EPA recognizes that TSCA section 5 does not require development of any particular new information (e.g., generating test data) before submission of a SNUN. There is an exception: If a

person is required to submit information for a chemical substance pursuant to a rule, order or consent agreement under TSCA section 4 (15 U.S.C. 2603), then TSCA section 5(b)(1)(A) (15 U.S.C. 2604(b)(1)(A)) requires such information to be submitted to EPA at the time of submission of the SNUN.

In the absence of a rule, order, or consent agreement under TSCA section 4 covering the chemical substance, persons are required only to submit information in their possession or control and to describe any other information known to or reasonably ascertainable by them (see 40 CFR 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. Unit IV. lists potentially useful information for all SNURs listed here. Descriptions are provided for informational purposes. The potentially useful information identified in Unit IV. will be useful to EPA's evaluation in the event that someone submits a SNUN for the significant new use. Companies who are considering submitting a SNUN are encouraged, but not required, to develop the information on the substance, which may assist with EPA's analysis of the SNUN.

EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. Furthermore, pursuant to TSCA section 4(h), which pertains to reduction of testing in vertebrate animals, EPA encourages consultation with the Agency on the use of alternative test methods and strategies (also called New Approach Methodologies, or NAMs), if available, to generate the recommended test data. EPA encourages dialog with Agency representatives to help determine how best the submitter can meet both the data needs and the objective of TSCA section 4(h).

The potentially useful information described in Unit IV. may not be the only means of providing information to evaluate the chemical substance associated with the significant new uses. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA sections 5(e) or 5(f). EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests. SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.

#### VIII. SNUN Submissions

According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notification requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in 40 CFR 720.40 and 721.25. E-PMN software is available electronically at <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca>.

#### IX. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers and processors of the chemical substances subject to this proposed rule. EPA's complete economic analysis is available in the docket for this rulemaking.

#### X. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations-and-executive-orders>.

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

This action proposes to establish SNURs for new chemical substances that were the subject of PMNs. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

##### B. Paperwork Reduction Act (PRA)

According to the PRA, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action does not impose any burden

requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Regulatory Support Division, Office of Mission Support (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

### C. Regulatory Flexibility Act (RFA)

Pursuant to section 605(b) of the RFA, 5 U.S.C. 601 *et seq.*, I hereby certify that promulgation of this proposed SNUR would not have a significant adverse economic impact on a substantial number of small entities. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a “significant new use.” Because these uses are “new,” based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA’s experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a small number of notices per year. For example, the number of SNUNs received was seven in Federal fiscal year (FY) 2013, 13 in FY2014, six in FY2015, 12 in FY2016, 13 in FY2017, and 11 in FY2018, only a fraction of these were from small businesses. In addition, the Agency currently offers relief to qualifying small businesses by reducing the SNUN submission fee from \$16,000 to \$2,800. This lower fee reduces the total reporting and recordkeeping of cost of submitting a SNUN to about \$10,116 for qualifying small firms. Therefore, the potential economic impacts of complying with this proposed SNUR are not expected to

be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

### D. Unfunded Mandates Reform Act (UMRA)

Based on EPA’s experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by this proposed rule. As such, EPA has determined that this proposed rule does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of UMRA sections 202, 203, 204, or 205 (2 U.S.C. 1531–1538 *et seq.*).

### E. Executive Order 13132: Federalism

This action will not have federalism implications because it is not expected to have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action will not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes, significantly or uniquely affect the communities of Indian Tribal governments, and does not involve or impose any requirements that affect Indian Tribes, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000).

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

### H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

### I. National Technology Transfer and Advancement Act (NTTAA)

In addition, since this action does not involve any technical standards, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

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

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898 (59 FR 7629, February 16, 1994).

### List of Subjects in 40 CFR Part 721 Environmental Protection, Chemicals, Hazardous Substances, Reporting and Recordkeeping Requirements.

Dated: October 30, 2020.

**Tala Henry,**

*Deputy Director, Office of Pollution Prevention and Toxics.*

Therefore, for the reasons stated in the preamble, EPA proposes to amend 40 CFR part 721 as follows:

### PART 721—SIGNIFICANT NEW USES OF CHEMICAL SUBSTANCES

■ 1. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, and 2625(c).

■ 2. Add §§ 721.11566 and 721.11567 to subpart E to read as follows:

#### Subpart E—Significant New Uses for Specific Chemical Substances

\* \* \* \* \*

#### § 721.11566 Formaldehyde, polymer with 4-(1,1-dimethylethyl)phenol and phenol, Bu ether.

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as formaldehyde, polymer with 4-(1,1-dimethylethyl)phenol and phenol, Bu ether (PMN P–18–175, CAS No. 2215936–67–5) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.



(2) The significant new uses are:

(i) *Release to water*. Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N = 1.

(ii) [Reserved]

(b) *Specific requirements*. The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) Recordkeeping. Recordkeeping requirements as specified in § 721.125(a) through (c), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements*. The provisions of § 721.185 apply to this section.

#### § 721.11567 Fatty acids, coco, iso-Bu esters.

(a) *Chemical substance and significant new uses subject to reporting*.

(1) The chemical substance identified as fatty acids, coco, iso-Bu esters (PMN P-19-38, CAS No. 91697-43-7) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water*. Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N = 1.

(ii) [Reserved]

(b) *Specific requirements*. The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) Recordkeeping. Recordkeeping requirements as specified in § 721.125(a) through (c), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements*. The provisions of § 721.185 apply to this section.

[FR Doc. 2020-25049 Filed 11-13-20; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R4-ES-2019-0018; FF09E22000 FXES1113090FEDR 212]

RIN 1018-BE09

#### Endangered and Threatened Wildlife and Plants; Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With a Section 4(d) Rule

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; announcement of a public informational meeting and public hearing.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), recently proposed to reclassify the endangered red-cockaded woodpecker (*Dryobates borealis*) as a threatened species with a rule issued under section 4(d) of the Endangered Species Act of 1973 (Act), as amended. We announced a 60-day public comment period on the proposed rule, ending December 7, 2020. We now announce a public informational meeting and public hearing on the proposed rule.

#### DATES:

*Public informational meeting and public hearing:* On December 1, 2020, we will hold a public informational meeting from 6 to 7:30 p.m., Eastern Time, followed by a public hearing from 7:30 to 9 p.m., Eastern Time.

*Comment submission:* We will accept written comments received or postmarked on or before December 7, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

**ADDRESSES: Availability of documents:** You may obtain copies of the October 8, 2020, proposed rule and associated documents on the internet at <http://www.regulations.gov> under Docket No. FWS-R4-ES-2019-0018.

*Public informational meeting and public hearing:* The public informational meeting and the public hearing will be held virtually using the Zoom platform. See Public Hearing, below, for more information.

*Comment submission:* You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R4-ES-2019-0018, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R4-ES-2019-0018, U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally

means that we will post any personal information you provide us (see Public Comments, below, for more information).

#### FOR FURTHER INFORMATION CONTACT:

Aaron Valenta, Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, Southeast Regional Office, 1875 Century Boulevard, Atlanta, GA 30345; telephone 404-679-4144. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Background

On October 8, 2020, we published a proposed rule (85 FR 63474) to reclassify the red-cockaded woodpecker from endangered to threatened (*i.e.*, “downlist” the species) under the Act (16 U.S.C. 1531 *et seq.*). The proposed rule established a 60-day public comment period, ending December 7, 2020. We received a request for a public hearing. Therefore, we are announcing a public informational meeting and a public hearing to allow the public an additional opportunity to provide comments on the proposed rule.

For a description of previous Federal actions concerning the red-cockaded woodpecker and information on the types of comments that would be helpful to us in promulgating this rulemaking action, please refer to the October 8, 2020, proposed rule (85 FR 63474).

##### Public Hearing

We have scheduled a public informational meeting and public hearing on our October 8, 2020, proposed rule to reclassify the red-cockaded woodpecker (85 FR 63474). We will hold the public informational meeting and public hearing on the date and at the times listed above under *Public informational meeting and public hearing* in **DATES**. We are holding the public informational meeting and public hearing via the Zoom online video platform and via teleconference so that participants can attend remotely. For security purposes, registration is required. To listen and view the meeting and hearing via Zoom, listen to the meeting and hearing by telephone, or provide oral public comments at the public hearing by Zoom or telephone, you must register. For information on how to register, or if you encounter problems joining Zoom the day of the meeting, visit <https://www.fws.gov/southeast/wildlife/birds/red-cockaded-woodpecker/#recovery-plan-section>. Registrants will receive the Zoom link

and the telephone number for the public informational meeting and public hearing. If applicable, interested members of the public not familiar with the Zoom platform should view the Zoom video tutorials (<https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials>) prior to the public informational meeting and public hearing.

The public hearing will provide interested parties an opportunity to present verbal testimony (formal, oral comments) regarding the October 8, 2020, proposed rule to reclassify the red-cockaded woodpecker (85 FR 63474). While the public informational meeting will be an opportunity for dialogue with the Service, the public hearing is not: It is a forum for accepting formal verbal testimony. In the event there is a large attendance, the time allotted for oral statements may be limited. Therefore, anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a prepared written copy of their statement to us through the Federal eRulemaking Portal, or U.S. mail (see **ADDRESSES**, above). There are no limits on the length of written comments submitted to us. Anyone wishing to make an oral statement at the public hearing must register before the hearing (<https://www.fws.gov/southeast/wildlife/birds/red-cockaded-woodpecker/#recovery-plan-section/>). The use of a virtual public hearing is consistent with our regulations at 50 CFR 424.16(c)(3).

#### Reasonable Accommodation

The Service is committed to providing access to the public informational meeting and public hearing for all participants. Closed captioning will be available during the public informational meeting and public hearing. Further, a full audio and video recording and transcript of the public hearing will be posted online at <https://www.fws.gov/southeast/wildlife/birds/red-cockaded-woodpecker/#recovery-plan-section/> after the hearing. Participants will also have access to live audio during the public informational meeting and public hearing via their telephone or computer speakers. Persons with disabilities requiring reasonable accommodations to participate in the meeting and/or hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** at least 5 business days prior to the date of the meeting and hearing to help ensure availability. An accessible version of the Service's public informational meeting presentation will also be posted online

at <https://www.fws.gov/southeast/wildlife/birds/red-cockaded-woodpecker/#recovery-plan-section> prior to the meeting and hearing (see **DATES**, above). See <https://www.fws.gov/southeast/wildlife/birds/red-cockaded-woodpecker/#recovery-plan-section> for more information about reasonable accommodation.

#### Public Comments

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via hard copy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>. Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on <http://www.regulations.gov>.

#### Authors

The primary authors of this document are the Ecological Services staff of the Southeast Regional Office, U.S. Fish and Wildlife Service.

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

#### Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–25280 Filed 11–13–20; 8:45 am]

**BILLING CODE 4333–15–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 201102–0285]

RIN 0648–BJ93

### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Regulatory Amendment 34

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes to implement management measures described in Regulatory Amendment 34 to the Fishery Management Plan (FMP) for the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). If implemented, this proposed rule would create 34 special management zones (SMZs) around artificial reefs in the exclusive economic zone (EEZ) off North Carolina and South Carolina. The purpose of this proposed rule is to designate new SMZs and to restrict fishing gear with greater potential to result in high exploitation rates. The restrictions are expected to reduce adverse effects to snapper-grouper species and enhance recreational fishing opportunities at these SMZs.

**DATES:** Written comments on the proposed rule must be received by December 16, 2020.

**ADDRESSES:** You may submit comments on the proposed rule, identified by “NOAA–NMFS–2020–0123,” by either of the following methods:

- **Electronic submission:** Submit all electronic comments via the Federal eRulemaking Portal. Go to <http://www.regulations.gov/docket?D=NOAA-NMFS-2020-0123>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to Rick DeVictor, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

**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 a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://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 required fields if you wish to remain anonymous).

Electronic copies of Regulatory Amendment 34 to the Snapper-Grouper FMP (Regulatory Amendment 34) may be obtained from [www.regulations.gov](http://www.regulations.gov) or the Southeast Regional Office website at <https://www.fisheries.noaa.gov/action/regulatory-amendment-34-special-management-zones-smz>. Regulatory Amendment 34 includes an environmental assessment, regulatory

impact review, and Regulatory Flexibility Analysis (RFA).

**FOR FURTHER INFORMATION CONTACT:** Rick DeVictor, NMFS Southeast Regional Office, telephone: 727-824-5305, or email: [rick.devictor@noaa.gov](mailto:rick.devictor@noaa.gov).

**SUPPLEMENTARY INFORMATION:** NMFS and the Council manage the snapper-grouper fishery under the Snapper-Grouper FMP. The Snapper-Grouper FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*).

### Background

The Council specified the SMZ designation process in 1983, and since that time SMZs have been designated in the EEZ off South Carolina, Georgia, and Florida and as recently as in 2000. There are no SMZs designated off North Carolina currently. Twenty-eight artificial reef sites in the EEZ off South Carolina have been designated as SMZs since the 1980s. The purpose of the SMZ designation process, and the subsequent specification of SMZs, is to protect snapper-grouper populations at the relatively small artificial reef sites in the EEZ and to create fishing opportunities that would not otherwise exist without their designation. Prior to the SMZ designation process, for example, black sea bass pots were used by commercial fishermen to efficiently remove black sea bass from artificial reefs off South Carolina. At the time of the SMZ designation process, the Council determined that because artificial reefs sites are small in area (because of the limited amount of suitable reef-building material), the sites are vulnerable to overexploitation by more efficient fishing gear that has the potential to result in localized depletion. In addition, the Council wanted to enhance fishing opportunities for the recreational sector through the designation of SMZs. The Council has determined that the harvest and gear restrictions will increase the abundance and size of snapper-grouper species at the sites, thereby increasing available catch for fishermen, such as those fishing under recreational harvest limits.

The North Carolina Division of Marine Fisheries (NCDMF) and the South Carolina Department of Natural Resources (SCDNR) requested that the Council designate artificial reefs located in the EEZ off their respective coasts as SMZs. Following a review of the requests, the Council developed

Regulatory Amendment 34 that would create 34 new SMZs (30 off North Carolina and 4 off South Carolina). The Council determined that the proposed actions in Regulatory Amendment 34 would enhance the fishing experience at the artificial reef sites for recreational fishermen and that would further promote the original intent of North Carolina and South Carolina for placing the artificial reefs at the sites. The purpose of Regulatory Amendment 34 and this proposed rule is to designate these sites as SMZs and to restrict fishing gear that could result in high exploitation rates to reduce potential adverse biological effects to federally managed snapper-grouper species and enhance recreational fishing opportunities at these sites.

### Management Measures Contained in this Proposed Rule

This proposed rule would create SMZs in the EEZ off North Carolina and South Carolina. Authorized gear and harvest levels for snapper-grouper species at these new SMZs would be specified to reduce potential adverse biological effects and enhance recreational fishing opportunities.

#### SMZs Off North Carolina

There are currently no artificial reefs in the EEZ off North Carolina designated as SMZs. The proposed rule would designate 30 SMZs off North Carolina in the EEZ. The NCDMF requested that the Council designate 30 artificial reefs located in the EEZ off North Carolina as SMZs in a letter dated March 12, 2019. The 30 sites are existing artificial reefs permitted by the Army Corps of Engineers. The proposed SMZs would match the sizes of the permitted artificial reefs, and would range from 0.24 to 0.76 square nautical miles or 0.25 to 1.01 square miles (0.82 to 2.6 square km). The NCDMF letter also requested that within the SMZs all harvest of snapper-grouper species would be allowed only with handline, rod and reel, and spear. Further, in the proposed SMZs off North Carolina, all commercial and recreational harvest of snapper-grouper species by spear would be limited to the applicable, existing recreational bag limits, as requested by the NCDMF.

#### SMZs Off South Carolina

There are currently 28 artificial reef sites in the EEZ off South Carolina that the Council has designated as SMZs. This proposed rule would designate four additional SMZs off the coast of South Carolina in the EEZ. The SCDNR requested that the Council designate additional artificial reefs located in the

EEZ off the South Carolina as SMZs in a letter dated March 1, 2019. The four additional sites are existing artificial reefs permitted by the Army Corps of Engineers. The proposed SMZs would match the sizes of the permitted artificial reefs, and would range from 0.031 to 0.25 square nautical miles or 0.041 to 0.33 square miles (0.11 to 0.86 square km). The SCDNR letter also requested that within the SMZs all harvest of snapper-grouper species would be allowed only with handline, rod and reel, and spear in the SMZs. Further, in the proposed SMZs off South Carolina, all commercial and recreational harvest of snapper-grouper species would be limited to the applicable, existing recreational bag limits, as requested by the SCDNR. If implemented, these restrictions would match the regulations in the current SMZs off South Carolina.

### Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Regulatory Amendment 34, the Snapper-Grouper FMP, the Magnuson-Stevens Act, and other applicable laws, 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 proposed 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 certification is as follows. A copy of the full analysis is available from NMFS (see **ADDRESSES**).

A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble.

The Magnuson-Stevens Act provides the statutory basis for this proposed rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting or record keeping compliance requirements are introduced in this proposed rule.

This proposed rule directly affects small businesses that operate commercial fishing vessels that harvest

snapper-grouper species within the 30 proposed SMZs in the EEZ off North Carolina and the 4 proposed SMZs in the EEZ off South Carolina.

Any commercial fishing vessel that harvests and sells snapper-grouper from the South Atlantic EEZ must have a valid Federal commercial permit for South Atlantic snapper-grouper. It is expected that any of the federally permitted vessels that may harvest snapper-grouper in any of the proposed SMZs land their catch in North Carolina or South Carolina.

From 2014 through 2018, an annual average of 173 federally permitted vessels reported landing snapper-grouper in the Carolinas: 120 in North Carolina and 53 in South Carolina. Average annual dockside revenue of the 120 permitted vessels that landed snapper-grouper in North Carolina was \$42,619 (2018 dollars), and average annual dockside revenue of the 53 permitted vessels that landed snapper-grouper in South Carolina was \$72,259 (2018 dollars). Those annual averages represent the baseline revenues of the directly affected vessels. An estimated 128 businesses operate these 173 federally permitted vessels.

All of the businesses that operate the above federally permitted vessels are expected to operate primarily in the commercial fishing industry (NAICS code 11411). For RFA purposes, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (50 CFR 200.2). A business primarily involved in the commercial fishing industry is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and its combined annual receipts are not in excess of \$11 million for all of its affiliated operations worldwide. Examination of annual dockside revenues of the vessels owned by the businesses indicates the total annual revenue of each business to be less than \$11 million. Consequently, all of the estimated 128 businesses directly affected by the proposed action are classified as small.

The proposed rule would designate 30 SMZs in the EEZ off North Carolina and 4 SMZs in the EEZ off South Carolina. Within the proposed SMZs, all harvest of snapper-grouper species would only be allowed with handline, rod and reel, and spear. Within the proposed SMZs off North Carolina, all harvest by spear would be limited to the applicable recreational bag limit, whereas within

the proposed SMZs off South Carolina, all harvest would be limited to the applicable recreational bag limit.

For the purpose of monitoring landings through the Coastal Logbook Program, NMFS divides the South Atlantic into statistical grids that follow lines of latitude and longitude. The maximum area of a reporting grid in the South Atlantic EEZ is 3,600 square nautical miles or 4,767 square miles (12,347.6 square km) while grids closer to shore cover less area due to truncation of the water area by coastline.

The proposed 30 SMZs in the EEZ off the North Carolina lie within seven statistical reporting grids and collectively those SMZs would cover 9 square nautical miles or 11.9 square miles (30.9 square km). That combined area represents approximately 0.25 percent of the combined areas of the seven statistical grids. The four proposed SMZs in the EEZ off South Carolina lie within two statistical reporting grids, collectively cover 0.45 square nautical miles or 0.6 square miles (1.5 square km), and represent approximately 0.0125 percent of the combined area of the two statistical reporting grids. Because of their very small size, there is insufficient information to determine precise numbers of landings of snapper-grouper that are harvested from the proposed SMZs.

If the proportion of the area covered by the 30 proposed SMZs off North Carolina (0.25 percent) is consistent with the proportion of snapper-grouper landings in North Carolina, then on average 2,637 lb (1,196.1 kg) gutted weight of snapper-grouper with a dockside value of \$9,223 (2018 dollars) are harvested from the 30 proposed SMZs annually. When divided across the 120 permitted vessels that landed snapper-grouper annually in North Carolina, the 30 proposed SMZs would reduce annual landings by 22 lb (9.9 kg) gutted weight and reduce annual dockside revenue by \$77 (2018 dollars). That reduction represents 0.18 percent of the average annual revenue of those 120 permitted vessels.

If the proportion of the area covered by the four proposed SMZs off South Carolina (0.0125 percent) is consistent with the proportion of snapper-grouper landings in South Carolina, then on average 111 lb (50.3 kg) gutted weight of snapper-grouper with a dockside value of \$472 (2018 dollars) is harvested annually from the combined four proposed SMZs. When divided across

the 53 permitted vessels that annually landed snapper-grouper in South Carolina, the four proposed SMZs would reduce annual landings by 2 lb (0.9 kg) gutted weight and annual dockside revenue by \$9 (2018 dollars). That reduction represents 0.012 percent of the average annual revenue of those 53 vessels.

From those figures and percentages, it is expected that this proposed rule would not have a significant economic impact on the average annual 128 commercial fishing businesses and their combined 173 federally permitted fishing vessels that harvest snapper-grouper from the South Atlantic EEZ and make their landings in North Carolina and South Carolina. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

#### List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Grouper, Snapper, South Atlantic.

Dated: November 2, 2020.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

#### PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.182, add paragraphs (e) and (f) to read as follows:

#### § 622.182 Gear-restricted areas.

\* \* \* \* \*

(e) *SMZs off North Carolina.* (1) The center of each SMZ in Table 3 to this paragraph (e) is located at the given point with a radius extending the applicable distance in every direction laterally from that point to form a circle around the center point.

(2) Harvest of South Atlantic snapper-grouper while in the SMZs in this paragraph (e) is permitted only by handline, rod and reel, and spearfishing gear. All harvest of South Atlantic snapper-grouper by spearfishing gear in the SMZs in this paragraph (e) is limited to the applicable recreational bag and possession limits in § 622.187.

TABLE 3 TO PARAGRAPH (e)

Reef name	North lat.	West long.	Radius in ft (m)
AR-130	36°00.296'	75°31.957'	1,500 (457)
AR-140	35°56.718'	75°31.965'	1,500 (457)
AR-145	35°54.017'	75°23.883'	1,500 (457)
AR-220	35°08.117'	75°40.633'	3,000 (914)
AR-225	35°06.768'	75°39.322'	1,500 (457)
AR-230	35°06.133'	75°42.933'	1,500 (457)
AR-250	34°56.900'	75°54.860'	1,500 (457)
AR-255	34°55.483'	75°57.910'	1,500 (457)
AR-285	34°33.383'	76°26.350'	1,500 (457)
AR-300	34°18.517'	76°24.133'	1,500 (457)
AR-302	34°10.265'	76°13.703'	1,500 (457)
AR-305	34°16.683'	76°38.650'	1,500 (457)
AR-330	34°33.634'	76°51.267'	3,000 (914)
AR-340	34°34.319'	76°58.345'	1,500 (457)
AR-345	34°32.266'	76°58.508'	1,500 (457)
AR-355	34°21.318'	77°19.877'	1,500 (457)
AR-362	34°15.657'	77°30.392'	1,500 (457)
AR-366	34°12.950'	77°25.250'	1,500 (457)
AR-368	34°09.514'	77°25.782'	1,500 (457)
AR-372	34°06.295'	77°44.917'	1,500 (457)
AR-376	34°03.283'	77°39.633'	1,500 (457)
AR-382	33°58.581'	77°41.172'	1,500 (457)
AR-386	33°57.517'	77°33.400'	1,500 (457)
AR-400	33°29.267'	77°35.227'	1,500 (457)
AR-420	33°51.050'	78°06.710'	1,500 (457)
AR-440	33°49.800'	78°13.083'	1,500 (457)
AR-445	33°44.783'	78°14.100'	1,500 (457)
AR-455	33°47.033'	78°17.883'	1,500 (457)
AR-460	33°50.089'	78°22.022'	1,500 (457)
AR-465	33°23.423'	78°11.052'	1,500 (457)

(f) *Additional SMZs off South Carolina.* (1) The center of each SMZ in Table 4 to this paragraph (f) is located at the given point with a radius extending the applicable distance in every direction laterally from that point to form a circle around the center point.

(2) Harvest of South Atlantic snapper-grouper while in the SMZs in this

paragraph (f) is permitted only by handline, rod and reel, and spearfishing gear (excludes a powerhead). All harvest of South Atlantic snapper-grouper by the allowable gear in the SMZs in this paragraph (f) is limited to the applicable recreational bag and possession limits in § 622.187.

(3) *PA-04—Ron McManus Memorial Reef.* This SMZ is bounded by lines connecting the following corner points: northwest corner point at 33°46.400' N, 78°36.200' W; northeast corner point at 33°46.400' N, 78°35.600' W; southeast corner point at 33°45.900' N, 78°35.600' W; and southwest corner point at 33°45.900' N, 78°36.200' W.

TABLE 4 TO PARAGRAPH (f)

Reef name	North Lat.	West Long.	Radius in ft (m)
PA-07 Pop Nash	33°34.510'	78°51.000'	600 (183)
PA-28 Lowcountry Anglers	32°34.300'	79°55.100'	600 (183)
PA-34 CCA-McClellanville	32°51.800'	79°22.500'	600 (183)

# Notices

Federal Register

Vol. 85, No. 221

Monday, November 16, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

November 10, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by December 16, 2020 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

### Food and Nutrition Service

*Title:* FNS Information Collection Needs Due to COVID-19.

*OMB Control Number:* 0584-0654.

*Summary of Collection:* As the Food and Nutrition Service (FNS) is responding to the COVID-19 Coronavirus pandemic (The Families First Coronavirus Recovery Act of 2020 (Pub. L. 116-127), it is implementing a number of waivers and program adjustments to ensure Americans in need can access nutrition assistance during the crisis while maintaining recommended social distancing practices. This extension covers burden associated with waivers and reporting required by FFCRA.

*Need and Use of the Information:* The information enables the Food and Nutrition Service to examine waiver applications and provide reporting data required by the Families First Coronavirus Recovery Act (FFCRA).

*Description of Respondents:* State, Local, or Tribal Government.

*Number of Respondents:* 2,066.

*Frequency of Responses:* Reporting: On occasion; Weekly.

*Total Burden Hours:* 19,890.

### Ruth Brown,

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2020-25232 Filed 11-13-20; 8:45 am]

**BILLING CODE 3410-30-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Forest Service Manual (FSM) 3800, Zero Code; State and Private Forestry Landscape Scale Restoration Program

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of availability for public comment.

**SUMMARY:** The U.S. Department of Agriculture (USDA), United States Forest Service (Agency), is issuing a proposed directive for the Agency's State and Private Forestry Landscape Scale Restoration (LSR) Program. The Landscape Scale Restoration Program (LSR) is a USDA, Forest Service State and Private Forestry (S&PF) competitive grant program that promotes

collaborative, science-based restoration of priority forest landscapes.

**DATES:** Comments must be received, in writing, on or before December 16, 2020.

**ADDRESSES:** Comments may be submitted electronically to <https://cara.ecosystem-management.org/Public/CommentInput?project=ORMS-2600>. Written comments may be mailed to Steven Koehn, Director of Cooperative Forestry, State and Private Forestry, 1400 Independence Avenue SW, Washington, DC 20250-1124. All timely received comments, including names and addresses, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received at <https://cara.ecosystem-management.org/Public/ReadingRoom?project=ORMS-2600>.

**FOR FURTHER INFORMATION CONTACT:** Margaret Haines, State and Private Forestry, National Program Specialist, 201 14th Street SW, Washington, DC 20250 (email: [margaret.haines@usda.gov](mailto:margaret.haines@usda.gov); phone: 202-384-7192). Additional information about the Landscape Scale Restoration Program may be obtained on the internet at <https://www.fs.usda.gov/managing-land/private-land/landscape-scale-restoration>.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** This proposed directive would set forth direction for the State and Private Forestry Landscape Scale Restoration Program and would implement State and Private Forestry (S&PF) Landscape Scale Restoration (LSR) Program as added by section 8102 of the Agriculture Improvement Act of 2018 (Pub. L. 115-334 (December 20, 2018)).

This manual is a new addition to the 3000 State and Private Forestry series and sets forth policy, responsibilities, and programmatic direction for the Landscape Scale Restoration Program. The Forest Service is seeking public comment on all content within the proposed manual. Comment is also invited on the sufficiency of the proposed manual in meeting its stated objectives, ways to enhance the utility and clarity of information within the

manual, or ways to streamline processes outlined in the text.

Forest Service National Environmental Policy Act (NEPA) procedures exclude from documentation in an environmental assessment or impact statement “rules, regulations, or policies to establish servicewide administrative procedures, program processes, or instructions.” 36 CFR 220.6(d)(2). The Agency’s conclusion is that these proposed directives fall within this category of actions and that no extraordinary circumstances exist as currently defined that require preparation of an environmental impact assessment or an environmental impact statement.

The Forest Service has also determined that the changes to the manual formulate standards, criterion, or guidelines applicable to a Forest Service program and are therefore publishing the proposed manual for public comment in accordance with 36 CFR part 216. The Forest Service is seeking public comment on the proposed directives, including the sufficiency of the proposed directives in meeting its stated objectives, ways to enhance the utility and clarity of information within the direction, or ways to streamline processes outlined.

After the public comment period closes, the Forest Service will consider timely comments that are within the scope of the proposed directives in the development of the final directives. A notice of the final directive, including a response to timely comments, will be posted on the Forest Service’s web page at <https://www.fs.usda.gov/about-agency/regulations-policies>.

**John Crockett,**

*Associate Deputy Chief, State and Private Forestry.*

[FR Doc. 2020–25233 Filed 11–13–20; 8:45 am]

**BILLING CODE 3411–15–P**

**COMMISSION ON CIVIL RIGHTS**

**Notice of Public Meeting of the Washington Advisory Committee**

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meetings.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Washington Advisory Committee (Committee) will hold a series of meetings via teleconference on Monday, December 7 and Wednesday, December

16, 2020 from 1:30 p.m.–3:00 p.m. Pacific Time. The purpose of these meetings is for the Committee to review their project proposal on excessive use of force.

**DATES:** These meetings will be held on:

- Monday, December 7, 2020 from 1:30 p.m.–3:00 p.m. Pacific Time.
- Wednesday, December 16, 2020 from 1:30 p.m.–3:00 p.m. Pacific Time.

**ADDRESSES:** December 7th Public Webex Registration Link: <https://tinyurl.com/y2k5drto>; December 16th Public Webex Registration Link: <https://tinyurl.com/y5fqdh57>.

**FOR FURTHER INFORMATION CONTACT:**

Brooke Peery, Designated Federal Officer (DFO), at [bpeery@usccr.gov](mailto:bpeery@usccr.gov), or by phone at (202) 701–1376.

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

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 N Los Angeles St., Suite 2010, Los Angeles, CA 90012 or email Brooke Peery at [bpeery@usccr.gov](mailto:bpeery@usccr.gov).

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: <https://www.facadatabase.gov/FACA/FACA/PublicViewCommitteeDetails?id=a10t0000001gzkZAAQ>.

Please click on the “Meeting Details” and “Documents” links. Persons interested in the work of this Committee are also directed to the Commission’s

website, <http://www.usccr.gov>, or may contact the Regional Programs Unit office at the above email or street address.

**Agenda**

- I. Welcome & Introductions
- II. Approval of Minutes
- III. Discussion of Project Proposal Draft
- IV. Public Comment
- V. Adjournment

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2020–25234 Filed 11–13–20; 8:45 am]

**BILLING CODE P**

**DEPARTMENT OF COMMERCE**

**Foreign-Trade Zones Board**

[B–68–2020]

**Foreign-Trade Zone (FTZ) 279— Houma, Louisiana; Notification of Proposed Production Activity; Deepwater Riser Services (Offshore Drilling Riser Systems and Equipment), Houma, Louisiana**

Deepwater Riser Services (Deepwater Riser) submitted a notification of proposed production activity to the FTZ Board for its facility in Houma, Louisiana. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on October 22, 2020.

The Deepwater Riser facility is located within FTZ 279. The facility will be used for the production of offshore drilling riser systems and drilling-related equipment. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials/components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Deepwater Riser from customs duty payments on the foreign-status materials/components used in export production. On its domestic sales, for the foreign-status materials/components noted below, Deepwater Riser would be able to choose the duty rates during customs entry procedures that apply to riser tools, drilling risers, telescopic joints, and pressure testing equipment (duty-free). Deepwater Riser would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The materials/components sourced from abroad include: Drill riser

buoyancy elements; rubber components (seals; O-rings; composite sheets); anodes; riser tool components (elastomers; test plugs; cylinders); riser telescopic joint components (packers; sleeves); riser fins; Kevlar® straps for fins; riser joint piping end protectors; stainless steel fasteners (bolts and screws); carbon steel components (nuts; lock washers; washers); riser fins bolt tensioners; hydraulic pipe receptacles; stainless steel hydraulic pipe; carbon steel receptacles (choke and kill line; booster); riser clip connectors; steel pins for peripheral line pipe fittings; drilling riser pipe (welded carbon steel; seamless carbon steel; stainless steel); and, welding wire rods (duty rate ranges from duty-free to 9.0%). The request indicates that certain materials/ components are subject to duties under Section 232 of the Trade Expansion Act of 1962 (Section 232) or Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 232 and 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](mailto:ftz@trade.gov). The closing period for their receipt is December 28, 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](http://www.trade.gov/ftz).

For further information, contact Juanita Chen at [juanita.chen@trade.gov](mailto:juanita.chen@trade.gov) or 202-482-1378.

Dated: November 9, 2020.

**Andrew McGilvray,**  
Executive Secretary.

[FR Doc. 2020-25197 Filed 11-13-20; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[B-45-2020]

#### Foreign-Trade Zone (FTZ) 26—Atlanta, Georgia; Authorization of Production Activity; Ricoh Electronics, Inc. (Toner Products, Thermal Paper and Film); Lawrenceville and Buford, Georgia

On July 13, 2020, Ricoh Electronics, Inc., submitted a notification of proposed production activity to the FTZ Board for its facilities within Subzone 26H, in Lawrenceville and Buford, Georgia.

The notification was processed in accordance with the regulations of the

FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (85 FR 44040, July 21, 2020). On November 10, 2020, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification, as amended, was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: November 10, 2020.

**Andrew McGilvray,**  
Executive Secretary.

[FR Doc. 2020-25198 Filed 11-13-20; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-533-898, C-557-822]

#### Utility Scale Wind Towers From India and Malaysia: Initiation of Countervailing Duty Investigations

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

**DATES:** Applicable November 9, 2020.

**FOR FURTHER INFORMATION CONTACT:** Melissa Kinter at (202) 482-1413 (India) and Nathan James at (202) 482-5305 (Malaysia), AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

#### SUPPLEMENTARY INFORMATION:

##### The Petitions

On September 30, 2020, the U.S. Department of Commerce (Commerce) received countervailing duty (CVD) petitions concerning imports of utility scale wind towers (wind towers) from India and Malaysia, filed in proper form on behalf of the Wind Tower Trade Coalition (the petitioner), the members of which are domestic producers of wind towers.<sup>1</sup> The Petitions were accompanied by antidumping duty (AD) petitions concerning imports of wind towers from India, Malaysia and Spain.<sup>2</sup>

On October 5 and October 6, 2020, Commerce requested supplemental information pertaining to certain aspects

<sup>1</sup> See Petitioner's Letter, "Petitions for the Imposition of Antidumping and Countervailing Duties: Utility Scale Wind Towers from India, Malaysia, and Spain," dated September 30, 2020 (the Petitions). The members of the Wind Tower Trade Coalition are Arcosa Wind Towers Inc. and Broadwind Towers, Inc.

<sup>2</sup> *Id.*

of the Petitions.<sup>3</sup> The petitioner filed responses to these requests on October 7 and October 9, 2020.<sup>4</sup>

On October 7, 2020, Commerce extended the initiation deadline by 20 days to poll the domestic industry in accordance with section 702(c)(4)(D) of the Tariff Act of 1930, as amended (the Act), because the Petitions as filed had "not established that the domestic producers or workers accounting for more than 50 percent of total production support the Petitions."<sup>5</sup>

In accordance with section 702(b)(1) of the Act, the petitioner alleges that the Government of India (GOI) and the Government of Malaysia (GOM) are providing countervailable subsidies, within the meaning of sections 701 and 771(5) of the Act, to producers of wind towers in India and Malaysia, and that imports of such products are materially injuring, or threatening material injury to, the domestic industry producing wind towers in the United States. Consistent with section 702(b)(1) of the Act and 19 CFR 351.202(b), for those alleged programs on which we are initiating CVD investigations, the Petitions were accompanied by information reasonably available to the petitioner supporting its allegations.

Commerce finds that the petitioner filed the Petitions on behalf of the domestic industry, because the petitioner is an interested party, as defined in sections 771(9)(C) and (E) of the Act. Commerce also finds that the petitioner demonstrated sufficient

<sup>3</sup> See Commerce's Letter, "Petition for the Imposition of Countervailing Duties on Utility Scale Wind Towers from Malaysia: Supplemental Questions," dated October 5, 2020; Commerce's Letter, "Petition for the Imposition of Countervailing Duties on Utility Scale Wind Towers from India: Supplemental Questions," dated October 5, 2020; and Commerce's Letter, "Petitions for the Imposition of Antidumping Duties on Imports of Utility Scale Wind Towers from India, Malaysia, and Spain and Countervailing Duties on Imports from India and Malaysia: Supplemental Questions," dated October 6, 2020.

<sup>4</sup> See Petitioner's Letter, "Utility Scale Wind Towers from India, Malaysia, and Spain: Response to First Supplemental Questions on General Issues and Injury Volume I of the Petition," dated October 7, 2020 (General Issues Supplement); Petitioner's Letter, "Utility Scale Wind Towers from India: Response to First Supplemental Questions on India CVD Volume V of the Petition," dated October 9, 2020 (India Supplemental); and Petitioner's Letter, "Utility Scale Wind Towers from Malaysia: Response to First Supplemental Questions on Malaysia CVD Volume VI of the Petition," dated October 9, 2020.

<sup>5</sup> See *Notice of Extension of the Deadline for Determining the Adequacy of the Antidumping and Countervailing Duty Petitions: Utility Scale Wind Towers from India, Malaysia, and Spain*, 85 FR 65028 (October 7, 2020) (*Initiation Extension Notice*).



industry support for the initiation of the requested CVD investigations.<sup>6</sup>

### Periods of Investigation

Because the Petitions were filed on September 30, 2020, the period of investigation (POI) for these CVD investigations is January 1, 2019 through December 31, 2019, pursuant to 19 CFR 351.204(b)(2).

### Scope of the Investigations

The products covered by these investigations are wind towers from India and Malaysia. For a full description of the scope of these investigations, see the appendix to this notice.

### Comments on Scope of the Investigations

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage (*i.e.*, scope).<sup>7</sup> Commerce will consider all comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,<sup>8</sup> all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that all interested parties submit scope comments by 5:00 p.m. Eastern Time (ET) on November 30, 2020, which is the next business day after 20 calendar days from the signature date of this notice.<sup>9</sup> Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on December 10, 2020, which is 10 calendar days from the initial comment deadline.

Commerce requests that any factual information the parties consider relevant to the scope of the investigations be submitted during this time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party may contact Commerce and request permission to

submit the additional information. All such comments must be filed on the records of each of the concurrent AD and CVD investigations.

### Filing Requirements

All submissions to Commerce must be filed electronically using Enforcement and Compliance's AD and CVD Centralized Electronic Service System (ACCESS), unless an exception applies.<sup>10</sup> An electronically filed document must be received successfully in its entirety by the time and date it is due.

### Consultations

Pursuant to sections 702(b)(4)(A)(i) and (ii) of the Act, Commerce notified the GOI and the GOM of the receipt of the Petitions and provided an opportunity for consultations with respect to the Petitions.<sup>11</sup> Commerce held consultations with the GOI and the GOM on October 16, 2020.<sup>12</sup>

### Determination of Industry Support for the Petitions

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for

more than 50 percent of the total production of the domestic like product, Commerce shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically-valid sampling method to poll the "industry."

Section 771(4)(A) of the Act defines the "industry" as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The International Trade Commission (ITC), which is responsible for determining whether "the domestic industry" has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,<sup>13</sup> they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.<sup>14</sup>

Section 771(10) of the Act defines the domestic like product as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title." Thus, the reference point from which the domestic like product analysis begins is "the article subject to an investigation" (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigations.<sup>15</sup> Based on our analysis of the information submitted on the record, we have determined that wind towers, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.<sup>16</sup>

<sup>6</sup> See "Determination of Industry Support for the Petitions" section, *infra*.

<sup>7</sup> See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997).

<sup>8</sup> See 19 CFR 351.102(b)(21) (defining "factual information.").

<sup>9</sup> The 20th day falls on Sunday, November 29, 2020. Commerce's practice dictates that where a deadline falls on a weekend or Federal holiday, the appropriate deadline is the next business day. See *Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005).

<sup>10</sup> See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011); see also *Enforcement and Compliance; Change of Electronic Filing System Name*, 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at <https://access.trade.gov/help.aspx> and a handbook can be found at <https://access.trade.gov/help/Handbook%20on%20Electronic%20Filing%20Procedures.pdf>.

<sup>11</sup> See Commerce's Letter, "Utility Scale Wind Towers from India: Invitation for Consultation to Discuss the Countervailing Duty Petition," dated October 1, 2020; and Commerce's Letter, "Countervailing Duty Petition on Utility Scale Wind Towers from Malaysia: Invitation for Consultations to Discuss the Countervailing Duty Petition," dated October 2, 2020.

<sup>12</sup> See Memorandum, "Utility Scale Wind Towers from India: Government of India Consultations," dated October 16, 2020; and Memorandum, "Consultations with the Government of Malaysia on the Countervailing Duty Petition Regarding Utility Scale Wind Towers from Malaysia," dated October 20, 2020.

<sup>13</sup> See section 771(10) of the Act.

<sup>14</sup> See *USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F. 2d 240 (Fed. Cir. 1989)).

<sup>15</sup> See Volume I of the Petitions at 19–21; see also General Issues Supplement at Exhibit I-Supp-1.

<sup>16</sup> For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, see *Countervailing Duty Investigation Initiation Checklists: Utility Scale*

Based on information provided in the Petitions, the supporters of the Petitions did not account for more than 50 percent of total production of the domestic like product in 2019. Therefore, on October 7, 2020, Commerce extended the initiation deadline by 20 days to poll the domestic industry in accordance with section 702(c)(4)(D) of the Act.<sup>17</sup>

On October 8, 2020, we issued polling questionnaires to all known producers of wind towers identified in the Petitions.<sup>18</sup> We requested that each company complete the polling questionnaire and certify its response by the due date specified in the cover letter to the questionnaire.<sup>19</sup> We received responses to these questionnaires on October 20, 2020.<sup>20</sup> The petitioner provided comments on the polling questionnaire responses on October 26, 2020.<sup>21</sup>

Section 702(c)(4)(B) of the Act states that: (i) Commerce “shall disregard the position of domestic producers who oppose the petition if such producers are related to foreign producers, as defined in section 771(4)(B)(ii), unless such domestic producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of a {CVD}order;” and (ii) Commerce “may disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise.” In addition, 19 CFR 351.203(e)(4) states that the position of a domestic producer that opposes the petition: (i) Will be disregarded if such producer “is related to a foreign producer or to a foreign exporter under section 771(4)(B)(ii) of the Act, unless such domestic producer demonstrates to the Secretary’s

satisfaction that its interests as a domestic producer would be adversely affected by the imposition” of a CVD order; and (ii) may be disregarded if the producer “is an importer of the subject merchandise, or is related to such an importer, under section 771(4)(B)(ii) of the Act.”

We received opposition to the Petitions from producers that are related to foreign producers of subject merchandise and/or who imported subject merchandise from the subject countries. We have analyzed the information provided in the polling questionnaire responses and other submissions to Commerce. Based on our analysis, we disregarded opposition to certain Petitions, pursuant to section 702(c)(4)(B) of the Act. When such opposition is disregarded in those cases, the industry support requirements of section 702(c)(4)(A) of the Act are satisfied.<sup>22</sup>

Accordingly, Commerce determines that the industry support requirements of section 702(c)(4)(A) of the Act have been met and that the Petitions were filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.<sup>23</sup>

#### Injury Test

Because India and Malaysia are “Subsidies Agreement Countries” within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to these investigations. Accordingly, the ITC must determine whether imports of the subject merchandise from India and/or Malaysia materially injure, or threaten material injury to, a U.S. industry.

#### Allegations and Evidence of Material Injury and Causation

The petitioner alleges that imports of the subject merchandise are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. In addition, the petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.<sup>24</sup>

The petitioner contends that the industry’s injured condition is illustrated by a significant and increasing absolute and relative volume of subject imports; underselling and price depression or suppression; declining financial performance; declining production, U.S. shipments,

and capacity utilization; negative impact on employment variables; and lost sales and revenues.<sup>25</sup> We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.<sup>26</sup>

#### Initiation of CVD Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 702 of the Act. Therefore, we are initiating CVD investigations to determine whether imports of wind towers from India and Malaysia benefit from countervailable subsidies conferred by the GOI and the GOM, respectively. In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 65 days after the date of these initiations.

#### India

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 69 of the 78 alleged programs. For a full discussion of the basis for our decision to initiate on each program, see India CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

#### Malaysia

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on seven of the 10 alleged programs. For a full discussion of the basis for our decision to initiate on each program, see Malaysia CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

#### Respondent Selection

In the Petitions, the petitioner named five companies in India and one company in Malaysia as producers/exporters of wind towers.<sup>27</sup> Commerce intends to follow its standard practice in CVD investigations and calculate

Wind Towers from India and Malaysia, dated November 9, 2020 (Country-Specific CVD Initiation Checklists) at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Utility Scale Wind Towers from India, Malaysia, and Spain. These checklists are dated concurrently with this notice and on file electronically via ACCESS.

<sup>17</sup> See *Initiation Extension Notice*; see also Attachment II of the Country-Specific CVD Initiation Checklists.

<sup>18</sup> See Memorandum, “Utility Scale Wind Towers from India, Malaysia, and Spain: Polling Questionnaire,” dated October 8, 2020; see also Volume I of the Petitions at 2 and Exhibits I-1 and I-2.

<sup>19</sup> For a detailed discussion of the responses received, see Attachment II of the Country-Specific CVD Initiation Checklists. The polling questionnaire and questionnaire responses are on file electronically via ACCESS.

<sup>20</sup> *Id.*

<sup>21</sup> See Petitioner’s Letter, “Utility Scale Wind Towers from India, Malaysia, and Spain: Petitioner’s Comments Regarding the Responses to the Polling Questionnaire and Industry Support,” dated October 26, 2020.

<sup>22</sup> See Attachment II of the Country-Specific CVD Initiation Checklists.

<sup>23</sup> *Id.*

<sup>24</sup> See Volume I of the Petitions at 27–28 and Exhibit I-18.

<sup>25</sup> *Id.* at 18–19, 22–42 and Exhibits I-3, I-5, I-6, I-18, I-20, I-21, and I-23 through I-25.

<sup>26</sup> See Country-Specific CVD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Utility Scale Wind Towers from India, Malaysia, and Spain (Attachment III).

<sup>27</sup> See Volume I of the Petitions at Exhibit I-17; and India Supplemental at Exhibit V-Supp-1.

company-specific subsidy rates in this investigation.

Regarding India, in the event Commerce determines that the number of Indian producers/exporters is large and it cannot individually examine each company based upon Commerce's resources, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports of wind towers from India during the POI under the appropriate Harmonized Tariff Schedule of the United States numbers listed in the "Scope of the Investigations," in the appendix. On November 2, 2020, Commerce released CBP data for U.S. imports of wind towers from India, as well as for the companion CVD investigation for Malaysia, under Administrative Protective Order (APO) to all parties with access to information protected by APO.<sup>28</sup>

Regarding Malaysia, in the Petitions, the petitioner named only one company as a producer/exporter of wind towers in Malaysia, CS Wind Malaysia Sdn Bhd (CS Wind Malaysia).<sup>29</sup> Furthermore, the CBP import data placed on the record of the proceeding corroborates the identification of CS Wind Malaysia as the sole producer/exporter in the foreign market,<sup>30</sup> and we currently know of no additional producers/exporters of subject merchandise from Malaysia. Accordingly, Commerce intends to examine all known producers/exporters in this investigation (*i.e.*, CS Wind Malaysia), and will issue the initial countervailing duty questionnaire to the GOM and CS Wind Malaysia. If comments are received that create a need for a respondent selection process, we intend to finalize our decisions regarding respondent selection within 20 days of publication of this notice.

In the India CBP Memo and the Malaysia CBP Memo, we indicated that interested parties wishing to comment on the CBP data and/or respondent selection must do so within three business days of the publication date of the notice of initiation of these CVD

investigations.<sup>31</sup> Comments on CBP data and respondent selection must be filed electronically using ACCESS. An electronically filed document must be received successfully, in its entirety, via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

#### Distribution of Copies of the Petitions

In accordance with section 702(b)(4)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petitions has been provided to the GOI and GOM via ACCESS. Furthermore, to the extent practicable, Commerce will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

#### ITC Notification

Commerce will notify the ITC of its initiation, as required by section 702(d) of the Act.

#### Preliminary Determinations by the ITC

Typically, the ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that subject imports are materially injuring or threatening material injury to a U.S. industry.<sup>32</sup> Here, due to Commerce's extension of time to conduct polling and analyze industry support for the Petitions, the ITC has extended the time for issuance of its preliminary determination.<sup>33</sup> The ITC's preliminary determination is now due on December 4, 2020.<sup>34</sup>

A negative ITC determination for any country will result in the investigation being terminated with respect to that country.<sup>35</sup> Otherwise, these CVD investigations will proceed according to the statutory and regulatory time limits.

#### Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available

information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted<sup>36</sup> and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.<sup>37</sup> Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

#### Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by the Secretary. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301. For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; Commerce will grant untimely filed requests for the extension of time limits only in limited cases where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review *Extension of Time Limits; Final Rule*, 78 FR 57790 (September 20, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm>, prior to submitting extension requests or factual information in these investigations.

<sup>28</sup> See Memorandum, "Antidumping Duty Petition on Utility Scale Wind Towers from Malaysia: Release of Customs Data from U.S. Customs and Border Protection," dated November 2, 2020 (Malaysia CBP Data Memo); and Memorandum, "Antidumping Duty Petition on Utility Scale Wind Towers from India: Release of Customs Data from U.S. Customs and Border Protection," dated November 2, 2020 (India CBP Data Memo). Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at <http://enforcement.trade.gov/apo>.

<sup>29</sup> See Volume I of the Petitions at Exhibit I–17.

<sup>30</sup> See Malaysia CBP Data Memo.

<sup>31</sup> See India CBP Data Memo and Malaysia CBP Data Memo.

<sup>32</sup> See section 733(a) of the Act; *see also Utility Scale Wind Towers from India, Malaysia, and Spain; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations*, 85 FR 63137 (October 6, 2020).

<sup>33</sup> See *Utility Scale Wind Towers From India, Malaysia, and Spain Revised Schedule for the Subject Investigations*, 85 FR 67372 (October 22, 2020).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See 19 CFR 351.301(b).

<sup>37</sup> See 19 CFR 351.301(b)(2).

## Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.<sup>38</sup> Parties must use the certification formats provided in 19 CFR 351.303(g).<sup>39</sup> Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

## Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (e.g., by filing the required letters of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information until further notice.<sup>40</sup>

This notice is issued and published pursuant to sections 702 and 777(i) of the Act and 19 CFR 351.203(c).

Dated: November 9, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix

### Scope of the Investigations

The merchandise covered by these investigations consists of certain wind towers, whether or not tapered, and sections thereof. Certain wind towers support the nacelle and rotor blades in a wind turbine with a minimum rated electrical power generation capacity in excess of 100 kilowatts and with a minimum height of 50 meters measured from the base of the tower to the bottom of the nacelle (i.e., where the top of the tower and nacelle are joined) when fully assembled.

A wind tower section consists of, at a minimum, multiple steel plates rolled into cylindrical or conical shapes and welded together (or otherwise attached) to form a steel shell, regardless of coating, end-finish, painting, treatment, or method of manufacture, and with or without flanges, doors, or internal or external components (e.g., flooring/decking, ladders, lifts, electrical buss boxes, electrical cabling, conduit, cable harness for nacelle generator,

interior lighting, tool and storage lockers) attached to the wind tower section. Several wind tower sections are normally required to form a completed wind tower.

Wind towers and sections thereof are included within the scope whether or not they are joined with nonsubject merchandise, such as nacelles or rotor blades, and whether or not they have internal or external components attached to the subject merchandise.

Specifically excluded from the scope are nacelles and rotor blades, regardless of whether they are attached to the wind tower. Also excluded are any internal or external components which are not attached to the wind towers or sections thereof, unless those components are shipped with the tower sections.

Merchandise covered by these investigations is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7308.20.0020 or 8502.31.0000. Wind towers of iron or steel are classified under HTSUS 7308.20.0020 when imported separately as a tower or tower section(s). Wind towers may be classified under HTSUS 8502.31.0000 when imported as combination goods with a wind turbine (i.e., accompanying nacelles and/or rotor blades). While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these investigations is dispositive.

[FR Doc. 2020–25227 Filed 11–13–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–533–897, A–557–821, A–469–823]

### Utility Scale Wind Towers From India, Malaysia, and Spain: Initiation of Less-Than-Fair-Value Investigations

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

**DATES:** Applicable November 9, 2020.

**FOR FURTHER INFORMATION CONTACT:** Terre Keaton Stefanova at (202) 482–1280 (India); Justin Neuman at (202) 482–0468 (Malaysia); and Benito Ballesteros at (202) 482–7425 (Spain); AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:** The Petitions

On September 30, 2020, the Department of Commerce (Commerce) received antidumping duty (AD) petitions concerning imports of utility scale wind towers (wind towers) from India, Malaysia, and Spain, filed in proper form on behalf of the Wind

Tower Trade Coalition (the petitioner), the members of which are domestic producers of wind towers.<sup>1</sup> The Petitions were accompanied by countervailing duty (CVD) petitions concerning imports of wind towers from India and Malaysia.<sup>2</sup>

During the period October 5 through 20, 2020, Commerce requested supplemental information pertaining to certain aspects of the Petitions in separate supplemental questionnaires.<sup>3</sup> The petitioner filed responses to the supplemental questionnaires between October 7 and October 21, 2020.<sup>4</sup>

On October 7, 2020, Commerce extended the initiation deadline by 20 days to poll the domestic industry in accordance with section 732(c)(4)(D) of the Tariff Act of 1930, as amended (the Act), because “the Petitions have not established that the domestic producers or workers accounting for more than 50 percent of total production support the Petitions.”<sup>5</sup>

<sup>1</sup> See Petitioner’s Letter, “Utility Scale Wind Towers from India, Malaysia and Spain: Petitions for the Imposition of Antidumping and Countervailing Duties,” dated September 30, 2020 (collectively, the Petitions). The members of the Wind Tower Trade Coalition are Arcosa Wind Towers Inc. and Broadwind Towers, Inc.

<sup>2</sup> *Id.*

<sup>3</sup> See Commerce’s Letters, “Petitions for the Imposition of Antidumping Duties on Imports of Utility Scale Wind Towers from India, Malaysia and Spain and Countervailing Duties on Imports from India and Malaysia: Supplemental Questions,” dated October 5, 2020; *see also* Country-Specific Supplemental Questionnaires: India Supplemental, Malaysia Supplemental, and Spain Supplemental, dated October 5, 2020; and Memoranda, “Phone Call with Counsel to the Petitioner,” dated October 16 and 20, 2020.

<sup>4</sup> See Petitioner’s Letter, “Utility Scale Wind Towers from India, Malaysia and Spain: Response to First Supplemental Questions on General Issues and Injury Volume I of the Petition,” dated October 7, 2020 (General Issues Supplement); *see also* Petitioner’s Letters, “Utility Scale Wind Towers from India: Response to First Supplemental Questions on India AD Volume II of the Petition,” dated October 9, 2020; “Utility Scale Wind Towers from Malaysia: Response to First Supplemental Questions on Malaysia AD Volume III of the Petition,” dated October 9, 2020; and “Utility Scale Wind Towers from Spain: Response to First Supplemental Questions on Spain AD Volume IV of the Petition,” dated October 9, 2020; Petitioner’s Letters, “Utility Scale Wind Towers from India: Response to Second Supplemental Questions on India AD Volume II of the Petitions,” dated October 19, 2020; and “Utility Scale Wind Towers from Malaysia: Response to Second Supplemental Questions on Malaysia AD Volume III of the Petitions,” dated October 19, 2020; and Petitioner’s Letters, “Utility Scale Wind Towers from India: Response to Request for Clarification on India Volume II of the Petition,” dated October 21, 2020; and “Utility Scale Wind Towers from Malaysia: Response to Request for Clarification on Malaysia Volume III of the Petition,” dated October 21, 2020.

<sup>5</sup> See *Notice of Extension of the Deadline for Determining the Adequacy of the Antidumping and Countervailing Duty Petitions: Utility Scale Wind Towers from India, Malaysia, and Spain*, 85 FR

Continued

<sup>38</sup> See section 782(b) of the Act.

<sup>39</sup> See *Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule*, available at [http://enforcement.trade.gov/tlei/notices/factual\\_info\\_final\\_rule\\_FAQ\\_07172013.pdf](http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf).

<sup>40</sup> See *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19: Extension of Effective Period*, 85 FR 41363 (July 10, 2020).

In accordance with section 732(b) of the Act, the petitioner alleges that imports of wind towers from India, Malaysia, and Spain are being, or are likely to be, sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act, and that imports of such products are materially injuring, or threatening material injury to, the wind towers industry in the United States. Consistent with section 732(b)(1) of the Act, the Petitions are accompanied by information reasonably available to the petitioner supporting its allegations.

Commerce finds that the petitioner filed the Petitions on behalf of the domestic industry, because the petitioner is an interested party, as defined in sections 771(9)(C) and (E) of the Act. Commerce also finds that the petitioner demonstrated sufficient industry support for the initiation of the requested LTFV investigations.<sup>6</sup>

#### Periods of Investigation

Because the Petitions were filed on September 30, 2020, the period of investigation (POI) for these LTFV investigations is July 1, 2019 through June 30, 2020, pursuant to 19 CFR 351.204(b)(1).<sup>7</sup>

#### Scope of the Investigations

The products covered by these investigations are wind towers from India, Malaysia, and Spain. For a full description of the scope of these investigations, see the appendix to this notice.

#### Comments on the Scope of the Investigations

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage (*i.e.*, scope).<sup>8</sup> Commerce will consider all comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,<sup>9</sup> all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that all interested parties submit such comments by 5:00 p.m. Eastern Time (ET) on November 30, 2020, which is the next business day after 20 calendar days from the

signature date of this notice.<sup>10</sup> Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on December 10, 2020, which is 10 calendar days from the initial comment deadline.

Commerce requests that any factual information that parties consider relevant to the scope of these investigations be submitted during this period. However, if a party subsequently finds that additional factual information pertaining to the scope of these investigations may be relevant, the party may contact Commerce and request permission to submit the additional information. All such submissions must be filed on the records of each of the concurrent AD and CVD investigations.

#### Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's AD and CVD Centralized Electronic Service System (ACCESS), unless an exception applies.<sup>11</sup> An electronically filed document must be received successfully in its entirety by the time and date on which it is due.

#### Comments on Product Characteristics

Commerce is providing interested parties an opportunity to comment on the appropriate physical characteristics of wind towers to be reported in response to Commerce's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant costs of production accurately, as well as to develop appropriate product-comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) General product characteristics, and (2) product comparison criteria. We note that it is

<sup>10</sup> In this case, 20 days after initiation falls on November 29, 2020, a Sunday. Where a deadline falls on a weekend federal holiday, the appropriate deadline is the next business day. See *Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005) (*Next Business Day Rule*).

<sup>11</sup> See *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 FR 39263 (July 6, 2011); see also *Enforcement and Compliance: Change of Electronic Filing System Name*, 79 FR 69046 (November 20, 2014), for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on help using ACCESS can be found at <https://access.trade.gov/help.aspx> and a handbook can be found at [https://access.trade.gov/help/Handbook\\_on\\_Electronic\\_Filing\\_Procedures.pdf](https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf).

not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe wind towers, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, Commerce attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, all product characteristics comments must be filed by 5:00 p.m. ET on November 30, 2020, which is the next business day after 20 calendar days from the signature date of this notice.<sup>12</sup> Any rebuttal comments must be filed by 5:00 p.m. ET on December 10, 2020, which is 10 calendar days from the initial comment deadline. All comments and submissions to Commerce must be filed electronically using ACCESS, as explained above, on the record of each of the AD investigations.

#### Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the "industry."

Section 771(4)(A) of the Act defines the "industry" as the producers as a

<sup>12</sup> See *Next Business Day Rule*, 70 FR at 24533.

65028 (October 14, 2020) (*Initiation Extension Notice*).

<sup>6</sup> See *infra*, section on "Determination of Industry Support for the Petitions."

<sup>7</sup> See 19 CFR 351.204(b)(1).

<sup>8</sup> See *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

<sup>9</sup> See 19 CFR 351.102(b)(21) (defining "factual information").

whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The International Trade Commission (ITC), which is responsible for determining whether “the domestic industry” has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,<sup>13</sup> they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce’s determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.<sup>14</sup>

Section 771(10) of the Act defines the domestic like product as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.” Thus, the reference point from which the domestic like product analysis begins is “the article subject to an investigation” (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigations.<sup>15</sup> Based on our analysis of the information submitted on the record, we have determined that wind towers, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.<sup>16</sup>

Based on information provided in the Petitions, the supporters of the Petitions did not account for more than 50 percent of total production of the domestic like product in 2019.

Therefore, on October 7, 2020, Commerce extended the initiation deadline by 20 days to poll the domestic industry in accordance with section 732(c)(4)(D) of the Act.<sup>17</sup>

On October 8, 2020, we issued polling questionnaires to all known producers of wind towers identified in the Petitions.<sup>18</sup> We requested that each company complete the polling questionnaire and certify its response by the due date specified in the cover letter to the questionnaire.<sup>19</sup> We received responses to these questionnaires on October 20, 2020.<sup>20</sup> The petitioner provided comments on the polling questionnaire responses on October 26, 2020.<sup>21</sup>

Section 732(c)(4)(B) of the Act states that: (i) Commerce “shall disregard the position of domestic producers who oppose the petition if such producers are related to foreign producers, as defined in section 771(4)(B)(ii), unless such domestic producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of an antidumping duty order;” and (ii) Commerce “may disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise.” In addition, 19 CFR 351.203(e)(4) states that the position of a domestic producer that opposes the petition: (i) Will be disregarded if such producer is related to a foreign producer or to a foreign exporter under section 771(4)(B)(ii) of the Act, unless such domestic producer demonstrates to the Secretary’s satisfaction that its interests as a domestic producer would be adversely affected by the imposition of an antidumping order; and (ii) may be disregarded if the producer is an importer of the subject merchandise or is related to such an importer under section 771(4)(B)(ii) of the Act.

We received opposition to the Petitions from producers that are related to foreign producers of subject merchandise and/or who imported

subject merchandise from the subject countries. We have analyzed the information provided in the polling questionnaire responses and information provided in other submissions to Commerce. Based on our analysis, we disregarded opposition to certain of the Petitions, pursuant to section 732(c)(4)(B) of the Act. When such opposition is disregarded in those cases, the industry support requirements of section 732(c)(4)(A) of the Act are satisfied.<sup>22</sup>

Accordingly, Commerce determines that the industry support requirements of section 732(c)(4)(A) of the Act have been met and that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.<sup>23</sup>

### Allegations and Evidence of Material Injury and Causation

The petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at LTFV. In addition, the petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.<sup>24</sup>

The petitioner contends that the industry’s injured condition is illustrated by a significant and increasing absolute and relative volume of subject imports; underselling and price depression or suppression; declining financial performance; declining production, U.S. shipments, and capacity utilization; negative impact on employment variables; and lost sales and revenues.<sup>25</sup> We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.<sup>26</sup>

### Allegations of Sales at LTFV

The following is a description of the allegations of sales at LTFV upon which Commerce based its decision to initiate

<sup>13</sup> See section 771(10) of the Act.

<sup>14</sup> See *USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff’d* 865 F.2d 240 (Fed. Cir. 1989)).

<sup>15</sup> See Volume I of the Petitions at 19–21; see also General Issues Supplement at Exhibit I-Supp-1.

<sup>16</sup> For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, see Antidumping Duty Investigation Initiation Checklists: Utility Scale Wind Towers from India, Malaysia, and Spain, dated November 9, 2020 (Country-Specific AD Initiation Checklists) at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Utility Scale Wind Towers from India, Malaysia, and Spain. These checklists are dated concurrently with this notice and on file electronically via ACCESS.

<sup>17</sup> See *Initiation Extension Notice*; see also Attachment II of the country-specific AD Initiation Checklists.

<sup>18</sup> See Memorandum, “Utility Scale Wind Towers from India, Malaysia, and Spain: Polling Questionnaire,” dated October 8, 2020; see also Volume I of the Petitions at 2 and Exhibits I–1 and I–2.

<sup>19</sup> For a detailed discussion of the responses received, see Attachment II of the Country-Specific AD Initiation Checklists. The polling questionnaire and questionnaire responses are on file electronically via ACCESS.

<sup>20</sup> *Id.*

<sup>21</sup> See Petitioner’s Letter, “Utility Scale Wind Towers from India, Malaysia, and Spain: Petitioner’s Comments Regarding the Responses to the Polling Questionnaire and Industry Support,” dated October 26, 2020.

<sup>22</sup> See Attachment II of the Country-Specific AD Initiation Checklists.

<sup>23</sup> *Id.*

<sup>24</sup> See Volume I of the Petitions at 27–28 and Exhibit I–18.

<sup>25</sup> *Id.* at 18–19, 22–42 and Exhibits I–3, I–5, I–6, I–18, I–20, I–21, and I–23 through I–25.

<sup>26</sup> See Country-Specific AD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Utility Scale Wind Towers from India, Malaysia, and Spain (Attachment III).

these LTFV investigations of imports of wind towers from India, Malaysia, and Spain. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the Country-Specific AD Initiation Checklists.<sup>27</sup>

#### U.S. Price

For India, Malaysia, and Spain, the petitioner based export price (EP) on the average unit values of publicly available import data. The petitioner made certain adjustments to U.S. price to calculate a net ex-factory U.S. price.<sup>28</sup>

#### Normal Value<sup>29</sup>

For India, Malaysia, and Spain, the petitioner stated it was unable to obtain home market or third country prices to use as a basis for NV; therefore, the petitioner calculated NV based on constructed value (CV).<sup>30</sup> For further discussion of CV, see the section “Normal Value Based on Constructed Value.”

#### Normal Value Based on Constructed Value

As noted above, the petitioner was not able to obtain home market prices or third country prices to use as a basis for NV. Accordingly, the petitioner based NV on CV.<sup>31</sup> Pursuant to section 773(e) of the Act, the petitioner calculated CV as the sum of the cost of manufacturing, selling, general, and administrative expenses, financial expenses, and profit.<sup>32</sup>

#### Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of wind towers from India, Malaysia, and Spain are being, or are likely to be, sold in the United States at LTFV. Based on comparisons of EP to CV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for wind towers for each of the countries covered by this initiation are as follows: (1) India—54.03 percent; (2) Malaysia—93.83 percent; and (3) Spain—73.00 percent.<sup>33</sup>

#### Initiation of LTFV Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 732 of the Act. Therefore, we are initiating these LTFV investigations to determine whether imports of wind towers from India, Malaysia, and Spain are being, or are likely to be, sold in the United States at LTFV. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of this initiation.

#### Respondent Selection

In the Petitions, the petitioner named four companies in India and three companies in Spain<sup>34</sup> as producers and/or exporters of wind towers.

Following standard practice in LTFV investigations involving market economy countries, in the event Commerce determines that the number of exporters or producers in any individual case is large such that Commerce cannot individually examine each company based upon its resources, where appropriate, Commerce intends to select mandatory respondents in that case based on U.S. Customs and Border Protection (CBP) data for U.S. imports under the appropriate Harmonized Tariff Schedule of the United States numbers listed in the “Scope of the Investigations,” in the appendix.

On November 2, 2020, Commerce released CBP data on imports of wind towers from India and Spain under Administrative Protective Order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on the CBP data must do so within three business days of the publication date of the notice of initiation of these investigations.<sup>35</sup> Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce’s website at <https://enforcement.trade.gov/apo>.

In the Petitions, the petitioner named only one company as a producer/exporter of wind towers in Malaysia, CS Wind Malaysia Sdn Bhd (CS Wind

Malaysia).<sup>36</sup> Furthermore, we placed CBP import data onto the record of this proceeding, which corroborates the identification of CS Wind Malaysia as the sole producer/exporter in the foreign market,<sup>37</sup> and we currently know of no additional producers/exporters of subject merchandise from Malaysia. Accordingly, Commerce intends to examine all known producers/exporters in this investigation (*i.e.*, CS Wind Malaysia). Interested parties that wish to comment on this selection, or on the CBP data, may do so within three business days of the publication date of this notice. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Comments on CBP data and respondent selection must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline.

#### Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petitions have been provided to the governments of India, Malaysia, and Spain via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

#### ITC Notification

Commerce will notify the ITC of its initiation, as required by section 732(d) of the Act.

#### Preliminary Determinations by the ITC

Typically, the ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that subject imports are materially injuring or threatening material injury to a U.S. industry.<sup>38</sup> Here, due to Commerce’s extension of time to conduct polling and analyze industry support for the Petitions, the ITC has extended the time for issuance of its preliminary determination.<sup>39</sup> The ITC’s

<sup>27</sup> See Country-Specific AD Initiation Checklists.

<sup>28</sup> *Id.*

<sup>29</sup> In accordance with section 773(b)(2) of the Act, for these investigations, Commerce will request information necessary to calculate the constructed value and cost of production (COP) to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product.

<sup>30</sup> See Country-Specific AD Initiation Checklists.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>36</sup> See Volume I of the Petitions at Exhibit I–17

<sup>37</sup> Memorandum, “Antidumping Duty Petition on Utility Scale Wind Towers from Malaysia: Release of Customs Data from U.S. Customs and Border Protection,” dated November 2, 2020.

<sup>38</sup> See section 733(a) of the Act; see also *Utility Scale Wind Towers from India, Malaysia, and Spain; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations*, 85 FR 63137 (October 6, 2020).

<sup>39</sup> See *Utility Scale Wind Towers From India, Malaysia, and Spain Revised Schedule for the*

<sup>34</sup> See Volume I of the Petitions at Exhibit I–17.

<sup>35</sup> See Memoranda, “Antidumping Duty Petition on Utility Scale Wind Towers from India: Release of Customs Data from U.S. Customs and Border Protection,” and “Antidumping Duty Petition on Utility Scale Wind Towers from Spain: Release of Customs Data from U.S. Customs and Border Protection,” dated November 2, 2020.

preliminary determination is now due on December 4, 2020.<sup>40</sup>

A negative ITC determination for any country will result in the investigation being terminated with respect to that country.<sup>41</sup> Otherwise, these LTFV investigations will proceed according to statutory and regulatory time limits.

#### Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted<sup>42</sup> and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.<sup>43</sup> Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

#### Particular Market Situation Allegation

Section 773(e) of the Act addresses the concept of particular market situation (PMS) for purposes of CV, stating that “if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.” When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it

will modify its dumping calculations appropriately.

Neither section 773(e) of the Act, nor 19 CFR 351.301(c)(2)(v), set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of a respondent's initial section D questionnaire response.

#### Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301. For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, we may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; Commerce will grant untimely filed requests for the extension of time limits only in limited cases where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review *Extension of Time Limits; Final Rule*, 78 FR 57790 (September 20, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm>, prior to submitting factual information in these investigations.

#### Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.<sup>44</sup> Parties must use the certification formats provided in 19 CFR 351.303(g).<sup>45</sup> Commerce intends to

reject factual submissions if the submitting party does not comply with the applicable certification requirements.

#### Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (e.g., by filing the required letter of appearance). Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.<sup>46</sup>

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: November 9, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

#### Appendix

##### Scope of the Investigations

The merchandise covered by these investigations consists of certain wind towers, whether or not tapered, and sections thereof. Certain wind towers support the nacelle and rotor blades in a wind turbine with a minimum rated electrical power generation capacity in excess of 100 kilowatts and with a minimum height of 50 meters measured from the base of the tower to the bottom of the nacelle (i.e., where the top of the tower and nacelle are joined) when fully assembled.

A wind tower section consists of, at a minimum, multiple steel plates rolled into cylindrical or conical shapes and welded together (or otherwise attached) to form a steel shell, regardless of coating, end-finish, painting, treatment, or method of manufacture, and with or without flanges, doors, or internal or external components (e.g., flooring/decking, ladders, lifts, electrical buss boxes, electrical cabling, conduit, cable harness for nacelle generator, interior lighting, tool and storage lockers) attached to the wind tower section. Several wind tower sections are normally required to form a completed wind tower.

Wind towers and sections thereof are included within the scope whether or not they are joined with nonsubject merchandise, such as nacelles or rotor blades, and whether or not they have internal or external components attached to the subject merchandise.

Specifically excluded from the scope are nacelles and rotor blades, regardless of

*Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*). Answers to frequently asked questions regarding the *Final Rule* are available at [http://enforcement.trade.gov/tlei/notices/factual\\_info\\_final\\_rule\\_FAQ\\_07172013.pdf](http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf).

<sup>46</sup> See *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19: Extension of Effective Period*, 85 FR 41363 (July 10, 2020).

*Subject Investigations*, 85 FR 67372 (October 22, 2020).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See 19 CFR 351.301(b).

<sup>43</sup> See 19 CFR 351.301(b)(2).

<sup>44</sup> See section 782(b) of the Act.

<sup>45</sup> See *Certification of Factual Information to Import Administration During Antidumping and*



whether they are attached to the wind tower. Also excluded are any internal or external components which are not attached to the wind towers or sections thereof, unless those components are shipped with the tower sections.

Merchandise covered by these investigations is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7308.20.0020 or 8502.31.0000. Wind towers of iron or steel are classified under HTSUS 7308.20.0020 when imported separately as a tower or tower section(s). Wind towers may be classified under HTSUS 8502.31.0000 when imported as combination goods with a wind turbine (*i.e.*, accompanying nacelles and/or rotor blades). While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these investigations is dispositive.

[FR Doc. 2020-25226 Filed 11-13-20; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XA641]

#### North Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The North Pacific Fishery Management Council (Council) and its advisory committees will meet via webconference November 30, 2020 through December 12, 2020.

**DATES:** The Council's Scientific and Statistical Committee (SSC) will begin at 8 a.m. on Monday, November 30, 2020 and continue through Friday, December 4, 2020. The Council's Advisory Panel (AP) will begin at 8 a.m. on Monday, November 30, 2020 and continue through Saturday, December 5, 2020. The Charter Halibut Management Committee will meet on Monday, November 30, 2020, from 1 p.m. to 5 p.m. The Council will meet on Friday, December 4, 2020, from 8 a.m. to 5 p.m., and from 8 a.m. to 5 p.m. on Monday, December 7, 2020 through Saturday, December 12, 2020. All times listed are Alaska Standard Time.

**ADDRESSES:** The meetings will be by webconference. Join online through the links at <https://www.npfmc.org/upcoming-council-meetings>.

**Council address:** North Pacific Fishery Management Council, 1007 W 3rd Ave., Anchorage, AK 99501-2252; telephone: (907) 271-2809. Instructions

for attending the meeting via webconference are given under Connection Information, below.

**FOR FURTHER INFORMATION CONTACT:** Diana Evans, Council staff; email: [diana.evans@noaa.gov](mailto:diana.evans@noaa.gov). For technical support please contact our administrative staff, email: [npfmc.admin@noaa.gov](mailto:npfmc.admin@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Agenda

*Monday, November 30, 2020*

The Charter Halibut Management Committee will review and recommend management measures for the charter halibut fisheries in International Pacific Halibut Commission (IPHC) areas 2C and 3A for implementation in 2021, and other business. The agenda is subject to change, and the latest version will be posted at <https://meetings.npfmc.org/Meeting/Details/1785> prior to the meeting, along with meeting materials.

*Monday, November 30, 2020 Through Friday, December 4, 2020*

The SSC agenda will include the following issues:

- (1) BSAI Groundfish Harvest—Ecosystem Status Report, Final Specifications, Plan Team Report
- (2) GOA Groundfish Harvest—Ecosystem Status Report, Final Specifications, Plan Team Report
- (3) BSAI Pacific Cod Pot Catcher Processor Latency—Initial Review
- (4) 2021 Survey Planning—AFSC Report

The agenda is subject to change, and the latest version will be posted at <https://meetings.npfmc.org/Meeting/Details/1784> prior to the meeting, along with meeting materials.

In addition to providing ongoing scientific advice for fishery management decisions, the SSC functions as the Council's primary peer review panel for scientific information, as described by the Magnuson-Stevens Act section 302(g)(1)(e), and the National Standard 2 guidelines (78 FR 43066). The peer review process is also deemed to satisfy the requirements of the Information Quality Act, including the OMB Peer Review Bulletin guidelines.

*Monday, November 30, 2020 Through Saturday, December 5, 2020*

The Advisory Panel agenda will include the following issues:

- (1) Cook Inlet Salmon FMP—Final Action
- (2) BSAI Pacific Cod Trawl Catcher Vessel Limited Access Privilege Program
- (3) Charter Halibut 2021 Annual Management Measures, Committee Report

- (4) BSAI Pacific Cod Trawl Catcher Processor Latency—Initial Review
- (5) 2021 Survey Planning—AFSC Report
- (6) BSAI Groundfish Harvest—Ecosystem Status Report, Final Specifications, Plan Team Report
- (7) GOA Groundfish Harvest—Ecosystem Status Report, Final Specifications, Plan Team Report
- (8) Staff Tasking

*Friday, December 4, 2020*

The Council agenda will include the following issues. The Council may take appropriate action on any of the issues identified.

- (1) All B Reports (Executive Director, NMFS Management, NOAA GC, NOAA Enforcement, AFSC, ADF&G, USCG, USFWS)
- (2) Charter Halibut—2021 Annual Management Measures, Committee Report

*Monday, December 7, 2020 Through Saturday, December 12, 2020*

The Council agenda will include the following issues. The Council may take appropriate action on any of the issues identified.

- (3) Cook Inlet Salmon FMP—Final Action
- (4) BSAI Pacific Cod Trawl Catcher Vessel Limited Access Privilege Program
- (5) BSAI Groundfish Harvest—Ecosystem Status Report, Final Specifications, Plan Team Report
- (6) GOA Groundfish Harvest—Ecosystem Status Report, Final Specifications, Plan Team Report (including SSC report)
- (7) BSAI Pacific Cod Pot Catcher Processor Latency—Initial Review
- (8) Staff Tasking

#### Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: <https://www.npfmc.org/upcoming-council-meetings>. For technical support please contact our administrative staff, email: [npfmc.admin@noaa.gov](mailto:npfmc.admin@noaa.gov).

#### Public Comment

Public comment letters will be accepted and should be submitted electronically through the links at <https://www.npfmc.org/upcoming-council-meetings>, or for the Charter Halibut Management Committee, at <https://meetings.npfmc.org/Meeting/Details/1785>. The Council strongly encourages written public comment for this meeting, to avoid any potential for technical difficulties to compromise oral

testimony. The deadline for written comments is November 27, 2020, at 5 p.m. Alaska Time.

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

Dated: November 10, 2020.

**Diane M. DeJames-Daly,**

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

[FR Doc. 2020-25230 Filed 11-13-20; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XA642]

#### Western Pacific Fishery Management Council; Public Meetings

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

**ACTION:** Notice of public meetings and a partially closed meeting.

**SUMMARY:** The Western Pacific Fishery Management Council (Council) will hold its 138th Scientific and Statistical Committee (SSC), Pelagic and International Standing Committee, Executive and Budget Standing Committee, and 184th Council meetings to take actions on fishery management issues in the Western Pacific Region. A portion of the Council's Executive and Budget Standing Committee meeting will be closed to the public.

**DATES:** The meetings will be held between November 30 and December 4, 2020. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** The meetings will be held by web conference via WebEx. Instructions for connecting to the web conference and providing oral public comments will be posted on the Council website at [www.wpcouncil.org](http://www.wpcouncil.org). For assistance with the web conference connection, contact the Council office at (808) 522-8220.

The following venues will be the host sites for the 184th Council meeting: Cliff Pointe, 304 W. O'Brien Drive, Hagatna, Guam; BRI Building Suite 205, Kopa Di Oru St., Garapan, Saipan, CNMI; and, Tedi of Samoa Building Suite 208B, Fagatogo Village, American Samoa.

**FOR FURTHER INFORMATION CONTACT:** Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522-8220.

**SUPPLEMENTARY INFORMATION:** All times shown are in Hawaii Standard Time. The 138th SSC meeting will be held

between 10 a.m. and 5 p.m. on November 30–December 1, 2020. The Pelagic and International Standing Committee will be held between 1 p.m. and 3 p.m. on December 1, 2020. The Executive and Budget Standing Committee meeting will be held between 3:30 p.m. and 5:30 p.m. on December 1, 2020. The portion of the Executive and Budget Standing Committee from 4 p.m. to 4:30 p.m. will be closed to the public in accordance with Section 302(i)(3) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The 184th Council meeting will be held between 11 a.m. and 5 p.m. on December 2 to 4, 2020.

Please note that the evolving public health situation regarding COVID-19 may affect the conduct of the December Council and its associated meetings. At the time this notice was submitted for publication, the Council anticipated convening the Council meeting by web conference with host site locations in Guam, CNMI and American Samoa. Council staff will monitor COVID-19 developments and will determine the extent to which in-person public participation at host sites will be allowable consistent with applicable local and federal safety and health guidelines. If public participation will be limited to web conference only or on a first-come-first-serve basis consistent with applicable guidelines, the Council will post notice on its website at [www.wpcouncil.org](http://www.wpcouncil.org).

Agenda items noted as "Final Action" refer to actions that result in Council transmittal of a proposed fishery management plan, proposed plan amendment, or proposed regulations to the U.S. Secretary of Commerce, under Sections 304 or 305 of the MSA. In addition to the agenda items listed here, the Council and its advisory bodies will hear recommendations from Council advisors. An opportunity to submit public comment will be provided throughout the agendas. The order in which agenda items are addressed may change and will be announced in advance at the Council meeting. The meetings will run as late as necessary to complete scheduled business.

Background documents for the 184th Council meeting will be available at [www.wpcouncil.org](http://www.wpcouncil.org). Written public comments on final action items at the 184th Council meeting should be received at the Council office by 5 p.m. HST, November 27, 2020, and should be sent to Kitty M. Simonds, Executive Director; Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813, phone: (808) 522-8220 or fax: (808)

522-8226; or email: [info.wpcouncil@noaa.gov](mailto:info.wpcouncil@noaa.gov). Written public comments on all other agenda items may be submitted for the record by email throughout the duration of the meeting. Instructions for providing oral public comments during the meeting will be posted on the Council website. This meeting will be recorded for the purposes of generating the minutes of the meeting.

#### Agenda for the 138th Scientific and Statistical Committee Meeting

*Monday, November 30, 2020, 10 a.m. to 5 p.m.*

1. Introductions
2. Approval of Draft Agenda and Assignment of Rapporteurs
3. Status of the 137th SSC Meeting Recommendations
4. Report from Pacific Islands Fisheries Science Center Director
5. Pelagic Fisheries
  - A. Southern Exclusion Zone and Deep-set Longline Catch Rates
  - B. Oceanic Whitetip Shark Issues
    1. Updated Post-release Mortality of Oceanic Whitetip Sharks
    2. Analyses of Fisher Effects on Oceanic Whitetip Catch Rates
    3. Oceanic Whitetip Shark Working Group Report
    - C. Reasonable and Prudent Measures (RPMs) and/or Reasonable and Prudent Alternatives (RPAs) for the Hawaii and American Samoa Longline Fisheries (Action Item)
    - D. Regional Bigeye Tuna Research Plan
    - E. International Fisheries
      1. Potential Catch Limits for North Pacific Striped Marlin (Action Item)
      2. Proposed Tropical Tuna Measure for Western Central Pacific Fisheries Commission (WCPFC)
      - F. Public Comment
      - G. SSC Discussion and Recommendations
  6. Island Fisheries
    - A. Territorial Bottomfish Fishery
      1. Update on the American Samoa Interim Measure
      2. Options for the American Samoa Bottomfish Acceptable Biological Catch for Fishing Year 2021–2022 (Action Item)
      3. Options for American Samoa Bottomfish Rebuilding Plan (Action Item)
      4. Options for the Guam Bottomfish Rebuilding Plan (Action Item)
        - B. Plans for Hawaii Fishery Management
        - C. Public Comment
        - D. SSC Discussion and Recommendations

*Tuesday, December 1, 2020, 10 a.m. to 5 p.m.*

7. Protected Species

- A. Seabird Mitigation Measures
- 1. Review of Experimental Fishing Permit
- 2. Options for Including Tori Lines in the Hawaii Longline Fishery Seabird Mitigation Measures
- B. Stories of Conservation Success: Results of Interviews With Hawaii Longline Fishers
- C. Ecosystem-based Fishery Management Project TurtleWatch Validation
- D. Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) Updates
  - 1. Status of ESA Consultations
  - 2. Coral Critical Habitat
  - 3. Insular False Killer Whale (FKW) Draft Recovery Plan
  - 4. FKW Take Reduction Plan
  - 5. Other Updates
    - E. Public Comment
    - F. SSC Discussion and Recommendations
  - 8. Other Business
    - A. March 2021 SSC Meeting Dates
  - 9. Summary of SSC Recommendations to the Council

#### Agenda for the Pelagic and International Standing Committee

*Tuesday, December 1, 2020, 1 p.m. to 3 p.m.*

- 1. North Pacific Striped Marlin
  - A. Proposed Conservation and Management Measure (CMM) for North Pacific Striped Marlin
  - B. Options for Catch and/or Effort Limits for North Pacific Striped Marlin for Amendment 8 (Action Item)
- 2. Proposed Conservation and Management Measure for Tropical Tunas
- 3. Oceanic Whitetip Working Group Report
- 4. RPMs and/or RPAs for the Hawaii and American Samoa Longline Fisheries (Action Item)
- 5. Other Issues
- 6. Public Comment
- 7. Discussion and Recommendations

#### Agenda for the Executive and Budget Standing Committee

*Tuesday, December 1, 2020, 3:30 p.m. to 5:30 p.m. (4 p.m. to 4:30 p.m. CLOSED)*

- 1. Financial Reports
- 2. Administrative Reports
- 3. Council Family Changes
- 4. Update on Litigation (Closed Session—pursuant to MSA § 302(i)(3))
- 5. Election of Officers
- 6. Meetings and Workshops
- 7. Other Issues
- 8. Public Comment
- 9. Discussion and Recommendations

#### Agenda for the 184th Council Meeting

*Wednesday, December 2, 2020, 11 a.m. to 5 p.m.*

- 1. Welcome and Introductions
  - 2. Approval of the 184th Agenda
  - 3. Approval of the 183rd Meeting Minutes
  - 4. Executive Director's Report
  - 5. Agency Reports
    - A. National Marine Fisheries Service
      - 1. Pacific Islands Regional Office
      - 2. Pacific Islands Fisheries Science Center
        - B. NOAA Office of General Counsel Pacific Islands Section
        - C. Enforcement
          - 1. US Coast Guard
          - 2. NOAA Office of Law Enforcement
          - 3. NOAA Office of General Counsel Enforcement Section
            - D. U.S. State Department
            - E. U.S. Fish and Wildlife Service
            - F. Public Comment
            - G. Council Discussion and Action
      - B. Pelagic & International Fisheries
        - A. Region Bigeye Tuna Research Plan
        - B. Oceanic Whitetip Working Group Report
        - C. North Pacific Striped Marlin
          - 1. Proposed CMM for North Pacific Striped Marlin
          - 2. Options for Catch and/or Effort Limits for North Pacific Striped Marlin for Amendment 8 (Initial Action)
          - D. RPMs and/or RPAs for the Hawaii and American Samoa Longline Fisheries (Initial Action)
          - E. International Fisheries
            - 1. WCPFC
              - a. WCPFC Committee Outcomes
              - b. US Permanent Advisory Committee
            - 2. Proposed CMM for Tropical Tunas
            - 3. Virtual Roundtable on Illegal, Unreported, and Unregulated Fishing and the Western Pacific Region
              - F. Advisory Group Report and Recommendations
                - 1. Pelagic Plan Team
                - 2. Advisory Panel
                - 3. Scientific & Statistical Committee
                  - G. Standing Committee Report and Recommendations
                    - H. Public Comment
                    - I. Council Discussion and Action
                    - J. Standing Committee Report and Recommendations
                      - K. Public Comment
                      - L. Council Discussion and Action
7. Protected Species
  - A. Seabird Mitigation Measures
    - 1. Review of Experimental Fishing Permit
    - 2. Options for Including Tori Lines in the Hawaii Longline Fishery Seabird Mitigation Measures
  - B. Stories of Conservation Success: Results of Interviews with Hawaii

- Longline Fishers
- C. Ecosystem-based Fishery Management Project TurtleWatch Validation
  - D. ESA and MMPA Updates
    - 1. Status of ESA Consultations
    - 2. Coral Critical Habitat
    - 3. Insular FKW Draft Recovery Plan
    - 4. FKW Take Reduction Plan
    - 5. Other Updates
      - E. Advisory Group Report and Recommendations
        - 1. Pelagic Plan Team
        - 2. Advisory Panel
        - 3. Scientific & Statistical Committee
          - F. Public Comment
          - G. Council Discussion and Action

*Wednesday, December 2, 2020, 4:30 p.m. to 5 p.m.*

Public Comment on Non-Agenda Items

*Thursday, December 3, 2020, 11 a.m.–5 p.m.*

- 8. American Samoa Archipelago
  - A. Motu Lipoti
  - B. Department of Marine and Wildlife Resources Report
    - 1. CARES Act distribution of funds
    - 2. Catchit Logit App Training
    - 3. Bottomfish Fono Resolution
      - C. American Samoa Bottomfish Fisheries
        - 1. Update on the Bottomfish Fishery Interim Measure
        - 2. Options for Annual Catch Limits 2021–22 (Initial Action)
        - 3. Options for Bottomfish Stock Rebuilding Plan (Initial Action)
          - D. Status of the American Samoa Large Vessel Prohibited Area
          - E. Advisory Group Report and Recommendations
            - 1. Advisory Panel
            - 2. Scientific & Statistical Committee
            - F. Public Comment
            - G. Council Discussion and Action
  - 9. Mariana Archipelago
    - A. Guam
      - 1. Isla Informe
      - 2. Department of Agriculture/Division Aquatic and Wildlife Resources Report
        - a. CARES Act distribution of funds
        - b. Catchit Logit App Training
        - c. Mandatory Licensing and Reporting
- 3. Options for Guam Bottomfish Stock Rebuilding Plan (Initial Action)
- 4. Report on the Compact of Free Association Renegotiation
  - B. CNMI
    - 1. Arongol Falú
    - 2. Department of Land and Natural Resource/Division of Fish and Wildlife Report
      - a. CARES Act distribution of funds
      - b. Catchit Logit App Training
      - C. Advisory Group Reports and Recommendations

1. Advisory Panel
2. Scientific & Statistical Committee
  - D. Public Comment
  - E. Council Discussion and Action
10. Program Planning and Research
  - A. National Legislative Report
  - B. Electronic Technologies Implementation Plan
  - C. Status of Pacific Islands Marine Monuments
  - D. Update on Interagency US Seafood Trade Task Force
  - E. Regional Communications & Outreach Report
  - F. Advisory Group Report and Recommendations
1. Advisory Panel
2. Non-Commercial Fisheries Advisory Committee
3. Fishing Industry Advisory Committee
4. Scientific & Statistical Committee
  - G. Public Comment
  - H. Council Discussion and Action

Friday, December 4, 2020, 11 a.m.–5 p.m.

11. Hawai'i Archipelago & Pacific Remote Island Areas (PRIA)
  - A. Moku Pepa
  - B. Department of Land Natural Resources/Division of Aquatic Resources Report
1. CARES Act funding distribution
  - C. Plans for Hawaii Fishery Management
  - D. Advisory Group Report and Recommendations
1. Advisory Panel
2. Fishing Industry Advisory Committee
3. Scientific & Statistical Committee
  - E. Public Comment
  - F. Council Discussion and Action
13. Administrative Matters
  - A. Financial Reports
1. Current Grants
  - B. Administrative Reports
  - C. Program Plan Report
  - D. Council Coordination Committee
  - E. Council Family Changes
  - F. Meetings and Workshops
  - G. Code of Ethics Training
  - H. Standing Committee Report and Recommendations
  - I. Public Comment
  - J. Council Discussion and Action
14. Election of Officers
15. Other Business

Non-emergency issues not contained in this agenda may come before the Council for discussion and formal Council action during its 184th meeting. However, Council action on regulatory issues will be restricted to those issues specifically listed in this document and any regulatory issue arising after publication of this document that requires emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of

the Council's intent to take action to address the emergency.

### Special Accommodations

These meetings are accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522-8220 (voice) or (808) 522-8226 (fax), at least 5 days prior to the meeting date.

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

Dated: November 10, 2020.

**Diane M. DeJames-Daly,**

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

[FR Doc. 2020-25231 Filed 11-13-20; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER21-330-000]

#### Specialty Products US, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Specialty Products US, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 30, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an

eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call toll-free, (888) 208-3676 or TTY, (202) 502-8659.

Dated: November 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020-25205 Filed 11-13-20; 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 exempt wholesale generator filings:

*Docket Numbers:* EG21-35-000.

*Applicants:* Flat Ridge

Interconnection LLC.

*Description:* Notice of Self-Certification of Exempt Wholesale Generator Status of Flat Ridge Interconnection LLC.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5218.

*Comments Due:* 5 p.m. ET 11/27/20.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER19-2373-002; ER10-1841-019; ER10-1845-019;

ER10-1852-044; ER10-1905-019;  
ER10-1907-018; ER10-1918-019;  
ER10-1925-019; ER10-1927-019;  
ER10-1950-019; ER10-1951-026;  
ER10-1970-018; ER10-1972-018;  
ER10-2005-019; ER10-2006-019;  
ER10-2078-019; ER11-26-019; ER11-  
4462-047; ER12-1660-018; ER13-2458-  
013; ER13-2461-013; ER16-1872-009;  
ER16-2506-010; ER17-2270-010;  
ER17-838-022; ER18-1771-008; ER18-  
2224-008; ER18-2246-007; ER19-1003-  
006; ER19-1393-006; ER19-1394-006;  
ER19-2382-002; ER19-2398-003;  
ER19-2437-002; ER19-2461-002;  
ER19-987-006; ER20-122-002; ER20-  
975-001.

*Applicants:* Ashtabula Wind I, LLC, Ashtabula Wind II, LLC, Ashtabula Wind III, LLC, Butler Ridge Wind Energy Center, LLC, Crowned Ridge Interconnection, LLC, Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, Crystal Lake Wind Energy I, LLC, Crystal Lake Wind Energy II, LLC, Crystal Lake Wind III, LLC, Emmons-Logan Wind, LLC, Endeavor Wind I, LLC, Endeavor Wind II, LLC, Florida Power & Light Company, FPL Energy Mower County, LLC, FPL Energy North Dakota Wind, LLC, FPL Energy North Dakota Wind II, LLC, FPL Energy Oliver Wind I, LLC, FPL Energy Oliver Wind II, LLC, Garden Wind, LLC, Hancock County Wind, LLC, Hawkeye Power Partners, LLC, Heartland Divide Wind Project, LLC, Langdon Renewables, LLC, Marshall Solar, LLC, NextEra Energy Duane Arnold, LLC, NextEra Energy Point Beach, LLC, Oliver Wind III, LLC, Pegasus Wind, LLC, Pheasant Run Wind, LLC, Story County Wind, LLC, Stuttgart Solar, LLC, Tuscola Bay Wind, LLC, Tuscola Wind II, LLC, White Oak Energy LLC, NEPM II, LLC, NextEra Energy Services Massachusetts, LLC, NextEra Energy Marketing, LLC.

*Description:* Notification of Change in Status of NextEra Resources Entities.

*Filed Date:* 11/5/20.

*Accession Number:* 20201105-5187.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-321-000.

*Applicants:* RRE Power LLC, Bridge Solar LLC.

*Description:* Petition of for Limited Waiver of RRE Power LLC, et al.

*Filed Date:* 10/30/20.

*Accession Number:* 20201030-5463.

*Comments Due:* 5 p.m. ET 11/20/20.

*Docket Numbers:* ER21-351-000.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2020-11-06\_Surplus Interconnection Product Study Clarification Filing to be effective 1/6/2021.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5162.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-352-000.

*Applicants:* Flat Ridge

Interconnection LLC.

*Description:* Baseline eTariff Filing: Filing of Common Facilities Agreement to be effective 12/1/2020.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5163.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-353-000.

*Applicants:* Oakland Power Company LLC.

*Description:* § 205(d) Rate Filing: Notices of Succession and Revisions to Tariffs and Agreements (I) to be effective 10/30/2020.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5166.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-354-000.

*Applicants:* Moss Landing Power Company LLC.

*Description:* § 205(d) Rate Filing: Notices of Succession and Revisions to Tariffs and Agreements (II) to be effective 10/30/2020.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5170.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-355-000.

*Applicants:* Pacific Gas and Electric Company.

*Description:* § 205(d) Rate Filing: 1st Amendment to CDWR Hyatt-Thermalito LGIA (SA 273) to be effective 1/6/2021.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5172.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-356-000.

*Applicants:* Flat Ridge 2 Wind Energy LLC.

*Description:* § 205(d) Rate Filing: Certificate of Concurrence to Common Facilities Agreement to be effective 12/1/2020.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5182.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-357-000.

*Applicants:* Public Service Company of New Mexico.

*Description:* § 205(d) Rate Filing: Executed Engineering and Procurement Agreement between PNM and 201LC 8me LLC to be effective 10/20/2020.

*Filed Date:* 11/6/20.

*Accession Number:* 20201106-5183.

*Comments Due:* 5 p.m. ET 11/27/20.

*Docket Numbers:* ER21-358-000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* § 205(d) Rate Filing: Original ISA, Service Agreement No. 5823; Queue No. AC2-103 to be effective 10/12/2020.

*Filed Date:* 11/9/20.

*Accession Number:* 20201109-5068.

*Comments Due:* 5 p.m. ET 11/30/20.

*Docket Numbers:* ER21-359-000.

*Applicants:* Flat Ridge 3 Wind Energy, LLC.

*Description:* § 205(d) Rate Filing: CFA, Common Facilities Agreement to be effective 12/1/2020.

*Filed Date:* 11/9/20.

*Accession Number:* 20201109-5067.

*Comments Due:* 5 p.m. ET 11/30/20.

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 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020-25204 Filed 11-13-20; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP21-6-000]

#### Spire Storage West, LLC; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Clear Creek Expansion Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document, that will discuss the environmental impacts of the Clear Creek Expansion Project involving construction and operation of facilities by Spire Storage West, LLC (Spire Storage) in Uinta County, Wyoming. The Commission will use this environmental document in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies regarding the project. As part of the National Environmental Policy Act (NEPA) review process, the Commission takes into account concerns the public may have about proposals and the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. This gathering of public input is referred to as “scoping.” The main goal of the scoping process is to focus the analysis in the environmental document on the important environmental issues. Additional information about the Commission’s NEPA process is described below in the *NEPA Process and Environmental Document* section of this notice.

By this notice, the Commission requests public comments on the scope of issues to address in the environmental document. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m. Eastern Time on December 9, 2020. Comments may be submitted in written form. Further details on how to submit comments are provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission before the opening of this docket on October 9, 2020, you will need to file those comments in Docket No. CP21–6–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission’s current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would

seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law. The Commission does not subsequently grant, exercise, or oversee the exercise of that eminent domain authority. The courts have exclusive authority to handle eminent domain cases; the Commission has no jurisdiction over these matters.

Spire Storage provided landowners with a fact sheet prepared by the FERC entitled “An Interstate Natural Gas Facility On My Land? What Do I Need To Know?” which addresses typically asked questions, including the use of eminent domain and how to participate in the Commission’s proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website ([www.ferc.gov](http://www.ferc.gov)) under the Natural Gas Questions or Landowner Topics link.

#### Public Participation

There are three methods you can use to submit your comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov).

(1) You can file your comments electronically using the *eComment* feature, which is located on the Commission’s website ([www.ferc.gov](http://www.ferc.gov)) under the link to FERC Online. Using *eComment* is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature, which is located on the Commission’s website ([www.ferc.gov](http://www.ferc.gov)) under the link to FERC Online. With *eFiling*, you can provide comments in a variety of formats by attaching them as a file with your submission. New *eFiling* users must first create an account by clicking on “*eRegister*.” You will be asked to select the type of filing you are making; a comment on a particular project is considered a “Comment on a Filing”; or

(3) You can file a paper copy of your comments by mailing them to the

Commission. Be sure to reference the project docket number (CP21–6–000) on your letter. 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.

Additionally, the Commission offers a free service called *eSubscription* which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to <https://www.ferc.gov/ferc-online/overview> to register for *eSubscription*.

#### Summary of the Proposed Project

Spire Storage proposes to expand its natural gas storage facilities at its existing Clear Creek Storage Field in Uinta County, Wyoming in order to increase the certificated gas capacities from 4.0 billion cubic feet (Bcf) to 20 Bcf, and increase the maximum daily injection and withdrawal capacities from 35 million cubic feet (MMcf) and 50 MMcf per day, to 350 MMcf and 500 MMcf per day, respectively. Spire Storage further proposes to construct pipeline connections north to the Canyon Creek Plant, south to the Kern River Gas Transmission mainline, and reconnect with the Questar Pipeline at the Clear Creek Plant. According to Spire Storage, the purpose of this project is to increase storage capacity and enhance operational capabilities to satisfy market demand for natural gas services in the Western United States.

The Clear Creek Expansion Project would consist of the following facilities:

- Four compressor units at the Clear Creek Plant;
- a tank storage and natural gas liquids fueling equipment facility on an existing pad;
- 11 new injection/withdrawal wells, one new water disposal well, and associated lines;
- approximately 10.6 miles of 20-inch-diameter pipeline;
- approximately 3.5 miles of 4,160-volt powerline; and
- other related appurtenances.

The general location of the project facilities is shown in appendix 1.<sup>1</sup>

### Land Requirements for Construction

Construction of the proposed facilities would disturb about 249.0 acres of land for the aboveground facilities and the pipeline. Following construction, Spire Storage would maintain about 128.1 acres for permanent operation of the project's facilities; the remaining acreage would be restored and revert to former uses.

### NEPA Process and the Environmental Document

Any environmental document issued by the Commission will discuss impacts that could occur as a result of the construction and operation of the proposed project under the relevant general resource areas:

- Geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- air quality and noise; and
- reliability and safety.

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed project.

<sup>1</sup> The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at [www.ferc.gov](http://www.ferc.gov) using the link called "eLibrary". For instructions on connecting to eLibrary, refer to the last page of this notice. At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact FERC at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call toll free, (886) 208-3676 or TTY (202) 502-8659.

If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/ Notice of Schedule* will be issued, which will open up an additional comment period. Staff will then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the public record through eLibrary<sup>2</sup> and the Commission's natural gas environmental documents web page (<https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents>). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the environmental document.<sup>3</sup> Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the *Public Participation* section of this notice. Currently, the Bureau of Land Management has expressed its intention to participate as a cooperating agency in the preparation of the environmental document to satisfy its NEPA responsibilities related to this project.

### Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Office(s), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.<sup>4</sup> The environmental document for this project will document findings on the impacts on historic properties and

<sup>2</sup> For instructions on connecting to eLibrary, refer to the last page of this notice.

<sup>3</sup> The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Section 1501.6.

<sup>4</sup> The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

summarize the status of consultations under section 106.

### Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

*If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please return the attached "Mailing List Update Form" (appendix 2).*

### Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208-FERC, or on the FERC website at [www.ferc.gov](http://www.ferc.gov) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number in the "Docket Number" field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov) or (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public sessions or site visits will be posted on the Commission's calendar located at <https://www.ferc.gov/news-events/events> along with other related information.

Dated: November 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020-25209 Filed 11-13-20; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Project No. 15035-000]

**Premium Energy Holdings, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications**

On June 9, 2020, Premium Energy Holdings LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Isabella Pumped Storage Project (Isabella Project or project), a closed-loop pumped storage project to be located in Kern County, California. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) An upper reservoir created by a new dam at one of three alternative locations in the Southern Sierra Nevada Mountains with a capacity between 19,073 and 34,459 acre-feet, at an elevation between 4,500 and 5,960 feet above mean sea level; (2) a tunnel system of steel penstocks and concrete pressurized tunnels to connect the upper and lower reservoirs to the powerhouse; (3) pump-turbine units in an underground powerhouse with generation capacity of 2,000 megawatts located at one of the three alternative locations; (4) a cavern of the transformers chamber adjacent to the powerhouse; (5) the existing Isabella Reservoir, to be used as the lower reservoir, with a storage capacity of 568,000 acre-feet, at an elevation of 2,580 feet above mean sea level; (6) electrical switchyards and interconnecting transmission lines from the powerhouse to the nearest major transmission interconnection at one of the six alternative locations; and (7) appurtenant facilities. The estimated average annual generation of the Isabella Project would be 6,900 gigawatt-hours.

*Applicant Contact:* Victor M. Rojas, Premium Energy Holdings, 355 South Lemon Avenue, Suite A, Walnut, California 91789; phone: (909) 595-5314.

*FERC Contact:* Khatoon Melick, (202) 502-8433, [khatoon.melick@ferc.gov](mailto:khatoon.melick@ferc.gov).

Deadline for filing comments, motions to intervene, competing applications

(without notices of intent), or notices of intent to file competing applications: 60 Days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at <https://ferconline.ferc.gov/ferconline.aspx>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment.aspx>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208-3676 (toll free), or (202) 502-8659 (TTY). 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. The first page of any filing should include docket number P-15035-000.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's website at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number (P-15035) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: November 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020-25208 Filed 11-13-20; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****Combined Notice of Filings**

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Number:* CP21-10-000.

*Applicants:* Tennessee Gas Pipeline Company, L.L.C.

*Description:* Abbreviated Joint Application for Authorization to Abandon Emergency Exchange Service

of Tennessee Gas Pipeline Company, L.L.C., et al. under CP21-10.

*Filed Date:* 11/2/2020.

*Accession Number:* 202011025124.

*Comments/Protests Due:* 5 p.m. ET 11/23/2020.

*Docket Number:* PR21-4-000.

*Applicants:* Columbia Gas of Ohio, Inc.

*Description:* Submits tariff filing per 284.123(b),(e)/: COH Rates effective 10-27-2020 to be effective 10/27/2020.

*Filed Date:* 11/4/2020.

*Accession Number:* 202011045030.

*Comments/Protests Due:* 5 p.m. ET 11/25/2020.

*Docket Number:* PR21-5-000.

*Applicants:* Moss Bluff Hub, LLC.

*Description:* Submits tariff filing per 284.123(b),(e)/: Moss Bluff LINK URL Conversion Filing to be effective 12/1/2020.

*Filed Date:* 11/5/2020.

*Accession Number:* 202011055026.

*Comments/Protests Due:* 5 p.m. ET 11/27/2020.

*Docket Numbers:* RP21-200-000.

*Applicants:* Rover Pipeline LLC.

*Description:* § 4(d) Rate Filing; Fuel Filing on 11-5-20 to be effective 11/1/2020.

*Filed Date:* 11/5/2020.

*Accession Number:* 20201105-5061.

*Comments Due:* 5 p.m. ET 11/10/20.

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 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020-25206 Filed 11-13-20; 8:45 am]

**BILLING CODE 6717-01-P**



**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. ER21–331–000]

**DDP Specialty Electronic Materials US, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization**

This is a supplemental notice in the above-referenced proceeding of DDP Specialty Electronic Materials US, Inc.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 30, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal**

**Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Dated: November 9, 2020.

**Nathaniel J. Davis, Sr.**,  
*Deputy Secretary.*

[FR Doc. 2020–25207 Filed 11–13–20; 8:45 am]

**BILLING CODE 6717–01–P**

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL–10016–69–Region 5]

**Proposed De Minimis Administrative Order on Consent for the Lane Street Ground Water Site in Elkhart, Indiana**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice; request for public comment.

**SUMMARY:** In accordance with the *De Minimis* Administrative Settlement Agreement and Order on Consent, notice is hereby given of a proposed administrative settlement concerning the Lane Street Ground Water Contamination Site in Elkhart, Indiana, with the following Settling Parties: Hach Company and Dynamic Metals LLC.

**DATES:** Comments must be submitted on or before December 16, 2020.

**ADDRESSES:** The proposed settlement is available for public inspection at the EPA, Region 5, Records Center, 77 W Jackson Blvd., 7th Fl., Chicago, Illinois 60604. A copy of the proposed settlement may be obtained from James Morris, Assoc. Regional Counsel, EPA, Office of Regional Counsel, Region 5, 77 W Jackson Blvd., mail code: C–14J, Chicago, Illinois 60604. Comments

should reference the Lane Street Ground Water Contamination Site, Elkhart, Indiana, and should be addressed to James Morris, Assoc. Regional Counsel, EPA, Office of Regional Counsel, Region 5, 77 W Jackson Blvd., mail code: C–14J, Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:** James Morris, Assoc. Regional Counsel, EPA, Office of Regional Counsel, Region 5, 77 W Jackson Blvd., C–14J, Chicago, Illinois 60604. 312–886–6632; email: [morris.james@epa.gov](mailto:morris.james@epa.gov).

**SUPPLEMENTARY INFORMATION:** The Site occupies about 65 acres and consists of a contaminated groundwater plume underlying both active and inactive industrial, commercial, and residential properties. Various industries using hazardous substances operated at the Site for over 20 years, until approximately 2004. The contaminants of concern in the Site's groundwater include trichloroethene, tetrachloroethene, 1,1-dichloroethane, and cis-1,2-dichloroethene. Under the terms of the settlement, the Settling Parties, Hach Company and Dynamic Metals LLC, will pay specified amounts into an EPA special account within 30 days of the effective date of the settlement. Hach Company will pay \$74,400.00 and Dynamic Metals LLC will pay \$82,667.00. In return, EPA would give the Settling Parties a covenant not to sue, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. On August 28, 2020, the Department of Justice issued its prior written approval of the settlement.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the EPA, Region 5, Records Center, 77 W Jackson Blvd., 7th Fl., Chicago, Illinois 60604.

**Douglas Ballotti**,  
*Director, Superfund & Emergency Management Division.*

[FR Doc. 2020–24902 Filed 11–13–20; 8:45 am]

**BILLING CODE 6560–50–P**

**FEDERAL RESERVE SYSTEM**

[Docket No. OP-1730]

**Federal Reserve Bank Services: Notification of the 2021 Private Sector Adjustment Factor and 2021 Fee Schedules of Federal Reserve Priced Services and Electronic Access**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Notification of 2021 private sector adjustment factor and fee schedules.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) has approved the private sector adjustment factor (PSAF) for 2021 of \$16.4 million and the 2021 fee schedules for Federal Reserve priced services and electronic access. These actions were taken in accordance with the Monetary Control Act of 1980, which requires that, over the long run, fees for Federal Reserve priced services be established on the basis of all direct and indirect costs, including the PSAF.

**DATES:** The new fee schedules become effective January 4, 2021.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding the fee schedules:

David C. Mills, Associate Director, (202) 530-6265; Jason Kim, Financial Institution Policy Analyst, (202) 475-6665; Dean Friedberg, Financial Institution Policy Analyst, (202) 425-3525; Division of Reserve Bank Operations and Payment Systems. For questions regarding the PSAF: Casey Clark, Assistant Director, (202) 912-7978; Grace Milbank, Lead Financial Institution Policy Analyst, (202) 263-4828, Division of Reserve Bank Operations and Payment Systems. For users of Telecommunications Device for the Deaf (TDD) only, please call (202) 263-4869. Copies of the 2020 fee schedules for the check service are available from the Board, the Federal Reserve Banks, or the Reserve Banks' financial services website at [www.frb-services.org](http://www.frb-services.org).

**SUPPLEMENTARY INFORMATION:**

**Private Sector Adjustment Factor, Priced Services Cost Recovery, and Overview of 2021 Price Changes**

A. Overview—Each year, as required by the Monetary Control Act of 1980, the Reserve Banks set fees for priced services provided to depository institutions.<sup>1</sup> These fees are set to recover, over the long run, all direct and

indirect costs and imputed costs, including financing costs, taxes, and certain other expenses, as well as the return on equity (profit) that will have been earned if a private business firm provided the services. The imputed costs and imputed profit are collectively referred to as the private-sector adjustment factor (PSAF). From 2010 through 2019, the Reserve Banks recovered 103.9 percent of their total expenses (including imputed costs) and targeted after-tax profits or return on equity (ROE) for providing priced services.<sup>2</sup>

The Board on July 21, 2020, announced its intent to maintain the current schedule of prices for most payment services that the Federal Reserve Banks provide to depository institutions (priced services) in 2021, in light of the uncertainties created by the COVID-19 pandemic and to support the business planning of users and providers of payment services.<sup>3</sup> Table 1 summarizes 2019 actual, 2020 estimated, and 2021 budgeted cost recovery rates for all priced services. Cost recovery is estimated to be 101.4 percent in 2020 and budgeted to be 98.7 percent in 2021.

**TABLE 1—AGGREGATE PRICED SERVICES PRO FORMA COST AND REVENUE PERFORMANCE<sup>a</sup>**  
[Dollars in millions]

| Year                  | Revenue<br>1 <sup>b</sup> | Total expense<br>2 <sup>c</sup> | Net income (ROE)<br>3<br>[1-2] | Targeted ROE<br>4 <sup>d</sup> | Recovery rate after targeted ROE (%)<br>5 <sup>e,f</sup><br>[1/(2+4)] |
|-----------------------|---------------------------|---------------------------------|--------------------------------|--------------------------------|---|
| 2019 (actual) .....   | \$444.1                   | \$441.2                         | \$2.9                          | \$5.4                          | 99.4  |
| 2020 (estimate) ..... | 445.5                     | 433.4                           | 12.1                           | 5.9                            | 101.4   |
| 2021 (budget) .....   | 438.4                     | 439.9                           | -1.5                           | 4.4                            | 98.7  |

<sup>a</sup> Calculations in this table and subsequent pro forma cost and revenue tables may be affected by rounding. Excludes amounts related to the development of the FedNow Service.

<sup>b</sup> Revenue includes imputed income on investments when equity is imputed at a level that meets minimum capital requirements and, when combined with liabilities, exceeds total assets (attachment 1). For 2020, the projected revenue assumes implementation of the fee changes.

<sup>c</sup> The calculation of total expense includes operating, imputed, and other expenses. Imputed and other expenses include taxes, Board of Governors' priced services expenses, the cost of float, and interest on imputed debt, if any. Credits or debits related to the accounting for pension plans under ASC 715 are also included.

<sup>d</sup> Targeted ROE is the after-tax ROE included in the PSAF.

<sup>e</sup> The recovery rates in this and subsequent tables do not reflect the unamortized gains or losses that must be recognized in accordance with ASC 715. Future gains or losses, and their effect on cost recovery, cannot be projected.

<sup>f</sup> For 2019 and 2020, credits or debits related to the accounting for pension plans under ASC 715 include service cost only with the adoption of ASU 2017-07 *Improving the Presentation of Net Periodic Pension Cost and Net Periodic Postretirement Benefit Cost* (Topic 715).

Table 2 provides an overview of cost-recovery budgets, estimates, and

performance for the 10-year period from 2010 to 2019, 2019 actual, 2020 budget,

2020 estimate, and 2021 budget by priced service.

<sup>1</sup> On August 5, 2019, the Federal Reserve Board announced that the Reserve Banks will develop the FedNow<sup>SM</sup> Service, an interbank real-time gross settlement (RTGS) service with integrated clearing functionality, to support the provision of end-to-end faster payment services. The Board anticipates the FedNow Service will be available in 2023 or 2024. Following the introduction of the FedNow Service, the Board will regularly disclose the

service's cost recovery and will monitor progress toward matching revenues and costs.

<sup>2</sup> The 10-year recovery rate is based on the pro forma income statements for Federal Reserve priced services published in the Board's *Annual Report*. In accordance with Accounting Standards Codification (ASC) 715 *Compensation—Retirement Benefits*, the Reserve Banks recognized a cumulative reduction

in equity related to the priced services' benefit plans. Including this cumulative reduction in equity from 2010 to 2019 results in cost recovery of 100.7 percent for the 10-year period. This measure of long-run cost recovery is also published in the Board's *Annual Report*.

<sup>3</sup> See <https://www.federalreserve.gov/newsevents/pressreleases/other20200721a.htm>.

TABLE 2—PRICED SERVICES COST RECOVERY  
[Percent]

| Priced service              | 2010–2019 | 2019 actual | 2020 budget <sup>a</sup> | 2020 estimate | 2021 budget <sup>b</sup> |
|-----------------------------|-----------|-------------|--------------------------|---------------|--------------------------|
| All services .....          | 103.9     | 99.4        | 101.7                    | 101.4         | 98.7                     |
| Check .....                 | 109.0     | 104.0       | 104.3                    | 102.4         | 97.7                     |
| FedACH .....                | 98.6      | 97.6        | 100.6                    | 97.6          | 97.4                     |
| Fedwire Funds and NSS ..... | 102.2     | 97.3        | 100.6                    | 105.1         | 100.5                    |
| Fedwire Securities .....    | 102.5     | 100.3       | 102.8                    | 101.9         | 100.9                    |

<sup>a</sup> The 2020 budget figures reflect the final budgets as approved by the Board in December 2019.

<sup>b</sup> The 2021 budget figures reflect preliminary budget information from the Reserve Banks. The Reserve Banks will submit final budget data to the Board in November 2020, for Board consideration in December 2020.

1. *2020 Estimated Performance*—The Reserve Banks estimate that they will recover 101.4 percent of the costs of providing priced services in 2020, including total expense and targeted ROE, compared with a 2020 budgeted recovery rate of 101.7 percent, as shown in table 2. Overall, the Reserve Banks estimate that they will fully recover actual and imputed costs and earn net income of \$12.1 million, compared with the targeted ROE of \$5.9 million. The Reserve Banks estimate that the Check Services, the Fedwire® Funds and National Settlement Services, and the Fedwire Securities Service will achieve full cost recovery; however, the Reserve Banks estimate that the FedACH® Service will not achieve full cost recovery in 2020. Consistent with recent years, the FedACH Service will not achieve full cost recovery because of investment costs associated with the multiyear technology initiative to modernize its processing platform.<sup>4</sup> This investment is expected to enhance efficiency, the overall quality of operations, and the Reserve Banks' ability to offer additional services to depository institutions.

2. *2021 Private-Sector Adjustment Factor*—The 2021 PSAF for Reserve Bank priced services is \$16.4 million. This amount represents a decrease of \$2.5 million from the 2020 PSAF of \$18.9 million. This decrease is primarily the result of a decrease in imputed return on equity and sales tax.

3. *2021 Projected Performance*—The Reserve Banks project a priced services cost recovery rate of 98.7 percent in 2021, with a net loss of \$1.5 million and targeted ROE of \$4.4 million. The Reserve Banks project that the price changes will result in a 2.7 percent average price increase for Check Services customers. The Reserve Banks project that each of the individual service lines, other than Check Services and FedACH, will fully recover their costs for 2021. The Check Services'

underrecovery projections are largely driven by an anticipated decline in check volumes. FedACH is projected to underrecover because of the ongoing technology modernization project. The Fedwire Funds Service and Fedwire Securities Service are projected to recover more than 100 percent of costs in 2021. Check Services is projected to fully recover costs in the long run.<sup>5</sup> Although FedACH is not budgeted to fully recover its costs in 2021, the Reserve Banks expect to fully recover costs in the long run once the modernization project is complete.

The primary risks to the Reserve Banks' ability to achieve their targeted cost recovery rates are unanticipated volume and revenue reductions—which may be more likely than in other years because of the COVID–19 pandemic—and the potential for cost overruns from new and ongoing improvement initiatives such as the technology modernization for FedACH. In light of these risks, the Reserve Banks will continue to monitor the impacts of the pandemic and refine their business and operational strategies, which may include managing costs and adjusting prices as appropriate.

4. *2021 Pricing*—With the exception of an increase to the fixed monthly Check 21 participation fee, the Reserve Banks will keep prices at existing levels for all existing priced services fees in 2021. The following summarizes the Reserve Banks' changes in fee schedules for priced services in 2021:

#### *Check*

The Reserve Banks will increase the fixed monthly Check 21 participation fee per parent customer from a fixed \$25 to a new tiered pricing structure with fees ranging from \$40 to \$135.

#### *FedACH*

The Reserve Banks will keep prices at existing levels for all existing priced FedACH products.

#### *Fedwire Funds*

The Reserve Banks will keep prices at existing levels for all existing priced Fedwire Funds products.

#### *National Settlement Service (NSS)*

The Reserve Banks will keep prices at existing levels for all existing priced NSS products.

#### *Fedwire Securities*

The Reserve Banks will keep prices at existing levels for all the existing priced Fedwire Securities products.

#### *FedLine® Solutions*

The Reserve Banks will keep prices at existing levels for all the existing priced FedLine Solutions products.

B. *Private Sector Adjustment Factor*—The imputed debt financing costs, targeted ROE, and effective tax rate are based on a U.S. publicly traded firm market model.<sup>6</sup> The method for calculating the financing costs in the PSAF requires determining the appropriate imputed levels of debt and equity and then applying the applicable financing rates. In this process, a pro forma balance sheet using estimated assets and liabilities associated with the Reserve Banks' priced services is developed, and the remaining elements that would exist are imputed as if these priced services were provided by a private business firm. The same generally accepted accounting principles that apply to commercial-entity financial statements apply to the relevant elements in the priced services pro forma financial statements.

The portion of Federal Reserve assets that will be used to provide priced services during the coming year is determined using information about actual assets and projected disposals and acquisitions. The priced portion of these assets is determined based on the allocation of depreciation and

<sup>6</sup> Data for U.S. publicly traded firms is from the Standard and Poor's Compustat® database. This database contains information on more than 6,000 U.S. publicly traded firms, which approximates information for the entirety of the U.S. market.

<sup>4</sup> The Reserve Banks have been engaged in a multiyear technology initiative to modernize the FedACH processing platform capabilities.

<sup>5</sup> From 2012–2021, Check Service's projected 10-year average recovery rate is 108.6 percent.

amortization expenses of each asset class. The priced portion of actual Federal Reserve liabilities consists of postemployment and postretirement benefits, accounts payable, and other liabilities. The priced portion of the actual net pension asset or liability is also included on the balance sheet.<sup>7</sup>

The equity financing rate is the targeted ROE produced by the capital asset pricing model (CAPM). In the CAPM, the required rate of return on a firm's equity is equal to the return on a risk-free asset plus a market risk premium. The risk-free rate is based on the three-month Treasury bill; the beta is assumed to be equal to 1.0, which approximates the risk of the market as a whole; and the market risk premium is based on the monthly returns in excess of the risk-free rate over the most recent 40 years. The resulting ROE reflects the return a shareholder would expect when investing in a private business firm.

For simplicity, given that federal corporate income tax rates are graduated, state income tax rates vary, and various credits and deductions can apply, an actual income tax expense is not explicitly calculated for Reserve Bank priced services. Instead, the Board targets a pretax ROE that would provide sufficient income to fulfill the priced services' imputed income tax obligations. To the extent that performance results are greater or less than the targeted ROE, income taxes are adjusted using the effective tax rate.

**Capital structure.** The capital structure is imputed based on the imputed funding need (assets less liabilities), subject to minimum equity constraints. Short-term debt is imputed to fund the imputed short-term funding need. Long-term debt and equity are imputed to meet the priced services long-term funding need at a ratio based on the capital structure of the U.S. publicly traded firm market. The level of equity must meet the minimum equity constraints, which follow the FDIC requirements for a well-capitalized institution. The priced services must maintain equity of at least 5 percent of total assets and 10 percent of risk-weighted assets.<sup>8</sup> Any equity imputed

that exceeds the amount needed to fund the priced services' assets and meet the minimum equity constraints is offset by a reduction in imputed long-term debt. When imputed equity is larger than what can be offset by imputed debt, the excess is imputed as investments in Treasury securities; income imputed on these investments reduces the PSAF.

**Application of the Payment System Risk (PSR) Policy to the Fedwire Funds Service.** The Board's PSR policy incorporates the international standards for financial market infrastructures (FMIs) developed by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions in the *Principles for Financial Market Infrastructures*. The policy requires that the Fedwire Funds Service meet or exceed the applicable risk-management standards. Principle 15 states that an FMI should identify, monitor, and manage general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services. The Fedwire Funds Service does not face the risk that a business shock would cause the service to wind down in a disorderly manner and disrupt the stability of the financial system. In order to foster competition with private-sector FMIs, however, the Reserve Banks' priced services will hold an amount equivalent to six months of the Fedwire Funds Service's current operating expenses as liquid financial assets and equity on the pro forma balance sheet.<sup>9</sup> Current operating expenses are defined as normal business operating expenses on the income statement, less depreciation, amortization, taxes, and interest on debt. Using the Fedwire Funds Service's preliminary 2021 budget, six months of current operating expenses would be \$47.5 million. In 2021, \$26.6 million of equity was imputed to meet the FDIC capital requirements. No additional equity was necessary to meet the PSR policy requirement.

the Federal Reserve priced services' equity on the pro forma balance sheet qualifies as tier 1 capital, only requirements 1 and 4 are binding. The FDIC rule can be located at [https://www.fdic.gov/news/board/2014/2014-04-08\\_notice\\_dis\\_c\\_fr.pdf](https://www.fdic.gov/news/board/2014/2014-04-08_notice_dis_c_fr.pdf).

<sup>9</sup>This requirement does not apply to the Fedwire Securities Service. There are no competitors to the Fedwire Securities Service that would face such a requirement, and imposing such a requirement when pricing the securities services could artificially increase the cost of these services.

**Effective tax rate.** Like the imputed capital structure, the effective tax rate is calculated based on data from U.S. publicly traded firms. The tax rate is the mean of the weighted average rates of the U.S. publicly traded firm market over the past five years.

**Debt and equity financing.** The imputed short- and long-term debt financing rates are derived from the nonfinancial commercial paper rates from the Federal Reserve Board's H.15 Selected Interest Rates release (AA and A2/P2) and the annual Merrill Lynch Corporate & High Yield Index rate, respectively. The equity financing rate is described above. The rates for debt and equity financing are applied to the priced services estimated imputed short-term debt, long-term debt, and equity needed to finance short- and long-term assets and meet equity requirements.

The 2021 PSAF is \$16.4 million, compared with \$18.9 million in 2020. The decrease of \$2.5 million is attributable to a net \$2.0 million decrease in the cost of capital and a \$0.5 million decrease in sales tax. The net \$2.0 million decrease in cost of capital resulted from an incremental \$1.0 million decrease in the return on equity imputed to satisfy the FDIC requirements for a well-capitalized institution and a \$1.0 million decrease in return on imputed equity necessary for PSR policy compliance.

The PSAF expense of \$16.4 million, detailed in table 5, reflects \$6.6 million for BOG expense, \$5.9 million for capital funding, and \$3.9 million in sales tax expense.

As shown in table 3, 2021 total assets of \$790.6 million decreased by \$50.6 million from 2020. The net decrease in total assets reflects an \$88.8 million decrease in short-term assets and imputed investments partially offset by a \$38.2 million increase in long-term assets.

The decrease in the short-term assets is primarily driven by a \$67.0 million decrease in items in process of collection resulting from a reduction in high balances in the value of foreign transactions. The remaining net decreases in short-term assets reflect a \$38.2 million decrease in the imputed investments in Treasury securities from imputed equity required to meet FDIC capital requirements for a well-capitalized institution and to comply with the PSR policy, partially offset by a \$16.5 million increase in imputed investments in Fed Funds.

The net long-term asset increase of \$38.2 million primarily consists of a \$66.8 million increase in the net pension asset partially offset by a

<sup>7</sup> The pension assets are netted with the pension liabilities and reported as a net asset or net liability as required by ASC 715 *Compensation—Retirement Benefits*.

<sup>8</sup> The FDIC rule, which was adopted as final on April 14, 2014, requires that well-capitalized institutions meet or exceed the following standards: (1) Total capital to risk-weighted assets ratio of at least 10 percent, (2) tier 1 capital to risk-weighted assets ratio of at least 8 percent, (3) common equity tier 1 capital to risk-weighted assets ratio of at least 6.5 percent, and (4) a leverage ratio (tier 1 capital to total assets) of at least 5 percent. Because all of

combined \$23.6 million decrease in Premises and in Leasehold improvements and long-term prepayments. The net pension asset increase reflects higher plan contributions over the past two years. The decreases in Premises and in Leasehold improvements and long-term prepayments are mainly due to a lower allocation of Reserve Bank assets to the Federal Reserve's priced services.

The capital structure of the 2021 pro forma balance sheet, provided in table 4, is composed of equity of \$51.8 million, or 10.0 percent of the 2021 risk-weighted assets detailed in table 6, and

\$9.1 million of long-term debt. The 2021 capital structure differs from that of 2020, which was composed of \$56.0 million of equity and no long-term debt. Provided in table 5, the 2021 initially imputed equity required to fund assets and meet the publicly traded firm model capital requirements is \$25.2 million. Long-term debt of \$35.7 million was imputed at the observed market ratio of 58.7 percent. To meet the FDIC capital requirements for a well-capitalized institution, \$26.6 million of imputed long-term debt was substituted for equity, and no additional equity was imputed. The resulting \$51.8 million

total level of equity was sufficient to satisfy the \$47.5 million equity requirement for the PSR policy requirements.

The net Accumulated Other Comprehensive loss is \$628.2 million, compared with \$625.2 million in 2020. The slight decrease is primarily attributable to a lower priced percentage and lower tax rate partially offset by a lower discount rate. AOCI is in a net loss position and does not reduce the total imputed equity required to fund priced services assets or fulfill the FDIC equity requirements for a well-capitalized institution.

**Table 3**

Comparison of Pro Forma Balance Sheets for Budgeted Federal Reserve Priced Services<sup>a</sup>  
(millions of dollars – projected average for year)

|  | <u>2021</u>     | <u>2020</u>     | <u>Change</u>    |
|--|-----------------|-----------------|------------------|
| <b>Short-term assets</b>   |                 |                 |                  |
| Receivables  | \$ 37.1         | \$ 37.1         | \$ -             |
| Materials and supplies   | 0.4             | 0.5             | (0.1)            |
| Prepaid expenses   | 10.8            | 10.8            | -                |
| Items in process of collection <sup>10</sup>                                     | 62.1            | 129.1           | (67.0)           |
| <b>Total short-term assets</b>   | <u>110.4</u>    | <u>177.5</u>    | <u>(67.1)</u>    |
| <b>Imputed investments<sup>11</sup></b>  |                 |                 |                  |
| Imputed investment in Treasury Securities  | \$ 0.0          | \$ 38.2         | \$ (38.2)        |
| Imputed investment in Fed Funds  | 242.0           | 225.5           | 16.5             |
| <b>Total imputed investments</b>   | <u>242.0</u>    | <u>263.7</u>    | <u>(21.7)</u>    |
| <b>Long-term assets</b>  |                 |                 |                  |
| Premises <sup>12</sup>   | \$ 94.6         | \$ 111.5        | \$ (16.9)        |
| Furniture and equipment  | 31.5            | 30.2            | 1.3              |
| Leasehold improvements and long-term prepayments                                 | 74.4            | 81.1            | (6.7)            |
| Net pension asset  | 66.8            | 0.0             | 66.8             |
| Deferred tax asset   | 170.9           | 177.2           | (6.3)            |
| <b>Total long-term assets</b>  | <u>438.2</u>    | <u>400.0</u>    | <u>38.2</u>      |
| <b>Total assets</b>  | <u>\$ 790.6</u> | <u>\$ 841.2</u> | <u>\$ (50.6)</u> |
| <b>Short-term liabilities</b>  |                 |                 |                  |
| Deferred credit items  | \$ 304.1        | \$ 354.6        | \$ (50.5)        |
| Short-term debt  | 8.1             | 13.0            | (4.9)            |
| Short-term payables  | 40.2            | 35.5            | 4.7              |
| <b>Total short-term liabilities</b>  | <u>352.4</u>    | <u>403.1</u>    | <u>(50.7)</u>    |
| <b>Long-term liabilities</b>   |                 |                 |                  |
| Pension liability  | \$ 0.0          | \$ 0.1          | \$ (0.1)         |
| Long-term debt   | 9.1             | -               | 9.1              |
| Postemployment/postretirement benefits and net pension liabilities <sup>13</sup> | 377.3           | 382.0           | (4.7)            |
| <b>Total liabilities</b>   | <u>\$ 738.8</u> | <u>\$ 785.2</u> | <u>\$ (46.4)</u> |
| <b>Equity<sup>14</sup></b>   | <u>\$ 51.8</u>  | <u>\$ 56.0</u>  | <u>\$ (4.2)</u>  |
| <b>Total liabilities and equity</b>  | <u>\$ 790.6</u> | <u>\$ 841.2</u> | <u>\$ (50.6)</u> |

<sup>a</sup>Calculations in this table and subsequent PSAF tables may be affected by rounding.

**Table 4**  
Imputed Funding for Priced-Services Assets  
(millions of dollars)

|   | 2021     | 2020     |
|---|----------|----------|
| A. Short-term asset financing   |          |          |
| Short-term assets to be financed                                      |          |          |
| Receivables   | \$ 37.1  | \$ 37.1  |
| Materials and supplies  | 0.4      | 0.5      |
| Prepaid expenses  | 10.8     | 10.8     |
| Total short-term assets to be financed                                | \$ 48.4  | \$ 48.4  |
| Short-term payables   | 40.2     | 35.5     |
| Net short-term assets to be financed                                  | \$ 8.1   | \$ 13.0  |
| Imputed short-term debt financing <sup>15</sup>                       | \$ 8.1   | \$ 13.0  |
| B. Long-term asset financing  |          |          |
| Long-term assets to be financed                                       |          |          |
| Premises  | \$ 94.6  | \$ 111.5 |
| Furniture and equipment   | 31.5     | 30.2     |
| Leasehold improvements and<br>long-term prepayments                   | 74.4     | 81.1     |
| Net pension asset   | 66.8     | -        |
| Deferred tax asset  | 170.9    | 177.2    |
| Total long-term assets to be financed                                 | \$ 438.2 | \$ 400.0 |
| Postemployment/postretirement<br>benefits and net pension liabilities | 377.3    | 382.0    |
| Net long-term assets to be financed                                   | \$ 60.9  | \$ 17.8  |
| Imputed long-term debt <sup>10</sup>                                  | \$ 9.1   | \$ -     |
| Imputed equity <sup>10</sup>  | 51.8     | 56.0     |
| Total long-term financing   | \$ 60.9  | \$ 56.0  |

**Table 5**  
Derivation of the 2021 and 2020 PSAF  
(dollars in millions)

|  | 2021            |         | 2020             |         |
|--|-----------------|---------|------------------|---------|
|  | Debt            | Equity  | Debt             | Equity  |
| <b>A. Imputed long-term debt and equity</b>                                    |                 |         |                  |         |
| Net long-term assets to finance  | \$ 60.9         | \$ 60.9 | \$ 17.8          | \$ 17.8 |
| Capital structure observed in market   | 58.7%           | 41.3%   | 58.4%            | 41.6%   |
| Pre-adjusted long-term debt and equity   | \$ 35.7         | \$ 25.2 | \$ 10.4          | \$ 7.4  |
| Equity adjustments <sup>16</sup> :   |                 |         |                  |         |
| Equity to meet capital requirements  | -               | 51.8    | -                | 49.0    |
| Adjustment to debt and equity funding given capital requirements <sup>17</sup> | (26.6)          | 26.6    | (10.4)           | 10.4    |
| Adjusted equity balance  | -               | 51.8    | -                | 17.8    |
| Equity to meet capital requirements <sup>18</sup>                              | -               | -       | -                | 31.2    |
| Total imputed long-term debt and equity  | \$ 9.1          | \$ 51.8 | \$ -             | \$ 49.0 |
| <b>B. Cost of capital</b>  |                 |         |                  |         |
| Elements of capital costs  |                 |         |                  |         |
| Short-term debt <sup>19</sup>  | \$ 8.1 x 0.2% = | \$ 0.0  | \$ 13.0 x 2.3% = | \$ 0.3  |
| Long-term debt <sup>19</sup>   | 9.1 x 3.8% =    | 0.3     | - x 4.0% =       | -       |
| Equity <sup>20</sup>   | 51.8 x 10.7% =  | 5.6     | 49.0 x 13.3% =   | 6.6     |
|  |                 | \$ 5.9  |                  | \$ 6.9  |
| <b>C. Incremental cost of PSR policy</b>                                       |                 |         |                  |         |
| Equity to meet policy  | \$ - x 10.7% =  | \$ -    | \$ 7.1 x 13.5% = | \$ 1.0  |
| <b>D. Other required PSAF costs</b>  |                 |         |                  |         |
| Sales taxes  | \$ 3.9          |         | \$ 4.4           |         |
| Board of Governors expenses  | 6.6             |         | 6.7              |         |
|  |                 | 10.5    |                  | 11.1    |
|  |                 | \$ 16.4 |                  | \$ 18.9 |
| <b>E. Total PSAF</b>   |                 |         |                  |         |
| As a percent of assets   |                 | 2.1%    |                  | 2.2%    |
| As a percent of expenses   |                 | 4.1%    |                  | 3.4%    |
| <b>F. Tax rates</b>  |                 | 20.8%   |                  | 22.1%   |

**Table 6**  
Computation of 2020 Capital Adequacy for Federal Reserve Priced Services  
(dollars in millions)

|  | <u>Assets</u>   | <u>Risk Weight</u> | <u>Weighted Assets</u> |
|--|-----------------|--------------------|------------------------|
| Imputed investments:                             |                 |                    |                        |
| 1-Year Treasury securities <sup>21</sup>         | \$ -            | -                  | \$ -                   |
| Federal funds <sup>22</sup>                      | 242.0           | 0.2                | 48.4                   |
| Total imputed investments                        | <u>242.0</u>    |                    | <u>48.4</u>            |
| Receivables                                      | \$ 37.1         | 0.2                | \$ 7.4                 |
| Materials and supplies                           | 0.5             | 1.0                | 0.5                    |
| Prepaid expenses                                 | 10.8            | 1.0                | 10.8                   |
| Items in process of collection                   | 62.1            | 0.2                | 12.4                   |
| Premises   | 94.6            | 1.0                | 94.6                   |
| Furniture and equipment                          | 31.5            | 1.0                | 31.5                   |
| Leasehold improvements and long-term prepayments | 74.4            | 1.0                | 74.4                   |
| Pension asset                                    | 66.8            | 1.0                | 66.8                   |
| Deferred tax asset                               | <u>170.9</u>    | 1.0                | <u>170.9</u>           |
| Total  | <u>\$ 790.6</u> |                    | <u>\$ 517.7</u>        |
| Imputed equity:                                  |                 |                    |                        |
| Capital to risk-weighted assets                  | 10.0%           |                    |                        |
| Capital to total assets                          | 6.5%            |                    |                        |

C. *Check Service*—Table 7 shows the 2019 actual, 2020 estimated, and 2021

budgeted cost-recovery performance for the commercial check service.

<sup>10</sup>Credit float, which represents the difference between items in process of collection and deferred credit items, occurs when the Reserve Banks debit the paying bank for transactions before providing credit to the depositing bank. Float is directly estimated at the service level.

<sup>11</sup>Consistent with the Board's PSR policy, the Reserve Banks' priced services will hold and amount equivalent to six months of the Fedwire Funds Service's current operating expenses as liquid net financial assets and equity on the pro forma balance sheet. Six months of the Fedwire Funds Service's projected current operating expenses is \$47.5 million. In 2021, 26.7 million of equity was imputed to meet the regulatory capital requirements.

<sup>12</sup>Includes the allocation of Board of Governors assets to priced services of \$2.4 million for 2021 and \$3.1 million for 2020.

<sup>13</sup>Includes the allocation of Board of Governors liabilities to priced services of \$1.0 million for 2021 and \$0.8 million for 2020.

<sup>14</sup>Includes an accumulated other comprehensive loss of \$628.2 million for 2021 and \$625.2 million for 2020, which reflects the ongoing amortization of the accumulated loss in accordance with ASC 715.

Future gains or losses, and their effects on the pro forma balance sheet, cannot be projected. See table 5 for calculation of required imputed equity amount.

<sup>15</sup>Imputed short-term debt financing is computed as the difference between short-term assets and short-term liabilities. As presented in table 5, the financing costs of imputed short-term debt, imputed long-term debt and imputed equity are the elements of cost of capital, which contribute to the calculation of the PSAF.

<sup>16</sup>If minimum equity constraints are not met after imputing equity based on the capital structure observed in the market, additional equity is imputed to meet these constraints. The long-term funding need was met by imputing long-term debt and equity based on the capital structure observed in the market (see tables 4 and 6). In 2021, the amount of imputed equity met the minimum equity requirements for risk-weighted assets.

<sup>17</sup>Equity adjustment offsets are due to a shift of long-term debt funding to equity in order to meet FDIC capital requirements for well-capitalized institutions.

<sup>18</sup>Additional equity in excess of that needed to fund priced services assets is offset by an asset

balance of imputed investments in treasury securities.

<sup>19</sup>Imputed short-term debt and long-term debt are computed at table 4.

<sup>20</sup>The 2021 ROE is equal to a risk-free rate plus a risk premium (beta \* market risk premium). The 2021 after-tax CAPM ROE is calculated as 0.13% + (1.0 \* 8.36%) = 8.50%. Using a tax rate of 20.8%, the after-tax ROE is converted into a pretax ROE, which results in a pretax ROE of (8.50% / (1 - 20.8%)) = 10.72%. Calculations may be affected by rounding.

<sup>21</sup>If minimum equity constraints are not met after imputing equity based on all other financial statement components, additional equity is imputed to meet these constraints. Additional equity imputed to meet minimum equity requirements is invested solely in Treasury securities. The imputed investments are similar to those for which rates are available on the Federal Reserve's H.15 statistical release, which can be located at <http://www.federalreserve.gov/releases/h15/data.htm>.

<sup>22</sup>The investments are imputed based on the amounts arising from the collection of items before providing credit according to established availability schedules.



TABLE 7—CHECK SERVICE PRO FORMA COST AND REVENUE PERFORMANCE  
[Dollars in millions]

| Year                  | Revenue | Total expense | Net income (ROE) | Targeted ROE | Recovery rate after targeted ROE (%) |
|-----------------------|---------|---------------|------------------|--------------|--------------------------------------|
|                       | 1       | 2             | 3<br>[1–2]       | 4            | 5<br>[1/(2+4)]                       |
| 2019 (actual) .....   | \$128.2 | \$121.9       | \$6.3            | \$1.4        | 104.0                                |
| 2020 (estimate) ..... | 114.4   | 110.4         | 4.0              | 1.3          | 102.4                                |
| 2021 (budget) .....   | 107.1   | 108.5         | –1.5             | 1.1          | 97.7                                 |

1. *2020 Estimate*—The Reserve Banks estimate that the check service will recover 102.4 percent of total expenses and targeted ROE, compared with a 2020 budgeted recovery rate of 104.3 percent.

Through August, total commercial forward and total commercial return check volumes were 14.9 percent and 24.6 percent lower, respectively, than they were during the same period last year. Consistent with anticipated fourth-quarter declines and combined with the uncertainties created by COVID–19, for full-year 2020, the Reserve Banks estimate that their total forward check volume will decline 13.6 percent (compared with a budgeted decline of 8.9 percent) and their total return check volume will decline 27.1 percent (compared with a budgeted decline of 8.7 percent) from 2019 levels.<sup>23</sup> The Reserve Banks expect that check volumes will continue to decline, although uncertainty remains as to the rate of decline into 2021. In particular, the Reserve Banks' check volumes are expected to decline because of

substitution away from checks to other payment instruments. While these volume declines will affect budgeted total revenue, the Reserve Banks estimate that total expenses will also be lower given the continued realization of operational efficiencies.

2. *2021 Pricing*—The Reserve Banks expect Check Services to recover 97.7 percent of total expenses and targeted ROE in 2021. The Reserve Banks project revenue to be \$107.1 million, a decline of 6.4 percent from the 2020 estimate. Total expenses for Check Services are projected to be \$108.5 million, a decrease of \$1.9 million, or 1.7 percent, from 2020 expenses, primarily because of reduced operating costs.

The Reserve Banks will increase the fixed monthly participation fee and introduce a new tiered pricing structure. The tier structure will align with the structure and volume thresholds of the existing FedForward® Standard Endpoint Tier Listing. In light of the ongoing volume declines, the changes are intended to continue to support revenue stability through fixed fees while minimizing the impact of fee

increases on smaller institutions, taking into account higher network capacity costs associated with higher volumes from larger institutions. Table 8 shows the 2021 tiered participation fees.

TABLE 8—CHECK 21 PARTICIPATION FEE STRUCTURE

| Tier <sup>24</sup> | Monthly fee |
|--------------------|-------------|
| 1 .....            | \$135.00    |
| 2 .....            | 90.00       |
| 3 .....            | 60.00       |
| 4 .....            | 40.00       |

The primary risks to the Reserve Banks' ability to achieve budgeted 2021 cost recovery for Check Services include greater-than-expected declines in check volume due to the general reduction in check writing and competition from correspondent banks, aggregators, and direct exchanges, which would result in lower-than-anticipated revenue.

D. *FedACH Service*—Table 9 shows the 2019 actual, 2020 estimate, and 2021 budgeted cost-recovery performance for the commercial FedACH service.

TABLE 9—FEDACH SERVICE PRO FORMA COST AND REVENUE PERFORMANCE  
[Dollars in millions]

| Year                  | Revenue | Total expense | Net income (ROE) | Targeted ROE | Recovery rate after targeted rate ROE (%) |
|-----------------------|---------|---------------|------------------|--------------|---|
|                       | 1       | 2             | 3<br>[1–2]       | 4            | 5<br>[1/(2+4)]                            |
| 2019 (actual) .....   | \$153.1 | \$154.8       | \$–1.7           | \$2.0        | 97.6                                      |
| 2020 (estimate) ..... | 158.1   | 160.2         | –2.1             | 1.9          | 97.6                                      |
| 2021 (budget) .....   | 159.6   | 162.3         | –2.7             | 1.6          | 97.4                                      |

1. *2020 Estimate*—The Reserve Banks estimate that the FedACH service will recover 97.6 percent of total expenses and targeted ROE, compared with a

<sup>23</sup> Total Reserve Bank forward check volumes are expected to be 3.8 billion in 2020. Total Reserve Bank return check volumes are expected to be 19.8 million in 2020.

2020 budgeted recovery rate of 100.6 percent.

Through August, FedACH commercial origination and receipt volume was 4.6

<sup>24</sup> This fee is charged to financial institutions that have received any Check 21 electronic or substitute check volume (forward or return) from the Reserve Banks during the month. The fee is applied at the parent financial institution level, as defined in the

percent higher than it was during the same period last year. For full-year 2020, the Reserve Banks estimate that FedACH commercial origination and

Reserve Banks' Global Customer Directory (GCD). Each financial institution's tier assignment is determined by the criteria described in the FedForward Standard Endpoint Tier Listing.

receipt volume will increase 4.8 percent from 2019 levels, compared with a 2020 budgeted increase of 4.1 percent. However, investment costs associated with a multiyear technology initiative to modernize the FedACH processing platform continue to drive the overall underrecovery rate. Although FedACH is estimated to not fully recover its costs in 2020, the Reserve Banks are expected to fully recover FedACH costs following the finalization of the FedACH technology modernization project.

2. *2021 Pricing*—The Reserve Banks expect the FedACH service to recover 97.4 percent of total expenses and targeted ROE in 2021. The Reserve Banks project revenue to be \$159.6

million, an increase of 0.9 percent from the 2020 estimate. Total expenses are projected to be \$162.3 million, an increase of 1.3 percent from 2020 expenses.

The Reserve Banks will not change existing FedACH fees. This approach is consistent both with a multiyear strategy of providing price stability for customers over the period of modernizing the FedACH processing platform and the more recent uncertainties due to COVID-19. Given the continued costs associated with the FedACH technology modernization project, the Reserve Banks project to under recover costs in 2021 at 97.4 percent. Following implementation of

the FedACH technology modernization, the Reserve Banks expect to fully recover costs related to the provision of FedACH services.

The primary risks to the Reserve Banks' ability to achieve budgeted 2021 cost recovery for the FedACH service are unanticipated cost overruns associated with the FedACH technology modernization project and unanticipated volume reductions due to economic conditions.

E. *Fedwire Funds and National Settlement Services*—Table 10 shows the 2019 actual, 2020 estimate, and 2021 budgeted cost-recovery performance for the Fedwire Funds and National Settlement Services.

TABLE 10—FEDWIRE FUNDS AND NATIONAL SETTLEMENT SERVICES PRO FORMA COST AND REVENUE PERFORMANCE  
[Dollars in millions]

| Year                  | Revenue<br>1 | Total expense<br>2 | Net income (ROE)<br>3<br>[1-2] | Targeted ROE<br>4 | Recovery rate after targeted ROE (%)<br>5<br>[1/(2+4)] |
|-----------------------|--------------|--------------------|--------------------------------|-------------------|--|
| 2019 (actual) .....   | \$135.6      | \$137.7            | \$ -2.1                        | \$1.6             | 97.3   |
| 2020 (estimate) ..... | 144.3        | 134.9              | 9.4                            | 2.4               | 105.1  |
| 2021 (budget) .....   | 145.7        | 143.5              | 2.1                            | 1.4               | 100.5  |

1. *2020 Estimate*—The Reserve Banks estimate that the Fedwire Funds and National Settlement Services will recover 105.1 percent of total expenses and targeted ROE, compared with a 2020 budgeted recovery rate of 100.6 percent.

Through August, Fedwire Funds Service online volume was 6.8 percent higher than it was during the same period last year. For full-year 2020, the Reserve Banks estimate that Fedwire Funds Services online volume will increase 5.4 percent from 2019 levels, compared with the 1.0 percent volume decrease that had been budgeted. Through August, the National Settlement Service (NSS) settlement file volume was 7.2 percent lower than it

was during the same period last year, and settlement entry volume was 0.2 percent higher. For the full year, the Reserve Banks estimate that settlement file volume will decrease 5.3 percent (slightly more than the budgeted decrease of 4.3 percent) and settlement entry volume will increase 0.7 percent from 2019 levels (compared with a budgeted 0.7 percent decrease).

2. *2021 Pricing*—The Reserve Banks expect the Fedwire Funds and National Settlement Services to recover 100.5 percent of total expenses and targeted ROE. Revenue is projected to be \$145.7 million, an increase of 1.0 percent from the 2020 estimate. The Reserve Banks project total expenses to be roughly \$8.6 million higher than 2020. The Reserve

Banks will not change existing Fedwire Funds and National Settlement Service fees for 2021. This approach is consistent with the Reserve Banks' 2021 strategy of providing price stability for customers in light of uncertainties due to COVID-19.

The primary risk to the Reserve Banks' ability to achieve budgeted 2021 cost recovery for the Fedwire Funds and National Settlement Service is higher-than-anticipated operating costs associated with technology and resiliency initiatives.

F. *Fedwire Securities Service*—Table 11 shows the 2019 actual, 2020 estimate, and 2021 budgeted cost-recovery performance for the Fedwire Securities Service.<sup>25</sup>

<sup>25</sup> The Reserve Banks provide transfer services for securities issued by the U.S. Treasury, federal government agencies, government-sponsored enterprises, and certain international institutions. The priced component of this service, reflected in

this memorandum, consists of revenues, expenses, and volumes associated with the transfer of all non-Treasury securities. For Treasury securities, the U.S. Treasury assesses fees for the securities transfer component of the service. The Reserve

Banks assess a fee for the funds settlement component of a Treasury securities transfer; this component is not treated as a priced service.

TABLE 11—FEDWIRE SECURITIES SERVICE PRO FORMA COST AND REVENUE PERFORMANCE

[Dollars in millions]

| Year                  | Revenue | Total expense | Net income (ROE) | Targeted ROE | Recovery rate after targeted ROE (%) |
|-----------------------|---------|---------------|------------------|--------------|--------------------------------------|
|                       | 1       | 2             | 3<br>[1–2]       | 4            | 5<br>[1/(2+4)]                       |
| 2019 (actual) .....   | \$27.1  | \$26.7        | \$0.4            | \$0.3        | 100.3                                |
| 2020 (estimate) ..... | 28.7    | 27.9          | 0.8              | 0.3          | 101.9                                |
| 2021 (budget) .....   | 26.1    | 25.5          | 0.5              | 0.3          | 100.9                                |

1. *2020 Estimate*—The Reserve Banks estimate that the Fedwire Securities Service will recover 101.9 percent of total expenses and targeted ROE, compared with a 2020 budgeted recovery rate of 102.8 percent. The Reserve Banks estimate revenue to be \$26.6 million, an increase of 0.8 percent from the 2019 budget. Total expenses are projected to be \$27.1 million for full-year 2019, a decrease of 1.5 percent from the 2019 budget.

Through August, Fedwire Securities Service online agency transfer volume was 50.9 percent higher than it was during the same period last year. For full-year 2020, the Reserve Banks estimate that Fedwire Securities Service online agency transfer volume will increase 38.3 percent from 2019 levels, compared with a budgeted increase of 3.4 percent. The volatility in online agency transfer volume is attributed to a combination of uncertainties generated by COVID–19, and the low interest rate environment spurring incentives to refinance mortgages.

For full-year 2020, volumes for two of the top three Fedwire Securities' largest revenue-generating services—account maintenance and issue maintenance—are expected to decline from 2019 levels. Through August, account maintenance volume was 3.6 percent lower than it was during the same period last year. For full-year 2020, the Reserve Banks estimate that account maintenance volume will decline 3.6 percent from 2019 levels, compared with a budgeted decline of 2.1 percent. Through August, the number of agency issues maintained was 3.3 percent lower than it was during the same period last year. For full-year 2020, the Reserve Banks estimate that the number of agency issues maintained will decline 3.5 percent from 2019 levels, compared with a budgeted decline of 1.0 percent.

2. *2021 Pricing*—The Reserve Banks expect the Fedwire Securities Service to recover 100.9 percent of total expenses and targeted ROE in 2021. Revenue is projected to be \$26.1 million, a decrease of 9.05 percent from the 2020 estimate.

The Reserve Banks also project that 2021 expenses will decrease by \$2.4 million from the 2020 estimate.

The Reserve Banks will not change Fedwire Securities Service fees for 2021. This approach is consistent with the Reserve Banks' 2021 strategy of providing price stability for customers in light of uncertainties due to COVID–19.

The primary risk to the Reserve Banks' ability to achieve budgeted 2021 cost recovery for these services is higher than anticipated operating costs associated with technology and resiliency initiatives. In addition, market volatility related to COVID–19 could introduce further uncertainty in forecasting revenue associated with online agency transfers.

G. *FedLine Solutions*—The Reserve Banks charge fees for the electronic connections that depository institutions use to access priced services and allocate the costs and revenues associated with this electronic access to the priced services.<sup>26</sup> There are currently six FedLine channels through which customers can access the Reserve Banks' priced services: FedMail®, FedLine Exchange®, FedLine Web®, FedLine Advantage®, FedLine Command® and FedLine Direct®.<sup>27</sup> The Reserve Banks bundle these channels into eleven FedLine packages, described below, that are supplemented by a number of premium (or à la carte) access and accounting information options. In addition, the Reserve Banks offer FedComplete packages, which are bundled offerings of FedLine connections and a fixed number of FedACH, Fedwire Funds, and Check 21-enabled transactions.

<sup>26</sup> FedLine Solutions provide customers with access to Reserve Bank priced services. As such, FedLine costs and revenue are allocated to the Reserve Banks' priced services on an expense ratio basis.

<sup>27</sup> FedMail, FedLine Exchange, FedLine Web, FedLine Advantage, FedLine Command, and FedLine Direct are registered trademarks of the Federal Reserve Banks.

Eight attended access packages offer manual access to critical payment and information services via a web-based interface. The FedMail package provides access to basic information services via email, while the two FedLine Exchange packages are designed to provide certain services, such as the E-Payments Routing Directory, to customers that otherwise do not use FedLine for any payment services. The two FedLine Web packages offer online attended access to a range of services, including cash services, FedACH information services, and Check services. Three FedLine Advantage packages expand upon the FedLine Web packages and offer attended access to critical transactional services: FedACH, Fedwire Funds, and Fedwire Securities.

Three unattended access packages are computer-to-computer, internet Protocol (IP)-based interfaces. The FedLine Command package offers an unattended connection to FedACH as well as to most accounting information services. The two remaining options are FedLine Direct packages, which allow for unattended connections at multiple connection speeds to Check, FedACH, Fedwire Funds, and Fedwire Securities transactional and information services and to most accounting information services.

The Reserve Banks will not change FedLine Solutions packages for 2021. This approach is consistent with the Reserve Banks' 2021 strategy of providing price stability for customers in light of uncertainties due to COVID–19.

## II. Analysis of Competitive Effect

All operational and legal changes considered by the Board that have a substantial effect on payment system participants are subject to the competitive impact analysis described in the March 1990 policy "The Federal Reserve in the Payments System."<sup>28</sup> Under this policy, the Board assesses

<sup>28</sup> Federal Reserve Regulatory Service (FRRS) 9–1558.

whether changes would have a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services because of differing legal powers or constraints or because of a dominant market position deriving from such legal differences. If any proposed changes create such an effect, the Board must further evaluate the changes to assess

whether the benefits associated with the changes—such as contributions to payment system efficiency, payment system integrity, or other Board objectives—can be achieved while minimizing the adverse effect on competition.

The 2021 fees, fee structures, and changes in service will not have a direct and material adverse effect on the ability of other service providers to compete effectively with the Reserve

Banks in providing similar services. The Reserve Banks may experience overrecovery or underrecovery in the short run because of the unpredictability of COVID-19 and its implications for volumes. Broadly, holding prices flat offers price stability for customers facing unique challenges in 2021 and provides for full cost recovery over the long run.

**III. 2021 Fee Schedules**

**FEDACH SERVICE 2021 FEE SCHEDULE**

[Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee                 |
|--|---------------------|
| FedACH minimum monthly fee:  |                     |
| Originating depository financial institution (ODFI) <sup>29</sup> .....  | \$50.00.            |
| Receiving depository financial institution (RDFI) <sup>30</sup> .....  | \$40.00.            |
| Origination (per item or record):  |                     |
| Forward or return items .....  | \$0.0035.           |
| SameDay Service—forward item <sup>31</sup> .....   | \$0.0010 surcharge. |
| Addenda record .....   | \$0.0015.           |
| FedLine Web-originated returns and notification of change (NOC) <sup>32</sup> .....                              | \$0.35.             |
| Facsimile Exception Return/NOC <sup>33</sup> .....   | \$45.00.            |
| SameDay Exception Return .....   | \$45.00.            |
| Automated NOC .....  | \$0.20.             |
| Volume discounts (based on monthly billed origination volume) <sup>34</sup> per item when origination volume is: |                     |
| 750,001 to 1,500,000 items per month .....   | \$0.0008 discount.  |
| more than 1,500,000 items per month .....  | \$0.0010 discount.  |
| Volume discounts (based on monthly billed receipt volume) <sup>35</sup> per item when receipt volume is:         |                     |
| 10,000,001 to 15,000,000 items per month .....   | \$0.0002 discount.  |
| more than 15,000,000 items per month .....   | \$0.0003 discount.  |
| Receipt (per item or record):  |                     |
| Forward Item .....   | \$0.0035.           |
| Return Item .....  | \$0.0075.           |
| Addenda record .....   | \$0.0015.           |

<sup>29</sup> Any ODFI incurring less than \$50 for the following fees will be charged a variable amount to reach the minimum: Forward value and non-value item origination fees, and FedGlobal ACH origination surcharges.

<sup>30</sup> Any RDFI not originating forward value and non-value items and incurring less than \$40 in receipt fees will be charged a variable amount to reach the minimum. Any RDFI that originates forward value and nonvalue items incurring less than \$50 in forward value and nonvalue item origination fees will only be charged a variable amount to reach the minimum monthly origination fee.

<sup>31</sup> This surcharge is assessed on all forward items that qualify for same-day processing and settlement and is incremental to the standard origination item fee.

<sup>32</sup> The fee includes the item and addenda fees in addition to the conversion fee.

<sup>33</sup> The fee includes the item and addenda fees in addition to the conversion fee. Reserve Banks also assess a \$45 fee for every government paper return/NOC they process.

<sup>34</sup> Origination volumes at these levels qualify for a waterfall discount which includes all FedACH origination items.

<sup>35</sup> Origination discounts based on monthly billed receipt volume apply only to those items received by FedACH receiving points and are available only to Premium Receivers.

<sup>36</sup> RDFIs receiving through FedACH less than 90 percent of their FedACH-originated items.

<sup>37</sup> This per-item discount is a reduction to the standard receipt fees listed in this fee schedule.

<sup>38</sup> Receipt volumes at these levels qualify for a waterfall discount which includes all FedACH receipt items.

<sup>39</sup> RDFIs receiving through FedACH at least 90 percent of their FedACH-originated items, but less than 90 percent of all of their ACH items originated through any operator.

<sup>40</sup> RDFIs receiving through FedACH at least 90 percent of all of their ACH items originated through any operator.

<sup>41</sup> To qualify for the discount, a financial institution must meet all of the following criteria in a given month: (1) Be charged the minimum monthly fee—forward origination (57208); (2) subscribe to FedLine Web Plus or any higher FedLine® access solution; and (3) subscribe to the FedPayments Reporter service, the FedACH RDFI Alert service, or the FedACH Risk Origination Monitoring service.

<sup>42</sup> Criteria may be set for both the Origination Monitoring Service and the RDFI Alert Service. Subscribers with no criteria set up will be assessed the \$35 monthly package fee.

<sup>43</sup> Premier reports generated on demand are subject to the package/tiered fees plus a surcharge.

<sup>44</sup> The fee applies to RTNs that have received or originated FedACH transactions during a month. Institutions that receive only U.S. government transactions or that elect to use a private-sector operator exclusively are not assessed the fee.

<sup>45</sup> This surcharge is assessed to any RTN that originates at least one item meeting the criteria for same-day processing and settlement in a given month.

<sup>46</sup> The fee is applied to any RTN with activity during a month, including RTNs of institutions that elect to use a private-sector operator exclusively but also have items routed to or from customers that access the ACH network through FedACH. This fee does not apply to RTNs that use the Reserve Banks for only U.S. government transactions.

<sup>47</sup> Fee will be assessed only when automated NOCs are generated.

<sup>48</sup> Limited services are offered in contingency situations.

<sup>49</sup> The fees and credits listed are collected from the ODFI and credited to NACHA (admin network) or to the RDFI (same-day entry and unauthorized entry) in accordance with the *ACH Rules*.

<sup>50</sup> The international fees and surcharges vary from country to country as these are negotiated with each international gateway operator.

<sup>51</sup> A single monthly fee based on total FedGlobal ACH Payments origination volume.

<sup>52</sup> This per-item surcharge is in addition to the standard domestic origination fees listed in this fee schedule.

<sup>53</sup> This per-item surcharge is in addition to the standard domestic receipt fees listed in this fee schedule.

<sup>54</sup> Any financial institution that opens at least 1,000 Exception Resolution Service cases in a given month will receive a 50% discount on its Exception Resolution Service fixed fees for that month.

<sup>55</sup> The per case fees are rolled up to the parent RTN, such that a customer that opens a total of 100 cases per month under two separate RTNs would pay a total of \$112.50 (\$1.25 for the first 50 cases and \$1.00 for the next 50 cases) in addition to the fixed fees.

<sup>56</sup> A depository institution may enroll in the Service as an offline Service Participant by designating the Reserve Bank to access and use the functionality of the application on behalf of the Offline Participant.

## FEDACH SERVICE 2021 FEE SCHEDULE—Continued

[Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|   | Fee                |
|---|--------------------|
| Volume discounts:   |                    |
| Non-Premium Receivers <sup>36</sup> per item when volume is:  |                    |
| 750,001 to 12,500,000 items per month <sup>37</sup> .....   | \$0.0017 discount. |
| more than 12,500,000 items per month <sup>38</sup> .....  | \$0.0019 discount. |
| Premium Receivers, Level One <sup>39</sup> per item when volume is:                                 |                    |
| 750,001 to 1,500,000 items per month <sup>37</sup> .....  | \$0.0017 discount. |
| 1,500,001 to 2,500,000 items per month <sup>38</sup> .....  | \$0.0017 discount. |
| 2,500,001 to 12,500,000 items per month <sup>38</sup> .....   | \$0.0018 discount. |
| more than 12,500,000 items per month <sup>38</sup> .....  | \$0.0020 discount. |
| Premium Receivers, Level Two <sup>40</sup> per item when volume is:                                 |                    |
| 750,001 to 1,500,000 items per month <sup>37</sup> .....  | \$0.0017 discount. |
| 1,500,001 to 2,500,000 items per month <sup>38</sup> .....  | \$0.0017 discount. |
| 2,500,001 to 12,500,000 items per month <sup>38</sup> .....   | \$0.0019 discount. |
| more than 12,500,000 items per month <sup>38</sup> .....  | \$0.0021 discount. |
| FedACH Bundled Package Pricing Discount:  |                    |
| Monthly Bundled Service Package Discount <sup>41</sup> .....  | \$20.00 discount.  |
| FedACH Risk <sup>®</sup> Management Services: <sup>42</sup>   |                    |
| Monthly Package Fee (a single fee based on total number of criteria sets):                          |                    |
| For up to 5 criteria sets .....   | \$35.00.           |
| For 6 through 11 criteria sets .....  | \$70.00.           |
| For 12 through 23 criteria sets .....   | \$125.00.          |
| For 24 through 47 criteria sets .....   | \$150.00.          |
| For 48 through 95 criteria sets .....   | \$250.00.          |
| For 96 through 191 criteria sets .....  | \$425.00.          |
| For 192 through 383 criteria sets .....   | \$675.00.          |
| For 384 through 584 criteria sets .....   | \$850.00.          |
| For more than 584 criteria sets .....   | \$1,100.00.        |
| Batch/Item Monitoring (based on total monthly volume):  |                    |
| For 1 through 100,000 batches (per batch) .....   | \$0.007.           |
| For more than 100,000 batches (per batch) .....   | \$0.0035.          |
| Monthly FedPayments <sup>®</sup> Reporter Service:  |                    |
| FedPayments Reporter Service monthly package includes the following reports:                        |                    |
| ACH Received Entries Detail—Customer and Depository Financial Institution.                          |                    |
| ACH Return Reason Report—Customer and Depository Financial Institution.                             |                    |
| ACH Originated Entries Detail—Customer and Depository Financial Institution.                        |                    |
| ACH Volume Summary by SEC Code—Customer.  |                    |
| ACH Customer Transaction Activity.  |                    |
| ACH Death Notification.   |                    |
| ACH International (IAT).  |                    |
| ACH Notification of Change.   |                    |
| ACH Payment Data Information File.  |                    |
| ACH Remittance Advice Detail.   |                    |
| ACH Remittance Advice Summary.  |                    |
| ACH Return Item Report and File.  |                    |
| ACH Return Ratio.   |                    |
| ACH Social Security Beneficiary.  |                    |
| ACH Originator Setup.   |                    |
| ACH Report Delivery via FedLine Solution.   |                    |
| On Demand Report Surcharge <sup>43</sup> .....  | \$1.00.            |
| Monthly Package Fee (counts reflect reports generated as well as delivered via a FedLine Solution): |                    |
| For up to 50 reports .....  | \$40.00.           |
| For 51 through 150 reports .....  | \$60.00.           |
| For 151 through 500 reports .....   | \$110.00.          |
| For 501 through 1,000 reports .....   | \$200.00.          |
| For 1,001 through 1,500 reports .....   | \$285.00.          |
| For 1,501 through 2,500 reports .....   | \$460.00.          |
| For 2,501 through 3,500 reports .....   | \$640.00.          |
| For 3,501 through 4,500 reports .....   | \$820.00.          |
| For 4,501 through 5,500 reports .....   | \$995.00.          |
| For 5,501 through 7,000 reports .....   | \$1,225.00.        |
| For 7,001 through 8,500 reports .....   | \$1,440.00.        |
| For 8,501 through 10,000 reports .....  | \$1,650.00.        |
| For more than 10,000 reports .....  | \$1,800.00.        |
| Premier reports (per report generated): <sup>43</sup>   |                    |
| ACH Volume Summary by SEC Code Report—Depository Financial Institution:                             |                    |
| For 1 through 5 reports .....   | \$10.00.           |
| For 6 through 10 reports .....  | \$6.00.            |
| For 11 or more reports .....  | \$1.00.            |
| On Demand Surcharge .....   | \$1.00.            |
| ACH Routing Number Activity Report:   |                    |
| For 1 through 5 reports .....   | \$10.00.           |

**FEDACH SERVICE 2021 FEE SCHEDULE—Continued**  
 [Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee                 |
|--|---------------------|
| For 6 through 10 reports .....   | \$6.00.             |
| For 11 or more reports .....   | \$1.00.             |
| On Demand Surcharge .....  | \$1.00.             |
| ACH Originated Batch Report (monthly):   |                     |
| For 1 through 5 reports .....  | \$10.00.            |
| For 6 through 10 reports .....   | \$6.00.             |
| For 11 or more reports .....   | \$1.00.             |
| On Demand Surcharge .....  | \$1.00.             |
| ACH Originated Batch Report (daily):   |                     |
| Scheduled Report .....   | \$0.65.             |
| On Demand Surcharge .....  | \$1.00.             |
| On-us inclusion:   |                     |
| Participation (monthly fee per RTN) .....  | \$10.00.            |
| Per-item .....   | \$0.0030.           |
| Per-addenda .....  | \$0.0015.           |
| Report delivery via encrypted email (per email) .....  | \$0.20.             |
| Other Fees and Discounts:  |                     |
| Monthly fee (per RTN):   |                     |
| FedACH Participation Fee <sup>44</sup> .....   | \$65.00.            |
| SameDay Service Origination Participation Fee <sup>45</sup> .....                                | \$10.00.            |
| FedACH Settlement Fee <sup>46</sup> .....  | \$55.00.            |
| FedACH Information File Extract Fee .....  | \$150.00.           |
| IAT Output File Sort Fee .....   | \$75.00.            |
| Fixed Participation Fee—Automated NOCs <sup>47</sup> .....                                       | \$5.00.             |
| Non-Electronic Input/Output fee: <sup>48</sup>   |                     |
| CD/DVD (CD or DVD) .....   | \$50.00.            |
| Paper (file or report) .....   | \$50.00.            |
| Fees and Credits Established by NACHA: <sup>49</sup>   |                     |
| NACHA Same Day Entry fee (per item) .....  | \$0.052.            |
| NACHA Same Day Entry credit (per item) .....   | \$0.052 (credit).   |
| NACHA Unauthorized Entry fee (per item) .....  | \$4.50.             |
| NACHA Unauthorized Entry credit (per item) .....   | \$4.50 (credit).    |
| NACHA Admin Network fee (monthly fee per RTN) .....  | \$22.00.            |
| NACHA Admin Network fee (per entry) .....  | \$0.000185.         |
| FedGlobal® ACH Payments: <sup>50</sup>   |                     |
| Fixed Monthly Fee (per RTN): <sup>51</sup>   |                     |
| Monthly origination volume more than 500 items .....   | \$185.00.           |
| Monthly origination volume between 161 and 500 items .....                                       | \$60.00.            |
| Monthly origination volume less than 161 items .....   | \$20.00.            |
| Per-item Origination Fee for Monthly Volume more than 500 Items (surcharge): <sup>52</sup>       |                     |
| Canada service .....   | \$0.50.             |
| Mexico service .....   | \$0.55.             |
| Panama service .....   | \$0.60.             |
| Europe service .....   | \$1.13.             |
| Per-item Origination Fee for Monthly Volume between 161 and 500 items (surcharge): <sup>52</sup> |                     |
| Canada service .....   | \$0.75.             |
| Mexico service .....   | \$0.80.             |
| Panama service .....   | \$0.85.             |
| Europe service .....   | \$1.38.             |
| Per-item Origination Fee for Monthly Volume less than 161 items (surcharge): <sup>52</sup>       |                     |
| Canada service .....   | \$1.00.             |
| Mexico service .....   | \$1.05.             |
| Panama service .....   | \$1.10.             |
| Europe service .....   | \$1.63.             |
| Other FedGlobal ACH Payments Fees:   |                     |
| Canada service:  |                     |
| Return received from Canada <sup>53</sup> .....  | \$0.99 (surcharge). |
| Trace of item at receiving gateway .....   | \$5.50.             |
| Trace of item not at receiving gateway .....   | \$7.00.             |
| Mexico service:  |                     |
| Return received from Mexico <sup>53</sup> .....  | \$0.91 (surcharge). |
| Item trace .....   | \$13.50.            |
| Foreign currency to foreign currency (F3X) item originated to Mexico <sup>52</sup> .....         | \$0.67 (surcharge). |
| Panama service:  |                     |
| Return received from Panama <sup>53</sup> .....  | \$1.00 (surcharge). |
| Item trace .....   | \$7.00.             |
| NOC .....  | \$0.72.             |
| Europe service:  |                     |
| F3X item originated to Europe <sup>52</sup> .....  | \$1.25 (surcharge). |
| Return received from Europe <sup>53</sup> .....  | \$1.35 (surcharge). |
| Item trace .....   | \$7.00.             |

**FEDACH SERVICE 2021 FEE SCHEDULE—Continued**  
 [Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee      |
|--|----------|
| <b>Exception Resolution Service:</b>   |          |
| Fixed Fee per RTN <sup>54</sup> (monthly):   |          |
| Self-Managed Cases .....   | \$10.00. |
| Agent-Managed Cases .....  | \$10.00. |
| Offline Service Participant .....  | \$60.00. |
| Variable Case Open Monthly Fees per Case (applies to self-managed and agent-managed cases only at the parent RTN): <sup>55</sup> |          |
| 1–50 cases .....   | \$1.25.  |
| 51–100 cases .....   | \$1.00.  |
| 101–500 cases .....  | \$0.75.  |
| 501–1,000 cases .....  | \$0.50.  |
| 1,001–5,000 cases .....  | \$0.25.  |
| 5,001–10,000 cases .....   | \$0.20.  |
| 10,001–99,999,999 cases .....  | \$0.10.  |
| Offline Service Participant—Case Fees: <sup>56</sup>   |          |
| Case Open Fee .....  | \$5.00.  |
| Case Response Fee .....  | \$5.00.  |

**FEDWIRE FUNDS AND NATIONAL SETTLEMENT SERVICES 2021 FEE SCHEDULE**  
 [Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee     |
|--|---------|
| <b>Fedwire Funds Service</b>   |         |
| Monthly Participation Fee .....  | \$95.00 |
| Basic volume-based pre-incentive transfer fee (originations and receipts)—per transfer for:                                |         |
| Tier 1: The first 14,000 transfers per month .....   | \$0.840 |
| Tier 2: Additional transfers up to 90,000 per month .....  | 0.250   |
| Tier 3: Every transfer over 90,000 per month .....   | 0.165   |
| Volume-based transfer fee with the incentive discount (originations and receipts)—per eligible transfer for: <sup>57</sup> |         |
| Tier 1: The first 14,000 transfers per month .....   | 0.168   |
| Tier 2: Additional transfers up to 90,000 per month .....  | 0.050   |
| Tier 3: Every transfer over 90,000 per month .....   | 0.033   |
| Surcharge for Offline Transfers (Originations and Receipt) .....   | 65.00   |
| Surcharge for End-of-Day Transfer Originations <sup>58</sup> .....   | 0.26    |
| Monthly FedPayments Manager Import/Export fee <sup>59</sup> .....  | 50.00   |
| Surcharge for high-value payments:   |         |
| >\$10 million .....  | 0.14    |
| >\$100 million .....   | 0.36    |
| Surcharge for Payment Notification:  |         |
| Origination Surcharge <sup>60</sup> .....  | 0.01    |
| Receipt Volume <sup>60 61</sup> .....  | N/A     |
| Delivery of Reports—Hard Copy Reports to On-Line Customers .....   | 50.00   |
| Special Settlement Arrangements (charge per settlement day) <sup>62</sup> .....  | 150.00  |
| <b>National Settlement Service</b>   |         |
| Basic:   |         |
| Settlement Entry Fee .....   | 1.50    |
| Settlement File Fee .....  | 30.00   |
| Surcharge for Offline File Origination <sup>63</sup> .....   | 45.00   |
| Minimum Monthly Fee <sup>64</sup> .....  | 60.00   |

**FEDWIRE SECURITIES SERVICE 2021 FEE SCHEDULE (NON-TREASURY SECURITIES)**  
 [Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee    |
|--|--------|
| Basic Transfer Fee: <sup>65</sup>                                    |        |
| Transfer or reversal originated or received .....                    | \$0.98 |
| Surcharge: <sup>66</sup>   |        |
| Offline origination & receipt surcharge .....                        | 80.00  |
| Monthly Maintenance Fees: <sup>65</sup>                              |        |
| Account maintenance (per account) .....                              | 57.50  |
| Issue maintenance (per issue/per account) .....                      | \$0.77 |
| Claims Adjustment Fee <sup>65 67</sup> .....                         | 1.00   |
| GNMA Serial Note Stripping or Reconstitution Fee <sup>68</sup> ..... | 9.00   |

## FEDWIRE SECURITIES SERVICE 2021 FEE SCHEDULE (NON-TREASURY SECURITIES)—Continued

[Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee   |
|--|-------|
| Joint Custody Origination Surcharge <sup>65 69</sup> .....                     | 46.00 |
| Delivery of Reports—Hard Copy Reports to On-Line Customers <sup>65</sup> ..... | 50.00 |

## FEDLINE 2021 FEE SCHEDULE

[Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|   | Fee             |
|---|-----------------|
| <b>FedComplete Packages (Monthly)<sup>70 71</sup></b>         |                 |
| FedComplete 100A Plus <sup>72</sup> includes .....            | \$825.00.       |
| FedLine Advantage Plus package.                               |                 |
| FedLine subscriber 5-pack.                                    |                 |
| 7,500 FedForward transactions.                                |                 |
| 46 FedForward Cash Letter items.                              |                 |
| 70 FedReturn transactions.                                    |                 |
| 14,000 FedReceipt <sup>®</sup> transactions.                  |                 |
| 35 Fedwire Funds origination transfers.                       |                 |
| 35 Fedwire Funds receipt transfers.                           |                 |
| Fedwire monthly participation fee.                            |                 |
| 1,000 FedACH origination items.                               |                 |
| FedACH monthly minimum fee—Forward Origination.               |                 |
| 7,500 FedACH receipt items.                                   |                 |
| FedACH monthly minimum fee—Receipt.                           |                 |
| 10 FedACH web-originated return/NOC.                          |                 |
| 500 FedACH addenda record originated.                         |                 |
| 1,000 FedACH addenda record received.                         |                 |
| 100 FedACH SameDay Service origination items.                 |                 |
| FedACH Participation Fee.                                     |                 |
| FedACH settlement fee.  |                 |
| FedACH SameDay Service origination participation fee.         |                 |
| FedComplete 100A Premier includes .....                       | \$900.00.       |
| FedLine Advantage Premier package.                            |                 |
| Volumes included in the FedComplete 100A Plus package.        |                 |
| FedComplete 100C Plus includes .....                          | \$1,375.00.     |
| FedLine Command Plus package.                                 |                 |
| Volumes included in the FedComplete 100A Plus package.        |                 |
| FedComplete 200A Plus \$1,350.00.                             |                 |
| includes FedLine Advantage Plus package.                      |                 |
| FedLine subscriber 5-pack.                                    |                 |
| 25,000 FedForward transactions.                               |                 |
| 46 FedForward Cash Letter items.                              |                 |
| 225 FedReturn transactions.                                   |                 |
| 25,000 FedReceipt <sup>®</sup> transactions.                  |                 |
| 100 Fedwire Funds origination transfers.                      |                 |
| 100 Fedwire Funds receipt transfers.                          |                 |
| Fedwire monthly participation fee.                            |                 |
| 2,000 FedACH origination items.                               |                 |
| FedACH monthly minimum fee—Forward Origination.               |                 |
| 25,000 FedACH receipt items.                                  |                 |
| FedACH monthly minimum fee—Receipt.                           |                 |
| 20 FedACH web-originated return/NOC.                          |                 |
| 750 FedACH addenda record originated.                         |                 |
| 1,500 FedACH addenda record received.                         |                 |
| 200 FedACH SameDay Service origination items.                 |                 |
| FedACH Participation Fee.                                     |                 |
| FedACH settlement fee.  |                 |
| FedACH SameDay Service origination participation fee.         |                 |
| FedComplete 200A Premier includes .....                       | \$1,425.00.     |
| FedLine Advantage Premier package.                            |                 |
| Volumes included in the FedComplete 200A Plus package.        |                 |
| FedComplete 200C Plus includes .....                          | \$1,900.00.     |
| FedLine Command Plus package.                                 |                 |
| Volumes included in the FedComplete 200A Plus package.        |                 |
| FedComplete Excess Volume and Receipt Surcharge <sup>73</sup> |                 |
| FedForward <sup>74</sup> .....                                | \$0.03700/item. |
| FedReturn .....   | \$0.82000/item. |
| FedReceipt .....  | \$0.00005/item. |
| Fedwire Funds Origination .....                               | \$0.84000/item. |



## FEDLINE 2021 FEE SCHEDULE—Continued

[Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|   | Fee             |
|---|-----------------|
| Fedwire Funds Receipt .....   | \$0.08400/item. |
| FedACH Origination .....  | \$0.00350/item. |
| FedACH Receipt .....  | \$0.00035/item. |
| FedComplete credit adjustment .....                                 | various.        |
| FedComplete debit adjustment .....                                  | various.        |
| <b>FedLine Customer Access Solutions (Monthly)</b>                  |                 |
| FedMail <sup>75</sup> includes .....                                | \$85.00.        |
| FedMail access channel.   |                 |
| Check FedForward, Fed Return and FedReceipt Services.               |                 |
| Check Adjustments.  |                 |
| FedACH Download Advice and Settlement Information.                  |                 |
| Fedwire Funds Offline Advices.                                      |                 |
| Daily Statement of Account (Text).                                  |                 |
| Daylight Overdraft Reports.   |                 |
| Monthly Statement of Service Charges (Text).                        |                 |
| Electronic Cash Difference Advices.                                 |                 |
| FedLine Exchange <sup>75</sup> includes .....                       | \$40.00.        |
| E-Payments Directory (via manual download).                         |                 |
| FedLine Exchange Premier <sup>75</sup> includes .....               | \$125.00.       |
| FedLine Exchange package.   |                 |
| E-Payments Directory (via automated download).                      |                 |
| FedLine Web <sup>76</sup> includes .....                            | \$110.00.       |
| FedLine Web access channel.   |                 |
| Services included in the FedLine Exchange package.                  |                 |
| Check FedForward, FedReturn and FedReceipt services.                |                 |
| Check Adjustments.  |                 |
| FedACH Derived Returns and NOCs.                                    |                 |
| FedACH File, Batch and Item Detail Information.                     |                 |
| FedACH Download Advice.   |                 |
| FedACH Settlement Information.                                      |                 |
| FedACH Customer Profile Information.                                |                 |
| FedACH Returns Activity Statistics.                                 |                 |
| FedACH Risk RDFI Alert Service.                                     |                 |
| FedACH Risk Returns Reporting Service.                              |                 |
| FedACH Exception Resolution Service.                                |                 |
| FedCash <sup>®</sup> Services.                                      |                 |
| FedLine Web Plus <sup>76</sup> includes .....                       | \$160.00.       |
| Services included in the FedLine Web package.                       |                 |
| FedACH Risk Origination Monitoring Service.                         |                 |
| FedACH FedPayments Reporter Service.                                |                 |
| Check Large Dollar Return.  |                 |
| Check FedImage Services.  |                 |
| Account Management Information (AMI).                               |                 |
| Daily Statement of Account (PDF, Text).                             |                 |
| Daylight Overdraft Reports.   |                 |
| Monthly Account Services (SCRD) File.                               |                 |
| Monthly Statement of Service Charges (PDF, Text).                   |                 |
| E-Payments Routing Directory (via automated download).              |                 |
| FedLine Advantage <sup>76</sup> includes .....                      | \$415.00.       |
| FedLine Advantage access channel.                                   |                 |
| One VPN device.   |                 |
| Services included in the FedLine Web package.                       |                 |
| FedACH File Transmission To/From Federal Reserve.                   |                 |
| FedACH Request Output File Delivery.                                |                 |
| FedACH View File Transmission and Processing Status.                |                 |
| Fedwire Originate and Receive Funds Transfer.                       |                 |
| Fedwire Originate and Receive Securities Transfer.                  |                 |
| National Settlement Service Services.                               |                 |
| Check Large Dollar Return.  |                 |
| Check FedImage Services.  |                 |
| Account Management Information with Intra-Day Download Search File. |                 |
| Daily Statement of Account (PDF, Text).                             |                 |
| Daylight Overdraft Reports.   |                 |
| Monthly Account Services (SCRD) File.                               |                 |
| Monthly Statement of Service Charges (PDF, Text).                   |                 |
| FedLine Advantage Plus <sup>76</sup> includes .....                 | \$460.00.       |
| Services included in the FedLine Advantage package.                 |                 |
| One VPN device.   |                 |
| FedACH Risk Origination Monitoring Service.                         |                 |

FEDLINE 2021 FEE SCHEDULE—Continued

[Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee          |
|--|--------------|
| FedACH FedPayments Reporter Service.<br>Fedwire Funds FedPayments Manager Import/Export (less than or equal to 250 Fedwire transactions and one routing number per month).<br>FedTransaction Analyzer® (less than 250 or equal to Fedwire transactions and one routing number per month).<br>E-Payments Routing Directory (via automated download).  |              |
| FedLine Advantage Premier <sup>76</sup> includes .....   | \$570.00.    |
| FedLine Advantage Plus package.<br>Two VPN devices.<br>Fedwire Funds FedPayments Manager Import/Export (more than 250 Fedwire transactions or more than one routing number in a given month).<br>FedTransaction Analyzer (more than 250 Fedwire transactions or more than one routing number per month).   |              |
| FedLine Command Plus includes .....  | \$1,035.00.  |
| FedLine Command access channel.<br>Services included in the FedLine Advantage Plus package.<br>One VPN device.<br>Additional FedLine Command server certificates.<br>Fedwire Statement Services.<br>Fedwire Funds FedPayments Manager Import/Export.<br>FedTransaction Analyzer.<br>Intra-Day File with Transaction Details (up to six times daily).<br>Statement of Account Spreadsheet File (SASF).<br>Financial Institution Reconciliation Data (FIRD) File (machine readable). |              |
| FedLine Direct Plus <sup>77</sup> includes .....   | \$5,500.00.  |
| FedLine Direct access channel.<br>One VPN device.<br>2 Mbps Dedicated WAN Connection.<br>Services included in the FedLine Command Plus package.<br>FedLine Direct server certificates.<br>Treasury Check Information System (TCIS).<br>Dual Vendors.<br>FedLine Direct Contingency Solution.<br>Check 21 Services.   |              |
| FedLine Direct Premier <sup>77</sup> includes .....  | \$10,500.00. |
| FedLine Direct Plus package (new).<br>Two 2 Mbps dedicated WAN Connections.<br>One Network Diversity.<br>Two VPN devices.  |              |

**A la Carte Options (Monthly)<sup>78</sup>**

|  |              |
|--|--------------|
| Electronic Access:   |              |
| FedMail—FedLine Exchange Subscriber 5-pack .....                                 | \$15.00.     |
| FedLine Subscriber 5-pack (access to Web and Advantage) .....                    | \$80.00.     |
| Additional VPNs <sup>79</sup> .....  | \$100.00.    |
| Additional 2 Mbps WAN connection <sup>77</sup> .....                             | \$3,000.00.  |
| WAN Connection Upgrade:  |              |
| 10 Mbps <sup>80</sup> .....  | \$1,700.00.  |
| 30 Mbps <sup>80</sup> .....  | \$3,000.00.  |
| 50 Mbps <sup>80</sup> .....  | \$4,000.00.  |
| 100 Mbps <sup>80</sup> .....   | \$7,000.00.  |
| 200 Mbps <sup>80</sup> .....   | \$11,000.00. |
| FedLine International Setup (one-time fee) .....                                 | \$5,000.00.  |
| FedLine Custom Implementation Fee <sup>81</sup> various.                         |              |
| Network Diversity .....  | \$2,500.00.  |
| FedMail Email (for customers with FedLine Web and above) <sup>82</sup> .....     | \$40.00.     |
| FedMail Fax <sup>83</sup> .....  | \$150.00.    |
| VPN Device Modification .....  | \$200.00.    |
| VPN Device Missed Activation Appointment .....                                   | \$175.00.    |
| VPN Device Expedited Hardware Surcharge .....                                    | \$100.00.    |
| VPN Device Replacement or Move .....   | \$300.00.    |
| E-Payments Automated Download (1–5 Add'l Codes) <sup>84</sup> .....              | \$75.00.     |
| E-Payments Automated Download (6–20 Add'l Codes) <sup>84</sup> .....             | \$150.00.    |
| E-Payments Automated Download (21–50 Add'l Codes) <sup>84</sup> .....            | \$300.00.    |
| E-Payments Automated Download (51–100 Add'l Codes) <sup>84</sup> .....           | \$500.00.    |
| E-Payments Automated Download (101–250 Add'l Codes) <sup>84</sup> .....          | \$1,000.00.  |
| E-Payments Automated Download (≤250 Add'l Codes) <sup>84</sup> .....             | \$2,000.00.  |
| Accounting Information Services (monthly):                                       |              |
| Cash Management System (CMS) Plus—Own report—up to six files with: <sup>85</sup> |              |
| no respondent/sub-account activity .....   | \$60.00.     |
| less than 9 respondent and/or sub-accounts .....                                 | \$125.00.    |
| 10–50 respondent and/or sub-accounts .....                                       | \$250.00.    |

FEDLINE 2021 FEE SCHEDULE—Continued

[Effective January 4, 2021. **Bold indicates changes from 2020 prices.**]

|  | Fee                   |
|--|-----------------------|
| 51–100 respondents and/or sub-accounts .....   | \$500.00.             |
| 101–500 respondents and/or sub-accounts .....  | \$750.00.             |
| >500 respondents and/or sub-accounts .....   | \$1,000.00.           |
| End-of-Day Financial Institution Reconciliation Data (FIRD) File <sup>86</sup> ..... | \$150.00.             |
| Statement of Account Spreadsheet File <sup>87</sup> .....                            | \$150.00.             |
| Intra-day Download Search File (with AMI) <sup>88</sup> .....                        | \$150.00.             |
| Other:   |                       |
| Software Certification .....   | \$0.00 to \$8,000.00. |
| Vendor Pass-Through Fee .....  | various.              |
| Electronic Access Credit Adjustment .....  | various.              |
| Electronic Access Debit Adjustment .....   | various.              |

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

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2020–25176 Filed 11–13–20; 8:45 am]

**BILLING CODE P**

<sup>57</sup> The incentive discounts apply to the volume that exceeds 60 percent of a customer's historic benchmark volume. Historic benchmark volume is based on a customer's average daily activity over the previous five calendar years. If a customer has fewer than five full calendar years of previous activity, its historic benchmark volume is based on its daily activity for as many full calendar years of data as are available. If a customer has less than one year of past activity, then the customer qualifies automatically for incentive discounts for the year. The applicable incentive discounts are as follows: \$0.672 for transfers up to 14,000; \$0.200 for transfers 14,001 to 90,000; and \$0.132 for transfers over 90,000.

<sup>58</sup> This surcharge applies to originators of transfers that are processed by the Reserve Banks after 5:00 p.m. eastern time.

<sup>59</sup> This fee is charged to any Fedwire Funds participant that originates a transfer message via the FedPayments Manager (FPM) Funds tool and has the import/export processing option setting active at any point during the month.

<sup>60</sup> Payment Notification and End-of-Day Origination surcharges apply to each Fedwire funds transfer message.

<sup>61</sup> Provided on billing statement for informational purposes only.

<sup>62</sup> This charge is assessed to settlement arrangements that use the Fedwire Funds Service to effect the settlement of interbank obligations (as opposed to those that use the National Settlement Service). With respect to such special settlement arrangements, other charges may be assessed for each funds transfer into or out of the accounts used in connection with such arrangements.

<sup>63</sup> If your organization is a settlement agent, it may be able to use the NSS offline service if it is experiencing an operational event that prevents the transmission of settlement files via its electronic connection to the Federal Reserve Banks. The Federal Reserve Banks have limited capacity to process offline settlement files. As a result, while the Federal Reserve Banks use best efforts to process offline settlement file submissions, there is no guarantee that an offline settlement file, in particular one that is submitted late in the operating day or that contains a large number of entries, will be accepted for processing. Only those persons identified as authorized individuals on the NSS 04 Agent Contact Form may submit offline settlement files. For questions related to the NSS offline service, please contact NSS Central Support Service Staff (CSSS) at 800–758–9403, or via email at [csss.staff@ny.frb.org](mailto:csss.staff@ny.frb.org).

<sup>64</sup> Any settlement arrangement that accrues less than \$60 during a calendar month will be assessed a variable amount to reach the minimum monthly fee.

<sup>65</sup> These fees are set by the Federal Reserve Banks.

<sup>66</sup> This surcharge is set by the Federal Reserve Banks. It is in addition to any basic transfer or reversal fee.

<sup>67</sup> The Federal Reserve Banks offer an automated claim adjustment process only for Agency mortgage-backed securities.

<sup>68</sup> This fee is set by and remitted to the Government National Mortgage Association (GNMA).

<sup>69</sup> The Federal Reserve Banks charge participants a Joint Custody Origination Surcharge for both Agency and Treasury securities.

<sup>70</sup> FedComplete customers that use the email service would be charged the FedMail Email a la carte fee and for all FedMail-FedLine Exchange Subscriber 5-packs.

<sup>71</sup> FedComplete packages are all-electronic service options that bundle payment services with an access solution for one monthly fee.

<sup>72</sup> Packages with an "A" include the FedLine Advantage channel, and packages with "C" include the FedLine Command channel.

<sup>73</sup> Per-item surcharges are in addition to the standard fees listed in the applicable priced services fee schedules.

<sup>74</sup> FedComplete customers will be charged \$4 for each FedForward cash letter over the monthly package threshold. This activity will appear under billing code 51998 in Service Area 1521 on a month-lagged basis.

<sup>75</sup> FedMail and FedLine Exchange packages do not include user credentials, which are required to access priced services and certain informational services. Credentials are sold separately in packs of five via the FedMail-FedLine Exchange Subscriber 5-pack.

<sup>76</sup> FedLine Web and Advantage packages do not include user credentials, which are required to access priced services and certain informational services. Credentials are sold separately in packs of five via the FedLine Subscriber 5-pack.

<sup>77</sup> Early termination fees and/or expedited order fees may apply to all FedLine Direct packages and FedLine Direct a la carte options.

<sup>78</sup> These add-on services can be purchased only with a FedLine Solutions packages.

<sup>79</sup> Additional VPNs are available for FedLine Advantage, FedLine Command, and FedLine Direct packages only.

<sup>80</sup> These upgrades are only available for the new FedLine Direct packages and the Add'l 2M WAN connection. Fee is in addition to the FedLine Direct package fees or additional WAN fees.

<sup>81</sup> The FedLine Custom Implementation Fee is \$2,500 or \$5,000 based on the complexity of the setup.

**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 85 FR 30106–30708, dated May 20, 2020) is amended to reflect the reorganization of the Division of Sexually Transmitted Disease Prevention within the National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the titles and mission and function statements for the *Division of Sexually Transmitted Disease Prevention (CVJD)* and insert the following:

<sup>82</sup> Available only to customers with a priced FedLine package.

<sup>83</sup> Limited to installed base only.

<sup>84</sup> Five download codes are included at no cost in all Plus and Premier packages.

<sup>85</sup> Cash Management Service options are limited to plus and premier packages.

<sup>86</sup> The End of Day Reconciliation File option is available for FedLine Web Plus, FedLine Advantage Plus, and Premier packages. It is available for no extra fee in FedLine Command Plus and Direct packages.

<sup>87</sup> The Statement of Account Spreadsheet File option is available for FedLine Web Plus, FedLine Advantage Plus, and Premier packages. It is available for no extra fee in FedLine Command Plus and Direct packages.

<sup>88</sup> The Intra-day Download Search File option is available for the FedLine Web Plus package. It is available for no extra fee in FedLine Advantage and higher packages.

*Division of Sexually Transmitted Disease Prevention (CVJD).* (1) In cooperation with other CDC components, administers operational programs for the prevention of sexually transmitted diseases (STD); (2) provides consultation, training, statistical, educational, epidemiological, and other technical services to assist state and local health departments in the planning, development, implementation, evaluation, and overall improvement of STD prevention programs; (3) supports a nationwide framework for effective surveillance of STD other than HIV; (4) conducts behavioral, clinical, epidemiological, preventive health services, and operational research into factors affecting the prevention and control of STD; (5) provides leadership and coordinates, in collaboration with other CDC components, research and program activities that focus on STD and HIV prevention; (6) promotes linkages between health department STD programs and other governmental and non-governmental partners who are vital to effective STD prevention efforts; (7) provides technical supervision for division, state and local assignees; and (8) collaborates with other components of the division, NCHHSTP and CDC to develop and implement strategies and activities to meet goals for key division priorities.

*Office of the Director (CVJD1).* (1) Plans, directs and evaluates the activities of the division; (2) provides national leadership and guidance in STD science, surveillance, prevention and control policy formulation; program planning, development, management, and evaluation; development of training, educational, and health communications; (3) provides operational, administrative, fiscal, technical, and logistical support for division programs and units; (4) assures multidisciplinary collaboration in STD prevention and control activities; (5) in cooperation with other CDC components, provides leadership for developing research relevant to STD prevention and control; (6) provides leadership, guidance, and coordinates development of guidelines and standards to assure ongoing high-quality performance of STD prevention and control programs; (7) coordinates global STD activity of the division; (8) collaborates, as appropriate, with other divisions and offices in NCHHSTP, and with other divisions throughout CDC; (9) collaborates as appropriate with external organizations outside of CDC to achieve the mission of the division; and

(10) manages the Tuskegee Participants Health Benefits Program.

*STD Laboratory Reference and Research Branch (CVJDE).* (1) Performs research on the pathogenesis, genetics, and immunology of syphilis, gonococcal and chlamydial infections, and other sexually transmitted infections (STI), including rare (e.g., chancroid) or emerging (e.g., *Mycoplasma genitalium*) STI; (2) conducts research and reference services to develop, evaluate, and improve laboratory STI diagnostics and methods; (3) participates in the design, implementation, and analysis of national and international STD epidemiology studies, surveillance activities, and biomedical interventions; (4) conducts laboratory-based surveillance for and research on the genetics of antimicrobial resistance in *Neisseria gonorrhoeae* and for other STIs; (5) serves as the WHO International Collaborating Center for Reference and Research in STI and as reference laboratory for WHO STD diagnostics and surveillance initiatives; and (6) develops STD laboratory guidelines.

*Program Development and Evaluation Branch (CVJDG).* (1) Provides and facilitates technical assistance and capacity building to state and local health departments, non-governmental, and other partners in the planning, implementation, and evaluation of STD prevention and control strategies; (2) monitors and evaluates STD prevention strategies to assure programmatic objectives are being met and to track individual and collective progress over time; (3) conducts analysis of STD prevention and control strategies and collaborates with partners to resolve challenges and increase awareness of best practices; (4) develops and manages programs, solicitations, and evaluation projects to advance innovations and quality improvements in STD prevention and control strategies and activities; and (5) supports the identification, translation, dissemination, and adoption of evidence-based interventions and practices by state and local health departments, non-governmental, and other prevention partners.

*Surveillance and Data Science Branch (CVJDH).* (1) Assesses and disseminates data on STD burden, risks, and trends in STD morbidity and mortality; (2) leads, evaluates, and provides recommendations for improving STD surveillance systems; (3) provides leadership in the management and coordination of information systems that can electronically receive, store, and transmit STD surveillance and case management data; (4) provides

surveillance, data management and public health informatics technical assistance and support to the division, local and state health departments, and other national and international partners; and (5) translates informatics best practices for STD electronic case reporting, clinical decision support, and other division efforts.

*Disease Intervention and Response Branch (CVJDJ).* (1) Investigates STDs in the community (e.g., field testing, public health detailing, outbreak response, and contact tracing); (2) provides technical assistance and capacity in disease investigation to support communities and public health partners; (3) conducts activities to assure a competent disease investigation workforce (e.g., DIS certification, mentoring and training); and (4) provides linkage to services for STD prevention and control and other co-occurring activities (e.g., intimate partner violence, behavioral health, HIV care, PrEP, and reproductive health services).

*Behavioral Science and Epidemiology Branch (CVJDK).* (1) Synthesizes evidence and critically appraises existing prevention science research, as related to STD priorities; (2) identifies and describes the context for effective STD prevention science; (3) provides national and international leadership in the design and dissemination of studies to implement STD prevention interventions at individual, group, community, and structural levels; and (4) translates or adapts research strategies and evaluation results from formative assessments and prevention interventions for programmatic action and to inform national STD prevention policy and program direction.

*Clinical, Economics, and Health Services Research Branch (CVJDL).* (1) Develops and evaluates methodologies for conducting clinical, economic, modelling, and health services research related to STD prevention and control; (2) develops preventive clinical, health services, transmission dynamics, and cost-effectiveness models for STD-related issues; (3) estimates the economic and health impact burden of STDs and cost-effectiveness of STD prevention; (4) develops, disseminates, and evaluates STD prevention and clinical guidelines; (5) provides technical assistance, training, and capacity building pertaining to clinical and health services-related aspects of STD prevention; and (6) provides statistical research and technical

assistance to others in the division and to local and state STD control programs.

**Sherri Berger,**

*Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2020–25194 Filed 11–13–20; 8:45 am]

BILLING CODE 4160–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2019–D–3592]

#### Certificates of Confidentiality; Guidance for Sponsors, Sponsor-Investigators, Researchers, Industry, and Food and Drug Administration Staff; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled “Certificates of Confidentiality; Guidance for Sponsors, Sponsor-Investigators, Researchers, Industry, and Food and Drug Administration Staff.” This guidance is intended to explain FDA implementation of the revised statutory provisions applicable to the request for, and issuance of, a Certificate of Confidentiality (CoC). The 21st Century Cures Act (Cures Act) amended the statutory provisions relating to the issuance of CoCs. A CoC is intended to help protect the privacy of human subject research participants from whom sensitive and identifiable information is being collected or used in furtherance of the research. Historically, a CoC generally protected a researcher from being compelled in a legal proceeding to disclose identifiable sensitive information about the research participant, created or compiled for the research. As amended, a CoC prohibits a researcher from disclosing such information unless a specified exception applies. This guidance finalizes the draft guidance of the same title issued on November 25, 2019.

**DATES:** The announcement of the guidance is published in the **Federal Register** on November 16, 2020.

**ADDRESSES:** You may submit either electronic or written comments on any guidance at any time as follows:

#### *Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### *Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA–2019–D–3592 for “Certificates of Confidentiality; Guidance for Sponsors, Sponsor-Investigators, Researchers, Industry, and Food and Drug Administration Staff.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The

Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 4248, Silver Spring, MD 20993–0002. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the final guidance document.

**FOR FURTHER INFORMATION CONTACT:** Jarilyn Dupont, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 4248, Silver Spring, MD 20993–0002, 301–796–4716.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

FDA is announcing the availability of a final guidance to explain FDA’s implementation of the revised provisions applicable to the request for, and issuance of, a discretionary CoC. The Cures Act (Pub. L. 114–255, section 2012) amended the Public Health Service Act, section 301(d) (42 U.S.C. 241(d)), relating to the issuance of CoCs. A CoC is intended to help protect the privacy of human subject research participants from whom identifiable,

sensitive information is being collected or used in furtherance of the research. Historically, a CoC generally protected a researcher from being compelled in a legal proceeding (such as by subpoena or court order) to disclose identifiable and sensitive information about the research participant, created or compiled for purposes of the human subject research. The Cures Act broadened the protections of the statutory provision by affirmatively prohibiting holders of CoCs from disclosing such information unless a specific exception applies.

The Cures Act simplified certain aspects of the issuance of CoCs by requiring that CoCs be issued for federally funded human subject research that collects or uses identifiable, sensitive information (referred to in the guidance as mandatory CoCs). For non-federally funded research, issuance of CoCs is not required but may be issued at the discretion of FDA (referred to in the guidance as discretionary CoCs) when the study involves a product subject to FDA's jurisdiction and regulatory authority. FDA intends to continue receiving such requests and will issue discretionary CoCs as appropriate. This guidance is intended to provide information on how to request a discretionary CoC, the statutory requirements for requesting such a CoC, and the statutory responsibilities associated with possessing a CoC. Although the mandatory CoC and the discretionary CoC are issued under different processes, the protections afforded by the issuance of either CoC are identical and the statutory responsibilities are applicable to both.

This guidance finalizes the draft guidance entitled "Certificates of Confidentiality; Guidance for Sponsors, Sponsor-Investigators, Researchers, Industry, and Food and Drug Administration Staff" issued on November 25, 2019 (84 FR 64906). FDA considered comments received on the draft guidance as the guidance was finalized. Changes from the draft to the final guidance were made to address requests for definitional and process clarity.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on "Certificates of Confidentiality; Guidance for Sponsors, Sponsor-Investigators, Researchers, Industry, and Food and Drug Administration Staff." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if

it satisfies the requirements of the applicable statutes and regulations.

## II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to a previously approved FDA 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. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information have been approved under OMB control number 0910–0130.

## III. Electronic Access

Persons with access to the internet may obtain the guidance at either <https://www.fda.gov/RegulatoryInformation/Guidances/default.htm> or <https://www.regulations.gov>.

Dated: November 9, 2020.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2020–25238 Filed 11–13–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2020–N–2030]

#### Agency Information Collection Activities; Proposed Collection; Comment Request; Application for Food and Drug Administration Approval To Market a New Drug

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection associated with applications for FDA approval to market a new drug.

**DATES:** Submit either electronic or written comments on the collection of information by January 15, 2021.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 15, 2021. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 15, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

#### Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

**Instructions:** All submissions received must include the Docket No. FDA–2020–N–2030 for "Agency Information Collection Activities; Proposed Collection; Comment Request; Application for FDA Approval To

Market a New Drug.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, [PRASStaff@fda.hhs.gov](mailto:PRASStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget

(OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

#### **Application for FDA Approval To Market a New Drug;**

*OMB Control No. 0910–0001—Revision*

This information collection supports FDA regulations. Under § 505(a) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(a)), a new drug may not be commercially marketed in the United States unless an approval of an application filed with FDA under § 505(b) or (j) of the FD&C Act is effective with respect to such drug. We have issued regulations in part 314 (21 CFR part 314) to govern procedures and requirements for applications submitted in accordance with section 505. The regulations in subpart A (§§ 314.1 through 314.3) set forth general provisions, while regulations in subparts B and C (§§ 314.50 through 314.99) set forth content and format requirements for new drug applications (NDAs) and abbreviated new drug applications (ANDAs) respectively. The regulations include requirements for the submission of specific data elements along with patent information, pediatric

use information, supplements and amendments, proposed labeling, and specific postmarketing reports. Respondents to the information collection are sponsors of these applications.

To assist respondents to the information collection we have developed the following forms:

- Form FDA 0356h (and instructions): Application to Market a New or Abbreviated New Drug or Biologic for Human Use;
- Form FDA 2252 (and instructions): Transmittal of Annual Reports for Drugs and Biologics For Human Use (§ 314.81);
- Form FDA 2253 (and instructions): Transmittal of Advertisements and Promotional Labeling For Drugs and Biologics For Human Use; and
- Forms FDA 3331/3331a: Field Alert Report and Instruction;
- Forms FDA 3542 and 3542a and Instructions: Patent Information Submitted *Upon and After Approval* of an NDA Supplement; Patent Information Submitted *With the Filing* of an NDA, Amendment, or Supplement;
- New Draft Form FDA 3898 and Instruction: Drug Master File.

Individuals requesting printed forms are instructed to contact the FDA Forms Manager by email at [formsmanager@OC.FDA.GOV](mailto:formsmanager@OC.FDA.GOV). Certain fees may be applicable.

Regulations in subpart D (§§ 314.100 through 314.170) explain Agency actions on applications and set forth timeframes for FDA review. We are revising the information collection to include provisions established through our Agency user fee programs, most recently authorized under the FDA Reauthorization Act of 2017. These provisions pertain to review transparency, communications with FDA, dispute resolution, drug safety enhancements, and the allocation of Agency resources to align with these program objectives as agreed to with our stakeholders and set forth in our “Performance Goals for Fiscal Years 2018–2022” Commitment Letters, which are available from our website at <https://www.fda.gov> along with more information about FDA user fee programs.

Information collection pertaining to hearing and other administrative proceedings covered in 21 CFR subpart E are approved under OMB control no. 0910–0191. Unless otherwise noted, information collection pertaining to postmarket safety reporting and associated recordkeeping is approved under OMB control nos. 0910–0230, 0910–0291, and 0910–0645.

Included among the miscellaneous provisions in subpart G (§§ 314.410–314.445), § 314.420 covers information to include in drug master files (DMFs). To assist respondents to this information collection we have prepared templates and resources available from our website at [www.fda.gov/drugs/forms-submission-requirements/drug-master-files-dmfs](http://www.fda.gov/drugs/forms-submission-requirements/drug-master-files-dmfs). As noted above, we have developed new Form FDA 3898 and accompanying instructions on submitting DMFs in accordance with the applicable regulations. In accordance with § 314.445, we also develop Agency guidance documents to assist respondents in complying with provisions in part 314. These guidance

documents are issued consistent with our good guidance practice regulations at § 10.115. To search available FDA guidance documents, visit our website at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>. Finally, applications submitted in accordance with subpart H (§§ 314.500 through 314.560) pertain to accelerated approval of new drugs for serious or life-threatening illness, and submissions in subpart I (§§ 314.600 through 314.650) pertain to approval of new drugs when human efficacy studies are not ethical or feasible. The regulations provide for the submission of specific data elements along with promotional material.

We use the information collection to approve drugs shown to be safe and effective and to implement effective public health monitoring systems. We also use product approval and related patent and exclusivity information to publish the “Approved Drug Products with Therapeutic Equivalence Evaluations” list (the Orange Book). More information regarding the Orange book is available from our website at [www.fda.gov/drugs/drug-approvals-and-databases/approved-drug-products-therapeutic-equivalence-evaluations-orange-book](http://www.fda.gov/drugs/drug-approvals-and-databases/approved-drug-products-therapeutic-equivalence-evaluations-orange-book).

We estimate the burden for this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

| 21 CFR section  | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response (in hours) | Total hours |
|---|-----------------------|------------------------------------|------------------------|--|-------------|
| <b>SUBPART B</b>  |                       |                                    |                        |  |             |
| 314.50(a)–(l)—Content and format of a 505(b)(1) or 505(b)(2) application.                           | 121                   | 1.15                               | 139                    | 1,921 .....                            | 267,019     |
| 314.50(i)(1)—patent certifications Form FDA 3542 .....  | 281                   | 2.875                              | 808                    | 10 .....                               | 8,080       |
| Form FDA 3542a .....  | 310                   | 2.084                              | 646                    | 15 .....                               | 9,690       |
| 314.50(i)(6) amended patent certifications .....  | 17                    | 1                                  | 17                     | 2 .....                                | 34          |
| 314.52(a), (b), and (e)—NDAs—notice of noninfringement of patent certification.                     | 15                    | 3                                  | 45                     | 15 .....                               | 675         |
| 314.52(c)—Noninfringement of patent certification notice content.                                   | 22                    | 3                                  | 66                     | 0.33 (20 minutes)                      | 22          |
| 314.53(f)(1)—Correction of patent information errors by persons other than the NDA holder.          | 24                    | 1                                  | 24                     | 10 .....                               | 240         |
| 314.53(f)(2)—Correction of patent information errors by the NDA holder.                             | 28                    | 1.4                                | 39                     | 1 .....                                | 39          |
| 314.60—Amendments to unapproved NDA, supplement or resubmission.                                    | 256                   | 8.23                               | 2,106                  | 80 .....                               | 168,480     |
| 314.60(f)—patent certifications for unapproved applications.  | 6                     | 1                                  | 6                      | 2 .....                                | 12          |
| 314.65—Withdrawal of unapproved applications .....  | 14                    | 1.21                               | 17                     | 2 .....                                | 34          |
| 314.70 and 314.71—Supplements and other changes to approved application.                            | 492                   | 6.57                               | 3,232                  | 150 .....                              | 484,800     |
| 314.72—Changes of ownership of NDAs .....   | 67                    | 1.45                               | 97                     | 2 .....                                | 194         |
| 314.81—Other postmarketing reports 314.81(b)(1) [3331 and 3331a field alert reports and followups]. | 484                   | 20.3                               | 9,834                  | 8 .....                                | 78,672      |
| 314.81(b)(2)[2252]—Annual reports .....   | 626                   | 4.9                                | 3,066                  | 40 .....                               | 122,640     |
| 314.81(b)(2)[2253]—Promotional labeling .....   | 331                   | 141.3                              | 46,782                 | 2 .....                                | 93,564      |
| <b>SUBPART C</b>  |                       |                                    |                        |  |             |
| 314.94(a)and(d)—ANDA content .....  | 229                   | 4.3                                | 987                    | 480 .....                              | 473,760     |
| 314.94(a)(12)(viii) amended patent certifications before approval of ANDA.                          | 153                   | 1                                  | 153                    | 2 .....                                | 306         |
| 314.95(c)—Non-infringement of patents (ANDAs) .....   | 400                   | 3                                  | 1,200                  | 0.33 (20 minutes)                      | 400         |
| 314.96(a)(1)—Amendments to unapproved ANDAs .....   | 451                   | 36.2                               | 16,311                 | 80 .....                               | 1,304,880   |
| 314.96(c) amendment for pharmaceutical equivalent to a listed drug other than RLD.                  | 1                     | 1                                  | 1                      | 300 .....                              | 300         |
| 314.96(d)—patent certification requirements .....   | 100                   | 1                                  | 100                    | 2 .....                                | 200         |
| 314.97—Supplements and other changes to ANDAs ...   | 361                   | 22.8                               | 8,237                  | 80 .....                               | 658,960     |
| 314.97(b) Supplements to ANDA for pharmaceutical equivalent to a listed drug other than RLD.        | 1                     | 1                                  | 1                      | 300 .....                              | 300         |
| 314.99(a)—ANDA Applicants: Withdrawal of unapproved ANDAs.  | 77                    | 2.3                                | 177                    | 2 .....                                | 354         |
| 314.99(a)—ANDA Transfer of ownership .....  | 135                   | 1.24                               | 167                    | 2 .....                                | 334         |
| <b>SUBPART D</b>  |                       |                                    |                        |  |             |
| 314.101(a)—NDA or ANDA filing over protest .....  | 1                     | 1                                  | 1                      | 0.5 (30 minutes) ..                    | 0.5         |



TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN—Continued

| 21 CFR section   | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response (in hours) | Total hours |
|--|-----------------------|------------------------------------|------------------------|--|-------------|
| 314.107(e)—notification of court actions or written consent to approval. | 247                   | 2                                  | 494                    | 0.5 (30 minutes) ..                    | 247         |
| <b>SUBPART G, H, I</b>   |                       |                                    |                        |  |             |
| 314.420—drug master files [FDA 3938]—original amendments.                | 36                    | 27.2                               | 981                    | 61 .....                               | 59,841      |
| DMFs—technical, administrative, REMS) .....                              | 2,946                 | 11.4                               | 33,590                 | 8 .....                                | 268,720     |
| DMFs—annual reports .....  | 2,946                 | 3.33                               | 9,834                  | 4 .....                                | 39,336      |
| 314.550—Promotional material and subpart H applications.                 | 55                    | 11.6                               | 640                    | 120 .....                              | 76,800      |
| Total .....  | .....                 | .....                              | .....                  | .....                                  | 4,118,933.5 |

Our estimated burden for the information collection reflects a decrease. We attribute this adjustment to improved operational efficiencies with regard to Agency data systems and digital submission processes.

Dated: November 10, 2020.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2020–25239 Filed 11–13–20; 8:45 am]

**BILLING CODE 4164–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Resources and Services Administration**

**Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Information Collection Request Title: Coronavirus 2019 (COVID–19) Data Report OMB No. 0906–0053—Extension**

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA’s ICR only after the 30 day comment period for this notice has closed.

**DATES:** Comments on this ICR should be received no later than December 16, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call (301) 443–1984.

**SUPPLEMENTARY INFORMATION:**

*Information Collection Request Title:* Coronavirus 2019 Data Report OMB No. 0906–0053—Extension.

*Abstract:* HRSA’s Ryan White HIV/AIDS Program (RWHAP) funds and coordinates with cities, states, and local clinics/community-based organizations to deliver efficient and effective HIV care, treatment, and support to low income people with HIV. Nearly two-thirds of clients (patients) live at or below 100 percent of the federal poverty level and approximately three-quarters of RWHAP clients are racial/ethnic minorities. Since 1990, the RWHAP has developed a comprehensive system of safety net providers who deliver high quality direct health care and support services to over half a million people with HIV—more than 50 percent of all people with diagnosed HIV in the United States.

**FY 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act**

On March 27, 2020, the President signed into law the “Coronavirus Aid, Relief, and Economic Security Act”

(CARES Act). The CARES Act appropriated \$90 million to HRSA’s RWHAP to prevent, prepare for, and respond to coronavirus disease 2019 (COVID–19). This funding supports 581 RWHAP Parts A, B, C, D and F recipients across the country, including city/county health departments, state health departments, health clinics, community-based organizations, and AIDS Education and Training Centers in their efforts to help prevent or minimize the impact of COVID–19 on RWHAP clients. The award provides RWHAP recipients the flexibility to meet evolving COVID–19 needs in their respective communities, including extending operational hours, increasing staffing hours, purchasing additional equipment, enhancing workforce training and capacity development, and providing critical services to people with HIV during this pandemic, such as home-delivered meals, emergency housing, and transportation.

HRSA’s HIV/AIDS Bureau identified a new data collection need to support HRSA’s requirement to monitor and report quarterly to the Secretary of HHS the COVID–19 activities conducted with the CARES Act funding. The COVID–19 Data Report (CDR) module will collect information on the types of services provided and number of people served for the treatment or prevention of COVID–19 among RWHAP clients (and immediate household members in limited circumstances). This module will be required for all providers (*e.g.*, recipients or subrecipients) who receive CARES Act RWHAP funding.

A 60-day notice published in the **Federal Register** on September 1, 2020, vol. 85, No. 170; pp. 54390–54391. There were no public comments.

*Need and Proposed Use of the Information:* HRSA proposes that service providers who receive CARES Act RWHAP funding report aggregate

information on the number of clients and immediate household members tested for COVID-19, the number of clients newly diagnosed (or presumed positive) with COVID-19, the cumulative number of clients with COVID-19, the number of clients who received services in each RWHAP service category (identified in Policy Clarification Notice 16-02 RWHAP Services: Eligible Individuals and Allowable Uses of Funds), and the types of services provided using telehealth technology in the CDR. The information obtained in this module will assist

HRSA in understanding how CARES Act RWHAP funding is being used to support RWHAP clients and immediate household members and ensure that HRSA is compliant with federal reporting requirements.

*Likely Respondents:* All RWHAP providers (e.g., recipients or subrecipients) who receive CARES Act RWHAP funding.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time

needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

| Form name        | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total burden hours |
|------------------|-----------------------|------------------------------------|-----------------|--|--------------------|
| CDR Module ..... | 2,045                 | 12                                 | 24,540          | 3.2                                    | 78,528             |
| Total .....      | 2,045                 | .....                              | 24,540          | .....                                  | 78,528             |

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2020-25219 Filed 11-13-20; 8:45 am]

BILLING CODE 4165-15-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Meeting of the National Vaccine Advisory Committee**

**AGENCY:** Office of Infectious Disease and HIV/AIDS Policy, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that the National Vaccine Advisory Committee (NVAC) will hold a virtual meeting. The meeting will be open to the public and public comment will be heard during the meeting.

**DATES:** The meeting will be held December 4, 2020. The confirmed meeting times and agenda will be posted on the NVAC website at <http://www.hhs.gov/nvpo/nvac/meetings/index.html> as soon as they become available.

**ADDRESSES:** Instructions regarding attending this meeting will be posted online at: <http://www.hhs.gov/nvpo/nvac/meetings/index.html> at least one week prior to the meeting. Pre-registration is required for those who wish to attend the meeting or participate in public comment. Please register at <http://www.hhs.gov/nvpo/nvac/meetings/index.html>.

**FOR FURTHER INFORMATION CONTACT:** Ann Aikin, Acting Designated Federal Officer, at the Office of Infectious Disease and HIV/AIDS Policy, U.S. Department of Health and Human Services, Mary E. Switzer Building, Room L618, 330 C Street SW, Washington, DC 20024. Email: [nvac@hhs.gov](mailto:nvac@hhs.gov). Phone: 202-695-9742.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 2101 of the Public Health Service Act (42 U.S.C. 300aa-1), the Secretary of HHS was mandated to establish the National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines. The NVAC was established to provide advice and make recommendations to the Director of the National Vaccine Program on matters related to the Program's responsibilities. The Assistant Secretary for Health

serves as Director of the National Vaccine Program.

During this NVAC meeting, NVAC will hear presentations to support the recent charge from Admiral Brett P. Giroir, MD, the Assistant Secretary for Health and Director of the National Vaccine Program, and respond to the following question: *The FDA standards for approval and licensure of vaccines for COVID-19 addresses safety and effectiveness and encourages inclusion of minorities, the elderly, pregnant women, and people with medical comorbidities in clinical trials. In particular, for COVID-19 vaccines, I am interested in the approach the nation should take in regard to vaccination of children, given that there will be relatively little data on children from some of the early clinical trials? As context, the case fatality rate for children under age 18 is .02%. What is the appropriate approach, and timing, of generating the needed data and proceeding to potential childhood vaccination as we move forward?* The NVAC will also review a draft report of the response to the full charge. Please note that agenda items are subject to change, as priorities dictate. Information on the final meeting agenda will be posted prior to the meeting on the NVAC website: <http://www.hhs.gov/nvpo/nvac/index.html>.

Members of the public will have the opportunity to provide comment at the NVAC meeting during the public comment period designated on the agenda. Public comments made during the meeting will be limited to three

minutes per person to ensure time is allotted for all those wishing to speak. Individuals are also welcome to submit written comments in advance. Written comments should not exceed three pages in length. Individuals submitting comments should email their written comments or their request to provide a comment during the meeting to [nvac@hhs.gov](mailto:nvac@hhs.gov) at least five business days prior to the meeting.

Dated: October 27, 2020.

**Ann Aikin,**

*Acting Designated Federal Official, Office of the Assistant Secretary for Health.*

[FR Doc. 2020-25243 Filed 11-13-20; 8:45 am]

**BILLING CODE 4150-44-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Microbiology, Infectious Diseases and AIDS Initial Review Group; Acquired Immunodeficiency Syndrome Research Review Committee Acquired Immunodeficiency Syndrome Research Review Committee (AIDS).

*Date:* December 9–10, 2020.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* Robert C. Unfer, PhD., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21, Rockville, MD 20852, (240) 669-5035, [robert.unfer@nih.gov](mailto:robert.unfer@nih.gov). (Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856,

Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25185 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Office of the Secretary; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Muscular Dystrophy Coordinating Committee (MDCC).

The meeting will be open to the public. Individuals who plan to participate and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

*Name of Committee:* Muscular Dystrophy Coordinating Committee.

*Date:* December 16, 2020.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* The purpose of this meeting is to bring together committee members, representing government agencies, patient advocacy groups, other voluntary health organizations, and patients and their families to update one another on progress relevant to the Action Plan for the Muscular Dystrophies and to coordinate activities and discuss gaps and opportunities leading to better understanding of the muscular dystrophies, advances in treatments, and improvements in patients' and their families' lives. The agenda for this meeting is available on the MDCC website: [https://www.mdcc.nih.gov/Meetings\\_Events/december-16-2020](https://www.mdcc.nih.gov/Meetings_Events/december-16-2020).

*Registration:* To register, please go to:

[https://roseliassociates.zoomgov.com/webinar/register/WN\\_ztgxOEmQPkiTSwCXWyk1w](https://roseliassociates.zoomgov.com/webinar/register/WN_ztgxOEmQPkiTSwCXWyk1w).

*Webcast Live:* <https://videocast.nih.gov/>.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Glen Nuckolls, Ph.D., Program Director, National Institute of Neurological, Disorders and Stroke (NINDS), NIH, 6001 Executive Blvd., Rm 2203, Bethesda, MD 20892, 301-496-5876, [MDCC@nih.gov](mailto:MDCC@nih.gov).

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

More information can be found on the Muscular Dystrophy Coordinating Committee home page: <https://mdcc.nih.gov/>.

Dated: November 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25190 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIH Support for Conferences and Scientific Meetings (Parent R13 Clinical Trial Not Allowed).

*Date:* December 8–10, 2020.

*Time:* 8:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F43, Rockville, MD 20892, (Virtual Meeting).

*Contact Person:* Kelly Y. Poe, Ph.D., Deputy Director, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F43, Bethesda, MD 20892-9834, (240) 669-5036, [poeky@mail.nih.gov](mailto:poeky@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25187 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Preclinical and Translational Vaccine Development Support for HIV and Other Candidate Agents (PTVDS) (N01), Task Area G.

*Date:* December 8, 2020.

*Time:* 10:00 a.m. to 1:00 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G31, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* Cynthia L. De La Fuente, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G31, Bethesda, MD 20892-9834, 240-669-2740, [delafuentecl@niaid.nih.gov](mailto:delafuentecl@niaid.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25184 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Advancing vaccine science to improve tuberculosis treatment outcomes for people living with or without HIV (R01 Clinical Trial Not Allowed).

*Date:* December 8, 2020.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G11A, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* J. Bruce Sundstrom, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G11A, Bethesda, MD 20892-9823, 240-669-5045, [sundstromj@niaid.nih.gov](mailto:sundstromj@niaid.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25188 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

*Date:* December 8, 2020.

*Time:* 2:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21, Rockville, MD 20892 (Telephone Conference Call).

*Contact Person:* Robert C. Unfer, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21, Rockville, MD 20892-9823, 240-669-5035, [unferrc@nih.gov](mailto:unferrc@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25186 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****Center for Scientific Review: Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Seizure Disorders and Spinal Cord Injuries.

*Date:* December 2, 2020.

*Time:* 1:00 p.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jenny Raye Browning, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 5207, Bethesda, MD 20892, (301) 402-8197, [jenny.browning@nih.gov](mailto:jenny.browning@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Glioma, Neuroinflammation and Autoimmunity and Neurovirology.

*Date:* December 7, 2020.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Samuel C. Edwards, Ph.D., Chief, BDCN IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435-1246, [edwardss@csr.nih.gov](mailto:edwardss@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; R15 Research Enhancement Awards (REAP and AREA)—Cancer Biology.

*Date:* December 8, 2020.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Angela Y. Ng, Ph.D., MBA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804, Bethesda, MD 20892, (301) 435-1715, [nga@csr.nih.gov](mailto:nga@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Drug Discovery, Clinical, and Field Research in Infectious Diseases.

*Date:* December 9, 2020.

*Time:* 10:00 a.m. to 6:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Bidyottam Mitra, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435-4057, [bidyottam.mitra@nih.gov](mailto:bidyottam.mitra@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR-20-104: Biomedical Technology Development and Dissemination (BTDD) Center.

*Date:* December 9, 2020.

*Time:* 10:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* James J. Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, (301) 806-8065, [lijames@csr.nih.gov](mailto:lijames@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Population Science and Epidemiology.

*Date:* December 9, 2020.

*Time:* 10:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Denise Wiesch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7770, Bethesda, MD 20892, (301) 437-3478, [wieschd@csr.nih.gov](mailto:wieschd@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; RFA-AI-20-003 Partnerships for the Development of Universal Influenza Vaccines.

*Date:* December 9, 2020.

*Time:* 11:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Alok Mulky, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4203, MSC 7814, Bethesda, MD 20892, (301) 435-3566, [alok.mulky@nih.gov](mailto:alok.mulky@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and AIDS Related Research.

*Date:* December 10, 2020.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Shinako Takada, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of

Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 402-9448, [shinako.takada@nih.gov](mailto:shinako.takada@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR Panel: Pediatric and Obstetric Pharmacology and Therapeutics.

*Date:* December 10, 2020.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, (301) 435-1154, [dianne.hardy@nih.gov](mailto:dianne.hardy@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Topics in Nephrology.

*Date:* December 10, 2020.

*Time:* 11:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jonathan K. Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2190, MSC 7850, Bethesda, MD 20892, (301) 594-1245, [ivinsj@csr.nih.gov](mailto:ivinsj@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Biochemistry and Pharmacology.

*Date:* December 10, 2020.

*Time:* 12:00 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Richard D. Crosland, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4190, MSC 7850, Bethesda, MD 20892, (301) 694-7084, [crosland@nih.gov](mailto:crosland@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 9, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25174 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****Center for Scientific Review; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Psychopathology, Cognition and Stress across the Lifespan.

*Date:* December 4, 2020.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Biao Tian, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3089B, MSC 7848, Bethesda, MD 20892, (301) 402-4411, [tianbi@csr.nih.gov](mailto:tianbi@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Small Business: Microscopy, Imaging and Neuromodulation Devices for Pain.

*Date:* December 7, 2020.

*Time:* 9:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Susan Gillmor, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 240-762-3076, [susan.gillmor@nih.gov](mailto:susan.gillmor@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Gastroenterology.

*Date:* December 7, 2020.

*Time:* 11:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jonathan K Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2190, MSC 7850, Bethesda, MD 20892, (301) 594-1245, [ivinsj@csr.nih.gov](mailto:ivinsj@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Neurodegeneration.

*Date:* December 7, 2020.

*Time:* 11:30 a.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Richard D Crosland, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4190, MSC 7850, Bethesda, MD 20892, 301-694-7084, [crosland@nih.gov](mailto:crosland@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Radiation Therapeutics and Biology.

*Date:* December 7, 2020.

*Time:* 12:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Laura Asnaghi, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Room 6200, MSC 7804, Bethesda, MD 20892, (301) 443-1196, [laura.asnaghi@nih.gov](mailto:laura.asnaghi@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020-25189 Filed 11-13-20; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HOMELAND SECURITY**

**[Docket Number DHS-2020-0045]**

**Agency Information Collection Activities: Homeland Security Acquisition Regulation (HSAR) Various Homeland Security Acquisitions Regulations, DHS Form 700-1, DHS Form 700-2, DHS Form 700-3, DHS Form 700-4**

**AGENCY:** Department of Homeland Security (DHS).

**ACTION:** 60-Day notice and request for comments; Extension without change of a currently approved collection, 1600-0002.

**SUMMARY:** The Department of Homeland Security will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in

accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted until January 15, 2021. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** You may submit comments, identified by docket number Docket #DHS-2020-0045, at:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Please follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency name and docket number Docket #DHS-2020-0045. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

**SUPPLEMENTARY INFORMATION:** This information collection is associated with the forms listed below and is necessary to implement applicable parts of the HSAR (48 CFR Chapter 30). There are four forms under this collection of information request that are used by offerors, contractors, and the general public to comply with requirements in contracts awarded by the Department of Homeland Security (DHS). The information collected is used by contracting officers to ensure compliance with terms and conditions of DHS contracts.

The forms are as follows:

(1) DHS Form 700-1, Cumulative Claim and Reconciliation Statement (see (HSAR) 48 CFR 3004.804-507(a)(3))

(2) DHS Form 700-2, Contractor's Assignment of Refund, Rebates, Credits and Other Amounts (see (HSAR) 48 CFR 3004.804-570(a)(2))

(3) DHS Form 700-3, Contractor's Release (see (HSAR) 48 CFR 3004.804-570(a)(1))

(4) DHS Form 700-4, Employee Claim for Wage Restitution (see (HSAR) 48 CFR 3022.406-9)

These forms will be prepared by individuals, contractors or contract employees during contract administration. The information collected includes the following:

- DHS Forms 700-1, 700-2 and 700-3: Prepared by individuals, contractors or contractor employees prior to contract closure to determine whether there are excess funds that are available for deobligation versus remaining (payable) funds on contracts; assignment or transfer of rights, title, and interest to the Government; and release from liability. The contracting officer obtains the forms from the

contractor for closeout, as applicable. Forms 700–1 and 02 are mainly used for calculating costs related to the closeout of cost-reimbursement, time-and-materials, and labor-hour contracts; and, Form 700–3 is mainly used for calculating costs related to the closeout of cost-reimbursement, time-and-materials, and labor-hour contracts but can be used for all contract types.

- DHS Form 700–4 is prepared by contractor employees making claims for unpaid wages. Contracting officers must obtain this form from employees seeking restitution under contracts to provide to the Comptroller General. This form is applicable to all contract types, both opened and closed.

The prior information collection request for OMB No. 1600–0002 was approved through November 30, 2021 by OMB in a Notice of OMB Action. This justification supports a request for an extension of the approval.

The purpose of the information collected is to ensure proper closing of physically complete contracts. The information will be used by DHS contracting officers to ensure compliance with terms and conditions of DHS contracts and to complete reports required by other Federal agencies such as the General Services Administration and the Department of Labor (DOL). If this information is not collected, DHS could inadvertently violate statutory or regulatory requirements and DHS's interests concerning inventions and contractors' claims would not be protected.

The four DHS forms are available on the DHS Homepage (<https://www.dhs.gov/acquisition-policy>). These forms can be filled in electronically and submitted via email or facsimile to the specified Government point of contact. Since the responses must meet specific timeframes, a centralized mailbox or website would not be an expeditious or practical method of submission. The use of email or facsimile is the best solution and is most commonly used in the Government. The information requested by these forms is required by the HSAR. The forms are prescribed for use in the closeout of applicable contracts and during contract administration.

Information collection may or may not involve small business contractors. The burden applied to small business is the minimum consistent with the goals of ensuring responsiveness to Government requirements. To reduce burden on small businesses and other small entities, the HSAR is continuously reviewed to determine whether the requirements remain valid.

- DHS Form 700–1, Cumulative Claim and Reconciliation Statement:

Less frequent incidence of collecting such information would result in inadequate closeout data. The office administering the contract would not have the necessary information to (1) determine settlement of indirect costs; and (2) adequately closeout cost-reimbursement, time-and-materials, and labor-hour contracts.

There are FAR and HSAR clauses that require protection of rights in data and proprietary information if requested and designated by an offeror or contractor. Additionally, disclosure or non-disclosure of information is handled in accordance with the Freedom of Information Act. There is no assurance of confidentiality provided to the respondents.

No PIA is required as the information is collected from DHS personnel (contractors only). Although, the DHS/ALL/PIA–006 General Contacts lists PIA does provided basic coverage. And technically, because this information is not retrieved by personal identifier, no SORN is required. However, DHS/ALL–021 DHS Contractors and Consultants provides coverage for the collection of records on DHS contractors and consultants, to include resume and qualifying employment information.

The burden estimates provided are based upon contracts reported by DHS and its Components to the FPDS for Fiscal Year 2019. No program changes occurred and there were no changes to the information being collected. However, the burden was adjusted to reflect an agency adjustment decrease of 22,225 in the number of respondents within DHS for Fiscal Year 2019, and an increase in the average hourly wage rate. The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

## Analysis

*Agency:* Department of Homeland Security, (DHS).

*Title:* Agency Information Collection Activities: Homeland Security Acquisition Regulation (HSAR) Various Homeland Security Acquisitions Regulations.

*OMB Number:* 1600–0002.

*Frequency:* On Occasion.

*Affected Public:* Private Sector.

*Number of Respondents:* 34013.

*Estimated Time per Respondent:* 1 Hour.

*Total Burden Hours:* 34013.

**Robert Dorr,**

*Executive Director, Business Management Directorate.*

[FR Doc. 2020–25172 Filed 11–13–20; 8:45 am]

**BILLING CODE 9112–FL–P**

## DEPARTMENT OF HOMELAND SECURITY

[Docket Number DHS–2020–0046]

### Agency Information Collection Activities: Homeland Security Acquisition Regulation (HSAR) Regulation on Agency Protests

**AGENCY:** Department of Homeland Security (DHS).

**ACTION:** 60-Day Notice and request for comments; Extension without change of a currently approved collection, 1600–0004.

**SUMMARY:** The Department of Homeland Security will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted until January 15, 2021. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** You may submit comments, identified by docket number Docket # DHS–2020–0046, at:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Please follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency name and docket number Docket # DHS–2020–0046. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

**SUPPLEMENTARY INFORMATION:** The Federal Acquisition Regulation (FAR)

and 48 CFR Chapter 1 provide general procedures on handling protests submitted by contractors to Federal agencies. FAR Part 33.103, Protests, Disputes and Appeals, prescribes policies and procedures for filing protests and for processing contract disputes and appeals. While the FAR prescribes the procedures to be followed for protests to the agency, it allows agencies to determine the method of receipt. DHS will utilize electronic mediums (email or facsimile) for collection of information and will not prescribe a format or require more information than what is already required in the FAR. If DHS determines there is a need to collect additional information outside of what is required in the FAR, DHS will submit a request to the Office of Management and Budget (OMB) for approval.

The prior information collection request for OMB No. 1600–0004 was approved through November 30, 2021 by OMB in a Notice of OMB Action. This justification supports a request for an extension of the approval.

The information being collected will be obtained from contractors as part of their submissions whenever they file a bid protest with DHS. The information will be used by DHS officials in deciding how the protest should be resolved. Failure to collect this information would result in delayed resolution of protests.

Agency protest information is contained in each individual solicitation document, and provides the specified contracting officer's name, email, and mailing address that the contractors would use to submit its response. The FAR does not specify the format in which the contractor should submit protest information. However, most contractors use computers to prepare protest materials and submit time sensitive responses electronically (email or facsimile) to the specified Government point of contact. Since the responses must meet specific timeframes, a centralized mailbox or website would not be a practical method of submission. Submission of protest information through contracting officers' email or through facsimile are the best methods to use to document receipt of protest information, and are the methods most commonly used in the Government protest process.

This information collection may involve small business contractors, depending on the particular transaction. The burden applied to small businesses is minimal and consistent with the goals of achieving timely resolution of agency protests.

This information is collected only when contractors choose to file a protest. The information is requested from contractors so that the Government will be able to evaluate protests effectively and provide prompt resolution of issues in dispute when contractors file agency level claims.

DHS/ALL/PIA–006 General Contact Lists covers the basic contact information that must be collected for DHS to address these protests. The other information collected will typically pertain to the contract itself, and not individuals. However, all information for this information collection is submitted voluntarily. Technically, because this information is not retrieved by personal identifier, no SORN is required. However, DHS/ALL–021 DHS Contractors and Consultants provides coverage for the collection of records on DHS contractors and consultants, to include resume and qualifying employment information. There is no assurance of confidentiality provided to the respondents.

The burden estimates provided are based upon reports of protest activities submitted to the GAO or the Court of Federal Claims in Fiscal Year 2019. No program changes have occurred or changes to the information being collected, however, the burden was adjusted to reflect an agency adjustment decrease of 6 respondents within DHS for Fiscal Year 2019, as well as an increase in the average hourly wage rate.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

#### Analysis

*Agency:* Department of Homeland Security (DHS).

*Title:* Homeland Security Acquisition Regulation (HSAR) Regulation on Agency Protests.

*OMB Number:* 1600–0004.

*Frequency:* On occasion.

*Affected Public:* Private Sector.

*Number of Respondents:* 93.

*Estimated Time per Respondent:* 2 hours.

*Total Burden Hours:* 186.

**Robert Dorr,**

*Acting Executive Director, Business Management Directorate.*

[FR Doc. 2020–25221 Filed 11–13–20; 8:45 am]

**BILLING CODE 9112–FL–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLWO320000 L13300000.EP0000; OMB Control Number 1004–0103]**

#### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Mineral Materials Disposal

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Information Collection; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Land Management (BLM) are proposing to renew an information collection.

**DATES:** Interested persons are invited to submit comments on or before December 16, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to the U.S. Department of the Interior, Bureau of Land Management, 440 W 200 S #500, Salt Lake City, UT 84101, Attn. Darrin King, Information Collection Clearance Officer, or by email to [BLM\\_HQ\\_PRA\\_Comments@blm.gov](mailto:BLM_HQ_PRA_Comments@blm.gov). Please reference OMB Control Number 1004–0103 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this information collection request (ICR), contact Timothy L. Barnes by email at [tbarnes@blm.gov](mailto:tbarnes@blm.gov), or by telephone at 541–416–6858. Individuals who are hearing or speech impaired



may call the Federal Relay Service at 1-800-877-8339 for TTY assistance. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on August 14, 2020 (85 FR 49675). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Abstract:** The BLM is required by the Materials Act of 1947 (30 U.S.C. 601 and 602) and Section 302 of the Federal Land Policy and Management Act (43 U.S.C. 1732) to manage the sale and free use of mineral materials that are not subject to mineral leasing or location under the mining laws (*e.g.*, common varieties of sand, stone, gravel, pumice, pumicite, clay, and rock). The Materials Act authorizes the BLM to sell these mineral materials at fair market value and to grant free-use permits to government agencies and nonprofit organizations. To obtain a sales contract or free-use permit, an applicant must submit information to identify themselves, the location of the site, and the proposed method to remove the mineral materials. The BLM uses the information to process each request for disposal, determine whether the request to dispose of mineral materials meets statutory requirements, and whether to approve the request.

**Title of Collection:** Mineral Materials Disposal (43 CFR part 3600).

**OMB Control Number:** 1004-0103.

**Form Number:** 3600-9, Contract for the Sale of Mineral Materials.

**Type of Review:** Extension of a currently approved collection.

**Respondents/Affected Public:** An estimated 265 businesses annually submit applications to purchase or use mineral materials from public lands.

**Total Estimated Number of Annual Respondents:** 265.

**Total Estimated Number of Annual Responses:** 4,912.

**Estimated Completion Time per Response:** Varies from 30 minutes to 30 hours.

**Total Estimated Number of Annual Burden Hours:** 6,274.

**Respondent's Obligation:** Required to obtain or retain a benefit.

**Frequency of Collection:** On occasion.

**Total Estimated Annual Nonhour Burden Cost:** \$126,024.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**Darrin King,**

*Information Collection Clearance Officer.*

[FR Doc. 2020-25220 Filed 11-13-20; 8:45 am]

**BILLING CODE 4310-84-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[NPS-WASO-NRNL-DTS#-31147; PPWOCRADIO, PCU00RP14.R50000]

### National Register of Historic Places; Notification of Pending Nominations and Related Actions

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The National Park Service is soliciting electronic comments on the significance of properties nominated before October 31, 2020, for listing or related actions in the National Register of Historic Places.

**DATES:** Comments should be submitted electronically by December 1, 2020.

**ADDRESSES:** Comments are encouraged to be submitted electronically to [National\\_Register\\_Submissions@nps.gov](mailto:National_Register_Submissions@nps.gov) with the subject line "Public Comment on <property or proposed district name, (County) State>." If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

**SUPPLEMENTARY INFORMATION:** The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before October 31, 2020. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

#### GEORGIA

##### Glascocock County

Stonewall Park Historic District, Roughly Gift, Lytle, Florida, Sanders, and Glenwood Aves. SE, portions of Hemlock Cir., Atlanta, SG100005890

**IOWA****Jasper County**

First Avenue East Historic District, 415–629  
1st Ave. East, 5–10 Cardinal Ct., Newton,  
SG100005888

First Avenue West Historic District, 414–622  
1st Ave. West, Newton, SG100005889

**KENTUCKY****Franklin County**

Chapel on the Forks, 3984 Georgetown Rd.,  
Frankfort, SG100005892

**Madison County**

Berea College Square Commercial Historic  
District, Main St. (100 blk.), Short St. (200  
blk.), Center St. (100 blk., 204 Center),  
Jackson St., (103–105) and Prospect St.,  
Berea, SG100005899

**SOUTH DAKOTA****Minnehaha County**

Burger, Margaret, Apartment House, 619  
South Main Ave., Sioux Falls,  
SG100005893

**TEXAS****Harris County**

Houses at 1217 and 1219 Tulane Street,  
(Houston Heights MRA), 1217 Tulane St.,  
Houston, MP100005898

**VIRGINIA****Craig County**

Craig County Poor Farm, 630 Poorhouse  
Farm Run, New Castle vicinity,  
SG100005895

**Middlesex County**

Saluda Historic District, Gloucester Rd.,  
General Puller Hwy., Oakes Landing Rd.,  
Saluda, SG100005896

**Norfolk Independent City**

Diggs, J. Eugene, House, 2509 East Virginia  
Beach Blvd., Norfolk, SG100005897

**WISCONSIN****Brown County**

Franciscan Publishers Building, 165 East  
Pulaski St., Pulaski, SG100005900

**Milwaukee County**

Harley-Davidson Motor Company Factory  
No. 7, 228 South 1st St., Milwaukee,  
SG100005901

Sheridan Apartment Building, 2435 West  
Wisconsin Ave., Milwaukee, SG100005903

**Sheboygan County**

Robert C. Pringle (tug) Shipwreck, (Great  
Lakes Shipwreck Sites of Wisconsin MPS),  
8 mi. SE of the Sheboygan harbor entrance  
in L. Michigan Wilson vicinity,  
MP100005902

Sheboygan Press, The, 632 Center Ave.,  
Sheboygan, SG100005904

A request for removal has been made for  
the following resources:

**IOWA****Plymouth County**

Reeves Farmstead Historic District, 15991 IA  
60, LeMars vicinity, OT00001680

**OREGON****Multnomah County**

Portland General Electric Company Station  
“L” Group, 1841 SE Water St., Portland,  
OT85003090

Additional documentation has been  
received for the following resource:

**IOWA****Cherokee County**

Cherokee Commercial Historic District  
(Additional Documentation), Parts of Main,  
Maple and Willow Sts., between 1st and  
6th Sts., Cherokee, AD05000903  
Nomination submitted by Federal  
Preservation Officer:

The State Historic Preservation Officer  
reviewed the following nomination and  
responded to the Federal Preservation Officer  
within 45 days of receipt of the nomination  
and supports listing the property in the  
National Register of Historic Places.

**ARIZONA****Pima County**

Tucson Mountain Park Historic District,  
(Historic Park Landscapes in National and  
State Parks MPS), Address Restricted,  
Tucson vicinity, MP100005891

**Authority:** Section 60.13 of 36 CFR part 60.

Dated: November 3, 2020.

**Sherry A. Frear,**

*Chief, National Register of Historic Places/  
National Historic Landmarks Program.*

[FR Doc. 2020–25167 Filed 11–13–20; 8:45 am]

**BILLING CODE 4312–52–P**

**DEPARTMENT OF JUSTICE****Bureau of Alcohol, Tobacco, Firearms  
and Explosives**

[OMB Number 1140–0100]

**Agency Information Collection  
Activities; Proposed eCollection  
eComments Requested; Extension  
With Change of a Currently Approved  
Collection; Report of Multiple Sale or  
Other Disposition of Certain Rifles—  
ATF Form 3310.12**

**AGENCY:** Bureau of Alcohol, Tobacco,  
Firearms and Explosives, Department of  
Justice.

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice  
(DOJ), Bureau of Alcohol, Tobacco,  
Firearms and Explosives (ATF), will  
submit the following information  
collection request to the Office of  
Management and Budget (OMB) for

review and approval in accordance with  
the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and  
will be accepted for 60 days until  
January 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** If  
you have additional comments,  
regarding the estimated public burden  
or associated response time,  
suggestions, or need a copy of the  
proposed information collection  
instrument with instructions, or  
additional information, please contact:  
Neil Troppman, ATF National Tracing  
Center Division, Law Enforcement  
Support Branch, either by mail at 244  
Needy Road, Martinsburg, WV 25401,  
by email at [ntclawenforcementsupport@atf.gov](mailto:ntclawenforcementsupport@atf.gov)  
or by telephone at 304–260–  
1510.

**SUPPLEMENTARY INFORMATION:** Written  
comments and suggestions from the  
public and affected agencies concerning  
the proposed collection of information  
are encouraged. Your comments should  
address one or more of the following  
four points:

—Evaluate whether the proposed  
collection of information is necessary  
for the proper performance of the  
functions of the 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;

—Evaluate whether and if so how the  
quality, utility, and clarity of the  
information to be collected can be  
enhanced; and

—Minimize the burden of the  
collection of information on those who  
are to respond, including through the  
use of appropriate automated,  
electronic, mechanical, or other  
technological collection techniques or  
other forms of information technology,  
*e.g.*, permitting electronic submission of  
responses.

**Overview of This Information  
Collection**

1. *Type of Information Collection*  
(*check justification or form 83*):

Extension with change of a currently  
approved collection.

2. *The Title of the Form/Collection:*  
Report of Multiple Sale or Other  
Disposition of Certain Rifles.

3. *The agency form number, if any,  
and the applicable component of the  
Department sponsoring the collection:*

*Form number (if applicable):* ATF  
Form 3310.12.

*Component:* Bureau of Alcohol,  
Tobacco, Firearms and Explosives, U.S.  
Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Business or other for-profit.

*Other (if applicable):* None.

*Abstract:* Federal firearms licensees (FFLs) who are dealers and pawnbrokers in Arizona, California, New Mexico and Texas, must report multiple sale or other disposition of two or more rifles with the following characteristics: (a) Semi-automatic, (b) caliber greater than .22, and (c) the ability to accept a detachable magazine. These FFLs must complete the Report of Multiple Sale or Other Disposition of Certain Rifles—ATF Form 3310.12 regarding such sale or other disposition to an unlicensed person, whether it occurs one time or within five consecutive business days.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 1,000 respondents will utilize the form about twice annually, and it will take each respondent approximately 12 minutes to complete their responses.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 400 hours, which is equal to 1,000 (# of respondents) \* 2 (# of responses per respondent) \* .2 (12 minutes).

7. *An Explanation of the Change in Estimates:* The adjustments associated with this collection include a decrease in the number of respondents and responses by 870 and 7,640 respectively. Consequently, both the public burden hours and public cost burden have also reduced by 1,492 and \$20,067 respectively, since the last renewal in 2019.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: November 10, 2020.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2020-25244 Filed 11-13-20; 8:45 am]

**BILLING CODE 4410-18-P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### United States v. Liberty Latin America Ltd., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America v. Liberty Latin America Ltd., et al.*, Civil Action No. 1:20-cv-03064-TNM. On October 23, 2020, the United States filed a Complaint alleging that Liberty Latin America Ltd.'s proposed acquisition of AT&T Inc.'s wireline telecommunications operations in Puerto Rico would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Liberty Latin America Ltd. to divest certain fiber-optic telecommunications assets and customer accounts in Puerto Rico.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at <https://www.justice.gov/atr> and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Scott Scheele, Chief, Telecommunications and Broadband Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 7000, Washington, DC 20530 (telephone: (202) 616-5924).

**Suzanne Morris,**

*Chief, Premerger and Division Statistics, Antitrust Division.*

#### United States District Court for the District of Columbia

*United States of America, U.S. Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 7000, Washington, DC 20530, Plaintiff, v. Liberty Latin America LTD., 1550 Wewatta Street, Suite 710, Denver, CO 80202, Liberty*

*Communications of Puerto Rico LLC, 279 Ave. Ponce De Leon, San Juan, PR 00917, and AT&T Inc., 208 South Akard Street, Dallas, TX 75202, Defendants.*

Civil Action No. 1:20-cv-03064-TNM

### Complaint

The United States of America brings this civil antitrust action to enjoin the acquisition of certain assets of AT&T Inc. in Puerto Rico and the U.S. Virgin Islands by Liberty Latin America Ltd. and to obtain other equitable relief.

#### I. Nature of the Action

1. On October 9, 2019, Liberty Latin America Ltd. ("Liberty") entered into an agreement to purchase the wireless and wireline telecommunications operations of AT&T Inc. ("AT&T") in Puerto Rico and the U.S. Virgin Islands. Liberty does not compete with AT&T in the U.S. Virgin Islands or in the provision of wireless telecommunications services in Puerto Rico. Liberty does, however, compete directly with AT&T in the provision of wireline telecommunications services in Puerto Rico. The proposed transaction would eliminate this competition.

2. Specifically, Liberty and AT&T currently compete to provide wireline telecommunications services over fiber-optic networks that they own in Puerto Rico. Liberty and AT&T use these networks to provide fiber-based connectivity and telecommunications services to enterprise customers across the island. The enterprise customers that purchase these services include businesses of all sizes as well as institutions, such as universities, hospitals, and government agencies. Enterprise customers use these services to reliably transport data among their offices and other locations, place phone calls, and access the internet at high speeds. Many enterprise customers demand the high levels of quality and reliability that fiber-based services provide.

3. Liberty and AT&T have two of the three most extensive fiber-based networks in Puerto Rico. For many buildings on the island, Liberty and AT&T are either the only two providers, or two of only three providers, that own a direct fiber connection to the building. For many other buildings to which Liberty and AT&T do not own direct fiber connections, they are the only two providers, or two of only three providers, with fiber located close enough to connect their networks to the building economically. Liberty and AT&T compete particularly closely for customers that have multiple locations spread across Puerto Rico and demand service from a single provider that can

serve all of their locations over its network. The proposed acquisition thus would likely substantially lessen competition in the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

## II. Defendants and the Transaction

4. Liberty—a Bermuda corporation with its executive offices in Denver, Colorado—is a leading telecommunications provider in Latin America and the Caribbean. Across this region, Liberty provides video services, internet access, and home telephony services to more than 6 million subscribers and provides mobile wireless service to approximately 3.6 million subscribers. Liberty generates approximately \$3.9 billion in annual revenues. Through its subsidiary Liberty Communications of Puerto Rico LLC (“LCPR”), Liberty operates the largest cable company in Puerto Rico. In 2016, Liberty expanded its Puerto Rico operations by acquiring Cable & Wireless Communications Plc, which controlled Columbus International Inc., a leading provider of fiber-based connectivity and telecommunications services on the island. Today, Liberty operates a network that includes more than 3,000 route miles of fiber-optic facilities in Puerto Rico. Liberty uses this network to provide fiber-based connectivity and telecommunications services to enterprise customers located throughout the island.

5. AT&T—a Delaware corporation headquartered in Dallas, Texas—is a leading provider of telecommunications, media, and technology services globally. AT&T generates approximately \$180 billion in annual revenues. Beyond its well-known mobile wireless and residential telecommunications businesses, AT&T is also one of the largest providers of telecommunications services to enterprise customers in the United States. AT&T entered the Puerto Rico market in 2009 through its acquisition of the wireless and wireline operations of Centennial Communications Corp. Today, AT&T provides fiber-based connectivity and telecommunications services to enterprise customers across Puerto Rico over a network that includes over 3,500 route miles of fiber-optic facilities.

6. On October 9, 2019, Liberty announced that it had agreed to purchase AT&T’s wireless and wireline telecommunications operations in Puerto Rico and the U.S. Virgin Islands for \$1.95 billion in cash. Upon closing of the transaction, Liberty would take

ownership of certain AT&T assets in Puerto Rico, including its wireless and wireline networks, wireless spectrum, contracts, real estate, and most of AT&T’s customer relationships on the island.<sup>1</sup>

## III. Jurisdiction and Venue

7. The United States brings this action under the direction of the Attorney General and pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Liberty, LCPR, and AT&T from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

8. Liberty, LCPR, and AT&T are engaged in, and their activities substantially affect, interstate commerce. Liberty, LCPR, and AT&T sell wireline telecommunications services in Puerto Rico and the United States. The Court has subject-matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

9. Defendants Liberty, LCPR, and AT&T have consented to venue and personal jurisdiction in this District. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(b)(1) and (c).

## IV. Background

10. Wireline telecommunications services are critical for transporting the data that individuals, businesses, and other entities transmit. Wireline telecommunications services provided over fiber-optic networks generally provide a higher level of quality and reliability than other types of wireline telecommunications services, such as those provided over legacy copper telephone network facilities or coaxial cable facilities.

11. Businesses and other institutions, such as universities, hospitals, and government agencies, that purchase telecommunications services are often referred to as “enterprise customers.” Enterprise customers generally require higher-quality and more-reliable telecommunications services than the residential telecommunications services that are purchased by consumers. For example, many enterprise customers require very high levels of dedicated bandwidth to allow them to transmit large volumes of data among their offices, and many require services that offer penalty-backed service quality guarantees in order to ensure business continuity. Fiber-based services often

carry these features. Accordingly, many enterprise customers depend on fiber-based services to enable their day-to-day operations.

12. In Puerto Rico, fiber-based telecommunications networks include the fiber cables that connect individual buildings to the rest of a provider’s network; the fiber cables and related equipment in a provider’s network used to transport traffic within a municipality; and the fiber cables that connect municipalities to one another across the island. Fiber cables that connect an individual building, such as an office building, to a provider’s network are often referred to as “last-mile” connections. Without a last-mile connection to the building, customers cannot send data to or receive data from any point outside of the building. Without the networks to which those last-mile connections connect, customers cannot communicate with other buildings in the same municipality or reach any points beyond.

13. Liberty and AT&T possess two of the three most extensive fiber-based networks in Puerto Rico. Each owns thousands of last-mile fiber connections, fiber facilities in municipalities across the island, and a fiber-optic “ring” that connects the municipalities to one another. The only other provider with a comparable fiber-based network is the incumbent local telephone company on the island, Puerto Rico Telephone Company, Inc., which does business as “Claro.” Together, Liberty, AT&T, and Claro account for the vast majority of sales of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico.

## V. Relevant Markets

14. The provision of fiber-based connectivity and telecommunications services to enterprise customers constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. 18.

15. Fiber-based connectivity allows for data to be physically transported across fiber-optic facilities, and telecommunications providers utilize this connectivity to offer a range of telecommunications services. Enterprise customers purchase these services to reliably transport data among their offices and other locations, place phone calls, and access the internet at high speeds. Enterprise customers that purchase fiber-based connectivity and telecommunications services would not turn to other connectivity technologies (such as copper or coaxial cable) in sufficient numbers to make a small but significant increase in price of fiber-

<sup>1</sup> The transaction does not include AT&T’s DIRECTV assets in Puerto Rico, any submarine cables and landing stations, certain “global” customer contracts, or spectrum in the 3650–3700 MHz and 39 GHz ranges.

based connectivity and telecommunications services unprofitable for a provider of these services.

16. Providers of fiber-based connectivity and telecommunications services to enterprise customers maintain island-wide price lists that apply across Puerto Rico. The actual prices charged for services, however, frequently vary significantly from these lists, as prices are often determined through promotional rates or on an individual basis. In some instances, customers purchase service for individual locations. In other instances, customers purchase packages of services for multiple locations. Many customers with multiple locations spread throughout Puerto Rico demand service from a single provider that can serve all of their locations over its network. Providers with island-wide, fiber-optic networks are best suited to supply such customers.

17. The relevant geographic market for analyzing the effects of the proposed acquisition is no larger than the island of Puerto Rico. The relevant geographic market is best defined by the locations of the customers who purchase fiber-based connectivity and telecommunications services. Enterprise customers located in Puerto Rico purchase fiber-based connectivity and telecommunications services from providers that can provide service to their locations. Enterprise customers located in Puerto Rico are unlikely to move their offices or other buildings in order to purchase fiber-based connectivity and telecommunications services from firms that do not offer service to their locations. For these reasons, a hypothetical monopolist of fiber-based connectivity and telecommunications services for enterprise customers in Puerto Rico likely would increase its prices in that market by at least a small but significant and non-transitory amount. Therefore, Puerto Rico is a relevant geographic market and “section of the country” within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

#### VI. Anticompetitive Effects

18. The transaction likely would substantially lessen competition in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico.

19. This market is highly concentrated. Three providers—Liberty, AT&T, and Claro—account for the vast majority of sales. While other providers offer service in Puerto Rico, they collectively account for a small fraction

of sales. These smaller providers generally do not own networks of sufficient scale to enable them to compete effectively in many parts of the island.

20. In order for a provider to sell fiber-based connectivity and telecommunications services to enterprise customers over its own network, the provider must either own a last-mile connection to the customer’s location or own fiber close enough to the location to allow the provider to build such a connection economically. For many buildings on the island, Liberty and AT&T are either the only two providers, or two of only three providers, that own a last-mile fiber connection to the building. For many other buildings, Liberty and AT&T are the only two providers, or two of only three providers, with fiber located close enough to the building to be able to construct such a connection economically.

21. A provider that does not own a last-mile connection to a particular customer location can serve enterprise customers at that location over another provider’s last-mile connection. It can do so by purchasing wholesale fiber-based connectivity from another provider and reselling that connectivity as part of a broader package of services to the enterprise customer. However, providers that do not own island-wide networks, including a significant number of last-mile connections, are limited in their competitiveness because they are reliant on their wholesale providers for fiber-based connectivity and constrained by the terms that their wholesale providers set for this connectivity.

22. In Puerto Rico, telecommunications providers seeking wholesale fiber-based connectivity most often purchase this connectivity from Liberty, AT&T, or Claro. Other options are limited. Some providers may purchase wholesale connectivity from a subsidiary of Puerto Rico’s public utility known as PREPA Networks (“PREPA”), which owns an island-wide fiber ring and is required by law to provide only wholesale connectivity to other telecommunications providers rather than service directly to enterprise customers. PREPA owns far fewer last-mile connections than Liberty, AT&T, and Claro, however, and customers served over the PREPA network account for a very small fraction of the overall market.

23. As the providers with two of the three largest fiber-based networks in Puerto Rico, Liberty and AT&T compete vigorously for enterprise customers across the island. These customers

include businesses of all sizes, as well as institutions, such as universities, hospitals, and government agencies. Given the breadth of their networks, Liberty and AT&T compete particularly closely for customers that have multiple locations spread throughout Puerto Rico and demand service from a single provider that can serve all of their locations over its network.

24. Competition between Liberty and AT&T for enterprise customers takes several forms. In some instances, Liberty or AT&T offers promotional rates or discounts in order to attract customers away from the other. In other instances, customers can extract concessions from Liberty or AT&T by threatening to switch to the other. Liberty or AT&T may also construct new fiber facilities in order to attract customers away from the other. Enterprise customers throughout Puerto Rico have experienced the benefit of this competition in the form of lower prices and higher-quality services.

25. The acquisition of AT&T’s wireline telecommunications operations in Puerto Rico by Liberty would represent a loss of this competition. The highly concentrated market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico would become even more concentrated. The loss of Liberty and AT&T as independent competitors would leave many customers with only one alternative provider and others with no competitive choice at all. This change would likely result in increased prices and lower-quality services for enterprise customers across the island.

#### VII. Absence of Countervailing Factors

26. Entry of new competitors in the relevant market is unlikely to prevent or remedy the proposed transaction’s anticompetitive effects. Barriers to entry include (i) the substantial amount of time and expense required to construct a fiber-optic network, (ii) the need for a firm seeking to construct such a network to obtain the permits and approvals required to do so, (iii) the significant level of expertise required to successfully offer telecommunications services to enterprise customers, and (iv) the need for a provider to establish a brand and reputation that would allow enterprise customers to entrust the provider with supporting their day-to-day operations.

27. The proposed transaction would be unlikely to generate verifiable, merger-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that are likely to occur.

## VIII. Violations Alleged

28. The acquisition of AT&T's wireline telecommunications operations in Puerto Rico by Liberty likely would substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

29. Unless enjoined, the acquisition would likely have the following anticompetitive effects, among others:

a. competition in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico would be substantially lessened;

b. prices in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico would increase; and

c. quality of service in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico would decline.

## IX. Requested Relief

30. The United States requests that this Court:

a. adjudge and decree that Liberty's acquisition of AT&T's wireline telecommunications operations in Puerto Rico would violate Section 7 of the Clayton Act, 15 U.S.C. 18;

b. permanently enjoin and restrain Liberty and AT&T and all persons acting on their behalf from carrying out the stock purchase agreement dated October 9, 2019, or from entering into or carrying out any contract, agreement, plan, or understanding, by which Liberty would acquire the assets that are subject to the agreement;

c. award the United States its costs for this action; and

d. award the United States such other and further relief as the Court deems just and proper.

Dated: October 23, 2020

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

Makan Delrahim

Makan Delrahim (DC Bar #457795),  
Assistant Attorney General.

Bernard A. Nigro, Jr.

Bernard A. Nigro, Jr. (DC Bar #412357),  
Principal Deputy Assistant Attorney General.  
Alexander P. Okuliar

Alexander P. Okuliar (DC Bar # 481103),  
Deputy Assistant Attorney General.

Kathleen S. O'Neill

Kathleen S. O'Neill,  
Senior Director of Investigations & Litigation.  
Scott Scheele

Scott Scheele (DC Bar #429061),  
Chief, Telecommunications and Broadband  
Section.

Jared A. Hughes

Jared A. Hughes,  
Matthew C. Hammond,  
Assistant Chiefs, Telecommunications and  
Broadband Section.  
Matthew Jones

Matthew Jones \* (DC Bar #1006602)

Elizabeth A. Gudis

Z. Elif Aksoy (DC Bar #1005091)

Alvin H. Chu

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Carl Willner (DC Bar #412841)

Attorneys for the United States, U.S.

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514-6381, Email: [Matthew.Jones3@usdoj.gov](mailto:Matthew.Jones3@usdoj.gov).

\* Lead Attorney to be Noticed

## United States District Court for the District of Columbia

*United States of America*, Plaintiff, v. *Liberty Latin America LTD.*, *Liberty Communications of Puerto Rico LLC*, and *AT&T Inc.*  
Defendants.

Civil Action No. 1:20-cv-03064-TNM

## Proposed Final Judgment

*Whereas*, Plaintiff, United States of America, filed its Complaint on October 23, 2020;

*And whereas*, the United States and Defendants, Liberty Latin America Ltd. ("LLA"), Liberty Communications of Puerto Rico LLC ("LCPR"), and AT&T Inc. ("AT&T"), have consented to entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

*And whereas*, Defendants agree to make a divestiture to remedy the loss of competition alleged in the Complaint;

*And whereas*, Defendants represent that the divestiture and other relief required by this Final Judgment can and will be made and that Defendants will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;

*Now therefore, it is ordered, adjudged, and decreed:*

## I. JURISDICTION

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

## II. DEFINITIONS

As used in this Final Judgment:

A. "AT&T" means Defendant AT&T Inc., a Delaware corporation with its

headquarters in Dallas, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. "LCPR" means Defendant Liberty Communications of Puerto Rico LLC, a Puerto Rico limited liability company with its headquarters in San Juan, Puerto Rico, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "LLA" means Defendant Liberty Latin America Ltd., a Bermuda corporation with its headquarters in Hamilton, Bermuda, and executive offices in Denver, Colorado, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

D. "WorldNet" means WorldNet Telecommunications Inc., a Puerto Rico corporation with its headquarters in Guaynabo, Puerto Rico, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

E. "Acquirer" means WorldNet or another entity to which Defendants divest the Divestiture Assets.

F. "AT&T Aerial Fiber Core Segments" means the aerial fiber core network segments that connect AT&T's communications hubs to each other across Puerto Rico (excluding (1) the segment between Arecibo and Ponce and (2) the segments between or among Guaynabo, AT&T Plaza, Hato Rey, and Carolina).

G. "AT&T Customers" means enterprise and wholesale customers in Puerto Rico (excluding AT&T Global Services customers) that purchased services from AT&T immediately prior to the Transaction, all of which are being transferred to LLA upon closing of the Transaction.

H. "Columbus Customers" means LLA customers with one or more service locations on the Columbus Network but does not include (1) AT&T Customers or (2) LLA customers who purchase video, hybrid fiber-coaxial, wholesale, or residential services.

I. "Columbus Divestiture Assets" means all of LLA's rights, titles, and interests in, to, or under:

1. The Columbus Network; and
2. all LLA assets related to or used in connection with the provision of fiber-based connectivity and/or telecommunications services to

locations on the Columbus Network or related to or used in connection with Columbus Customers, including:

- a. All active or pending licenses, permits, certifications, approvals, consents, registrations, and waivers issued by any governmental organization;
- b. all rights of way, easements, and access agreements;
- c. all contracts, contractual rights, agreements, leases, commitments, certifications, and understandings;
- d. all Columbus Customer lists, contracts, accounts, relationships, and credit records;
- e. all intellectual property associated with the Columbus brand, including copyrights, trademarks, trade names, service marks, and service names; and
- f. all records and data, including all repair, maintenance, and performance records.

*Provided, however,* that the Columbus Divestiture Assets do not include (1) any subsea cable or any connection rights to subsea cable; (2) customer contracts for customers to whom LLA provides video, hybrid fiber-coaxial, wholesale, or residential services; (3) the LCPR Network; (4) the IRU between LCPR and Cable & Wireless Puerto Rico Inc. effective as of April 1, 2019; or (5) the IRU between Columbus Networks of Puerto Rico LLC and Liberty Communications of Puerto Rico LLC effective as of October 1, 2020.

J. "Columbus Network" means the fiber-based communication system in the San Juan Metro Area that LLA acquired as part of its May 17, 2016, acquisition of Cable & Wireless Communications, including colocation rights or a leasehold at the communications hubs located at Ana G. Méndez, Bayamón Corujo, Double Tree, MCS, and Metro Office Park; the equipment in those hubs; the facilities connecting the hubs to each other and to Columbus Customer locations; and any customer premises equipment at Columbus Customer locations.

K. "Construction Contractors" means individuals or companies hired by Defendants to conduct construction activities, which include contacting customers to request permission to conduct site surveys and obtain building access for construction activities.

L. "Divestiture Assets" means the Columbus Divestiture Assets, the LCPR Divestiture Assets, and the LCPR IRU.

M. "Divestiture Date" means the date on which LLA and the Acquirer close on a transaction effecting the required divestiture.

N. "IRU" means one or more grants of an indefeasible right of use, a long-term

interest that gives the holder of such interest the right for either (1) the exclusive use of specific fiber strands or other communications facilities or (2) the exclusive use of a specified amount of capacity in a fiber-based cable or other communications facility.

O. "LCPR Customers" means LLA customers with one or more service locations on the LCPR Network but does not include (1) AT&T Customers; (2) LLA customers who purchase video, hybrid fiber-coaxial, wholesale, or residential services; or (3) customers solely receiving service for dedicated subsea capacity.

P. "LCPR Network" means the fiber-based communication system owned by LCPR in Puerto Rico as of the date immediately preceding the closing of the Transaction, including all LCPR hubs in Puerto Rico (other than Columbus Network hubs), the equipment in those hubs, and the facilities connecting the hubs to each other and to LCPR Customer locations, and any customer premises equipment at LCPR Customer locations.

Q. "LCPR Divestiture Assets" means all of LLA's rights, titles, and interests in, to, or under:

1. All facilities owned by LCPR that are used to serve LCPR Customers exclusively; and
2. all other LLA assets related to or used in connection with the provision of fiber-based connectivity and/or telecommunications services to LCPR Customers or with facilities that are used to serve LCPR Customers exclusively, including:

- a. All licenses, permits, certifications, approvals, consents, registrations, and waivers issued by any governmental organization;
- b. all rights of way, easements, and access agreements;
- c. all contracts, contractual rights, agreements, leases, commitments, certifications, and understandings;
- d. all LCPR Customer lists, contracts, accounts, relationships, and credit records; and
- e. all records and data, including all repair, maintenance, and performance records.

*Provided, however,* that the LCPR Divestiture Assets do not include (1) assets used in the provision of video, hybrid fiber-coaxial, wholesale, or residential data services; (2) customer contracts for customers to whom LCPR provides video, hybrid fiber-coaxial, wholesale, or residential data services; (3) customer premises equipment for such customers or fiber drops to such customer locations; (4) any subsea cable or any connection rights to subsea cable; or (5) any assets that are required for the

operation of the LCPR Network but are not required for the provision of fiber-based connectivity and/or telecommunications services to LCPR Customers.

R. "LCPR IRU" means an exclusive IRU to provide fiber-based connectivity and telecommunications services over all portions of the LCPR Network that were used as of October 15, 2020 to serve LCPR Customers but are not included in the LCPR Divestiture Assets, the term of which is (1) at least five years for fiber routes to LCPR Customer locations within one mile of the Columbus Network; and (2) at least 15 years for all other fiber routes with one five-year extension at the option of the Acquirer.

S. "Regulatory Approvals" means (1) any approvals or clearances from the Federal Communications Commission, from any agency of Puerto Rico or its subdivisions, or under antitrust or competition laws that are required for the Transaction to proceed; and (2) any approvals or clearances pursuant to filings with CFIUS or under antitrust, competition, or other U.S. or international laws that are required for Acquirer's acquisition of the Divestiture Assets to proceed.

T. "Relevant Personnel" means all full-time, part-time, or contract employees of LCPR, wherever located, who spent all, or a majority, of their time in the operation of the Divestiture Assets at any time between January 1, 2019, and October 15, 2020, including sales, marketing, and sales support personnel, as well as network and operations personnel, including customer care, service installation technicians, service repair technicians, engineering, and outside plant personnel.

U. "San Juan Metro Area" means the municipalities of San Juan, Bayamón, Guaynabo, Carolina, Trujillo Alto, Cataño, Toa Baja, and Toa Alta.

V. "Transferred Customers" means the Columbus Customers and the LCPR Customers.

W. "Transaction" means the proposed acquisition of AT&T's wireline and wireless assets in Puerto Rico and the U.S. Virgin Islands by LLA.

### III. Applicability

A. This Final Judgment applies to LLA, LCPR, and AT&T, as defined above, and all other persons in active concert or participation with any Defendant who receive actual notice of this Final Judgment.

B. If, prior to complying with Sections IV and V of this Final Judgment, LLA sells or otherwise disposes of all or substantially all of its assets or of

business units that include the Divestiture Assets, AT&T Aerial Fiber Core Segments, or poles or conduit subject to the Acquirer options provided for in Paragraphs IV.J–IV.M, LLA must require any purchaser to be bound by the provisions of this Final Judgment that apply to the assets to be sold. LLA need not obtain such an agreement from Acquirer.

#### IV. Divestiture

A. LLA is ordered and directed, within 30 calendar days after the Court's entry of the Asset Preservation Stipulation and Order in this matter, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 60 calendar days in total and will notify the Court of any extensions.

B. If Acquirer or LLA has initiated contact with any governmental entity to seek any Regulatory Approval within five calendar days after the United States provides written notice pursuant to Paragraph VI.C. that it does not object to the proposed Acquirer, the time period provided in Paragraph IV.A. will be extended until 15 calendar days after that Regulatory Approval is received, except that the extension allowed for securing Regulatory Approvals may be no longer than 90 calendar days past the time period provided in Paragraph IV.A., unless the United States, in its sole discretion, consents to an additional extension.

C. LLA must use its best efforts to divest the Divestiture Assets as expeditiously as possible, and Defendants may not take any action to impede the permitting, operation, or divestiture of the Divestiture Assets.

D. Unless the United States otherwise consents in writing, the divestiture pursuant to this Final Judgment must include the entire Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by Acquirer as part of a viable, ongoing business of providing fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico and that the divestiture to Acquirer will remedy the competitive harm alleged in the Complaint.

E. LLA must provide Acquirer with an LCPR IRU to provide fiber-based connectivity and telecommunications services over specific fiber strands in the LCPR Network that are dedicated to Acquirer's use. For (a) individual

distribution fiber routes in the San Juan Metro Area where LLA's existing usage of the fiber exceeded industry best practices as of October 15, 2020, and (b) routes on LCPR's fiber core network, the LCPR IRU may provide Acquirer with the right to use a fixed amount of capacity rather than dedicated fiber strands. This fixed amount of capacity must be equal to the amount of capacity on the route that was used by LLA to serve LCPR Customers as of October 15, 2020, plus a commercially reasonable amount of additional capacity to allow Acquirer to provide additional services to both LCPR Customers and other customers in the future.

1. The LCPR IRU must include all rights and interests necessary to enable the LCPR IRU to be used by Acquirer to provide fiber-based connectivity and telecommunications services, including the right for Acquirer to splice into the IRU fiber at existing splice points or at new splice points requested by Acquirer, *provided, however*, that the LCPR IRU need not permit the Acquirer to splice at new splice points that would jeopardize the integrity of the LCPR Network.

2. The LCPR IRU must provide Acquirer with repair, maintenance, and installation capabilities of the same quality and speed that LCPR utilizes for its own network.

3. The LCPR IRU must not require Acquirer to pay a monthly or other recurring fee to preserve or make use of its rights but may contain other commercially reasonable and customary terms, including terms for payment to the grantor for ancillary services, such as non-recurring costs or repair fees.

4. The LCPR IRU must include an option, exercisable at the option of the Acquirer on commercially reasonable terms, for Acquirer to purchase the right to use the IRU to provide residential service.

5. Within 30 calendar days after the Court's entry of the Asset Preservation Stipulation and Order in this matter, LLA must identify to Acquirer and the United States each of the fiber routes to LCPR Customer locations within one mile of the Columbus Network.

F. The divestiture must be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico.

G. The divestiture must be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between

Acquirer and LLA gives LLA the ability unreasonably to raise Acquirer's costs, to lower Acquirer's efficiency, or otherwise to interfere in the ability of Acquirer to compete effectively.

H. In the event LLA is attempting to divest the Divestiture Assets to an Acquirer other than WorldNet, LLA promptly must make known, by usual and customary means, the availability of the Divestiture Assets. LLA must inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that the Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. LLA must offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets that are customarily provided in a due-diligence process; *provided, however*, that LLA need not provide information or documents subject to the attorney-client privilege or work-product doctrine. LLA must make all information and documents available to the United States at the same time that the information and documents are made available to any other person.

I. LLA must provide prospective Acquirers with (1) access to make inspections of the Divestiture Assets; (2) access to all environmental, zoning, and other permitting documents and information; and (3) access to all financial, operational, or other documents and information customarily provided as part of a due diligence process. LLA also must disclose all encumbrances on any part of the Divestiture Assets, including on intangible property.

J. At the option of Acquirer, within three years after the Divestiture Date, LLA must sell to Acquirer, on a segment-by-segment basis, and on commercially reasonable terms to be approved by the United States in its sole discretion, each of the AT&T Aerial Fiber Core Segments. The United States, in its sole discretion, may consent to one or more extensions of this time period not to exceed one year.

1. Within 30 calendar days after the Court's entry of the Asset Preservation Stipulation and Order in this matter, LLA must identify and describe with specificity each of the AT&T Aerial Fiber Core Segments to Acquirer and the United States.

2. If LLA serves customer locations that cannot be migrated off a segment acquired pursuant to this Paragraph IV.J., LLA may negotiate terms with Acquirer pursuant to which LLA may



retain an IRU necessary to serve such customer locations.

K. From the Divestiture Date until the date on which LLA completes its obligation under Paragraph IV.J, LLA must maintain the AT&T Aerial Fiber Core Segments in the ordinary course of business and consistent with past practices as ongoing, economically viable, competitive assets and must take all other actions necessary to preserve and maintain the full economic viability, marketability, and competitiveness of the AT&T Aerial Fiber Core Segments, including:

1. LLA must maintain all licenses, permits, approvals, authorizations, and certifications related to or necessary for the operation of the AT&T Aerial Fiber Core Segments and must maintain the AT&T Aerial Fiber Core Segments in compliance with all regulatory obligations and requirements;

2. LLA must ensure that the AT&T Aerial Fiber Core Segments are fully maintained in operable condition, including by maintaining and adhering to normal repair and maintenance schedules for the AT&T Aerial Fiber Core Segments.

3. Except as approved by the United States in accordance with the terms of the proposed Final Judgment, LLA may not sell, lease, assign, transfer, pledge, or encumber, any AT&T Aerial Fiber Core Segment(s) prior to completing its obligation under Paragraph IV.J.

4. LLA may decommission AT&T Aerial Core Fiber Segment(s), so long as it provides at least 60 days' advance written notice to Acquirer before doing so. If Acquirer does not exercise its option to purchase the identified segment(s) within 60 days after such notice is given, LLA may proceed with decommissioning.

L. At the option of Acquirer, at any time during the term of this Final Judgment, LLA must grant to Acquirer, on commercially reasonable terms comparable to those found in LLA's other pole attachment agreements and to be approved by the United States in its sole discretion, the right to attach fiber to LLA-owned poles located on the island of Puerto Rico where space on such poles is available. LLA is not required to reserve space on poles for Acquirer or to obtain regulatory approvals for Acquirer to install pole attachments.

M. At the option of Acquirer, at any time within three years of the Divestiture Date, LLA must sell to Acquirer, on commercially reasonable terms to be approved by the United States in its sole discretion, up to one inch in diameter of space, and the right to install fiber cables in such space, in

any underground conduit in Puerto Rico that (1) was owned by LLA or AT&T as of October 15, 2020, and (2) contains at least two inches in diameter of unused space (measured as the sum of all unused space, including space spread across multiple innerducts, within the conduit) as of the date of Acquirer's request.

1. Within 30 calendar days after the Court's entry of the Asset Preservation Stipulation and Order in this matter, LLA must identify to Acquirer and the United States all underground conduit routes in Puerto Rico that (1) were owned by LLA or AT&T as of October 15, 2020, and (2) contained at least two inches in diameter of unused space (measured as the sum of all unused space, including space spread across multiple innerducts, within the conduit) as of October 15, 2020.

2. Prior to deploying new facilities in any conduit route identified pursuant to Paragraph IV.M.1 during the three-year period specified above or during any extension under Paragraph IV.M.3 below, LLA must provide at least 60 days' advance written notice to Acquirer if such deployment would result in less than two inches in diameter of unused space (measured as the sum of all unused space, including space spread across multiple innerducts, within the conduit) remaining in the conduit. If Acquirer does not exercise its option to acquire that conduit space within 60 days after such notice is given, then LLA may proceed with the deployment.

3. If the United States consents to an extension or extensions of the period specified in Paragraph IV.J of this Final Judgment, the period within which Acquirer must exercise its option to acquire conduit space will be extended by the same amount of time.

4. Nothing in this Paragraph IV.M requires LLA to bear the expense of Acquirer's installation of fiber in LLA conduit or to obtain permits, authorizations, or regulatory approvals for such installation.

N. LLA must cooperate with and assist Acquirer to identify and hire all Relevant Personnel.

1. Within 10 business days following the filing of the Complaint in this matter, LLA must identify all Relevant Personnel to Acquirer and the United States, including by providing organization charts covering all Relevant Personnel.

2. Within 10 business days following receipt of a request by Acquirer, the United States, or the monitoring trustee, LLA must provide to Acquirer, the United States, and the monitoring trustee the following additional information related to Relevant

Personnel: Name; job title; current salary and benefits including most recent bonus paid, aggregate annual compensation, current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due to or promises made to the employee; descriptions of reporting relationships, past experience, responsibilities, and training and educational histories; lists of all certifications; and all job performance evaluations. If LLA is barred by any applicable law from providing any of this information, LLA must provide, within 10 business days following receipt of the request, the requested information to the full extent permitted by law and also must provide a written explanation of LLA's inability to provide the remaining information.

3. At the request of Acquirer, LLA must promptly make Relevant Personnel available for private interviews with Acquirer during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by Acquirer to employ any Relevant Personnel. Interference includes, but is not limited to, offering to increase the compensation or improve the benefits of Relevant Personnel unless: (a) The offer is part of a company-wide increase in compensation or improvement in benefits that was announced prior to October 9, 2019; or (b) the offer is approved by the United States, in its sole discretion. Defendants' obligations under this Paragraph IV.N.4 will expire six months after the Divestiture Date.

5. For Relevant Personnel who elect employment with Acquirer within six months of the Divestiture Date, LLA must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all other compensation and benefits that those Relevant Personnel have fully or partially accrued, and provide all benefits that those Relevant Personnel otherwise would have been provided had the Relevant Personnel continued employment with LLA, including any retention bonuses or payments. LLA may maintain reasonable restrictions on disclosure by Relevant Personnel of LLA's proprietary non-public information that is unrelated to the Divestiture Assets and not otherwise required to be disclosed by this Final Judgment.

6. For a period of one year from the Divestiture Date, Defendants may not solicit to rehire Relevant Personnel who were hired by Acquirer within six months of the Divestiture Date unless (a) an individual is terminated or laid off

by Acquirer or (b) Acquirer agrees in writing that Defendants may solicit to rehire that individual. Nothing in this Paragraph IV.N.6 prohibits Defendants from advertising employment openings using general solicitations or advertisements and rehiring Relevant Personnel who apply for an employment opening through a general solicitation or advertisement.

O. LLA must warrant to Acquirer that (1) the Divestiture Assets will be operational and without material defect on the date of their transfer to the Acquirer; (2) there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Divestiture Assets; and (3) LLA has disclosed all encumbrances on any part of the Divestiture Assets, including on intangible property. Following the sale of the Divestiture Assets, LLA must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits pertaining to the operation of the Divestiture Assets.

P. LLA must assign, subcontract, or otherwise transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships) included in the Divestiture Assets, including all supply and sales contracts, to Acquirer; *provided, however*, that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, LLA must use best efforts to accomplish the assignment, subcontracting, or transfer. LLA must not interfere with any negotiations between Acquirer and a contracting party.

Q. LLA must make best efforts to assist Acquirer to obtain all necessary licenses, registrations, and permits to operate the Divestiture Assets. Until Acquirer obtains the necessary licenses, registrations, and permits, LLA must provide Acquirer with the benefit of LLA's licenses, registrations, and permits to the full extent permissible by law.

R. At the option of Acquirer, and subject to approval by the United States, in its sole discretion, on or before the Divestiture Date, LLA must enter into a contract to provide transition services for back office, billing, provisioning, human resources, accounting, employee health and safety, and information technologies services and support for a period of up to 18 months on terms and conditions reasonably related to market conditions for the provision of transition services. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to

an additional 6 months. If Acquirer seeks an extension of the term of any transition services contract, LLA must notify the United States in writing at least three months prior to the date the contract for transition services expires. Acquirer may terminate a transition services contract without cost or penalty at any time upon commercially reasonable notice.

S. For a period of one year following the Divestiture Date, LLA must not initiate customer-specific communications to solicit any Transferred Customer; *provided, however*, that: (1) LLA may respond to inquiries initiated by Transferred Customers and enter into negotiations at the request of such customers (including responding to requests for quotation or proposal) to supply any business, whether or not such business was included in the Divestiture Assets; and (2) LLA must maintain a log of telephonic, electronic, in-person, and other communications that constitute inquiries or requests from Transferred Customers within the meaning of this Paragraph IV.S and make it available to the United States for inspection upon request. For so long as this prohibition is in effect, LLA must ensure that its Construction Contractors, in performing work on behalf of LLA, do not initiate communications with any Transferred Customer unless (1) the Transferred Customer is located in a building with multiple tenants and at least one of those tenants is not a Transferred Customer; and (2) the Transferred Customer is the landlord of the building or otherwise has authority to make decisions related to telecommunications services for the entire building. For the avoidance of doubt, nothing in this Final Judgment prevents LLA from initiating customer-specific communications with any AT&T Customer with respect to those services provided by AT&T to such customer as of the closing date of the Transaction.

T. If any term of an agreement between LLA and Acquirer to effectuate the divestiture required by this Final Judgment varies from a term of this Final Judgment, to the extent that LLA cannot fully comply with both, this Final Judgment determines LLA's obligations.

#### V. Appointment of Divestiture Trustee

A. If LLA has not divested the Divestiture Assets within the period specified in Paragraph IV.A, LLA must immediately notify the United States of that fact in writing. Upon motion of the United States, which Defendants may not oppose, the Court will appoint a divestiture trustee selected by the

United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a divestiture trustee by the Court, only the divestiture trustee will have the right to sell the Divestiture Assets. The divestiture trustee will have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, in its sole discretion, at a price and on terms as are then obtainable upon reasonable effort by the divestiture trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and will have other powers as the Court deems appropriate. The divestiture trustee must sell the Divestiture Assets as quickly as possible.

C. LLA may not object to a sale by the divestiture trustee on any ground other than malfeasance by the divestiture trustee. Objections by LLA must be conveyed in writing to the United States and the divestiture trustee within 10 calendar days after the divestiture trustee has provided the notice of proposed divestiture required under Section VI.

D. The divestiture trustee will serve at the cost and expense of LLA pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict of interest certifications, that are approved by the United States.

E. The divestiture trustee may hire at the cost and expense of LLA any agents or consultants, including investment bankers, attorneys, and accountants, that are reasonably necessary in the divestiture trustee's judgment to assist with the divestiture trustee's duties. These agents or consultants will be accountable solely to the divestiture trustee and will serve on terms and conditions, including terms and conditions governing confidentiality requirements and conflict-of-interest certifications, that are approved by the United States.

F. The compensation of the divestiture trustee and agents or consultants hired by the divestiture trustee must be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement that provides the divestiture trustee with incentives based on the price and terms of the divestiture and the speed with which it is accomplished. If the divestiture trustee and LLA are unable to reach agreement on the divestiture trustee's compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the divestiture trustee by the Court, the United States may, in its sole discretion,

take appropriate action, including by making a recommendation to the Court. Within three business days of hiring an agent or consultant, the divestiture trustee must provide written notice of the hiring and rate of compensation to LLA and the United States.

G. The divestiture trustee must account for all monies derived from the sale of the Divestiture Assets sold by the divestiture trustee and all costs and expenses incurred. Within 30 calendar days of the Divestiture Date, the divestiture trustee must submit that accounting to the Court for approval. After approval by the Court of the divestiture trustee's accounting, including fees for unpaid services and those of agents or consultants hired by the divestiture trustee, all remaining money must be paid to LLA and the trust will then be terminated.

H. LLA must use its best efforts to assist the divestiture trustee to accomplish the required divestiture. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, LLA must provide the divestiture trustee and agents or consultants retained by the divestiture trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets. LLA also must provide or develop financial and other information relevant to the Divestiture Assets that the divestiture trustee may reasonably request. LLA must not take any action to interfere with or to impede the divestiture trustee's accomplishment of the divestiture.

I. The divestiture trustee must maintain complete records of all efforts made to sell the Divestiture Assets, including by filing monthly reports with the United States setting forth the divestiture trustee's efforts to accomplish the divestiture ordered by this Final Judgment. The reports must include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets and must describe in detail each contact with any such person.

J. If the divestiture trustee has not accomplished the divestiture ordered by this Final Judgment within six months of appointment, the divestiture trustee must promptly provide the United States with a report setting forth: (1) The divestiture trustee's efforts to accomplish the required divestiture; (2)

the reasons, in the divestiture trustee's judgment, why the required divestiture has not been accomplished; and (3) the divestiture trustee's recommendations for completing the divestiture. Following receipt of that report, the United States may make additional recommendations consistent with the purpose of the trust to the Court. The Court thereafter may enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may include extending the trust and the term of the divestiture trustee's appointment by a period requested by the United States.

K. The divestiture trustee will serve until divestiture of all Divestiture Assets is completed or for a term otherwise ordered by the Court.

L. If the United States determines that the divestiture trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute divestiture trustee.

#### **VI. Notice of Proposed Divestiture**

A. Within two business days following execution of a definitive divestiture agreement, LLA or the divestiture trustee, whichever is then responsible for effecting the divestiture, must notify the United States of a proposed divestiture required by this Final Judgment. If the divestiture trustee is responsible for completing the divestiture, the divestiture trustee also must notify LLA. The notice must set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets.

B. Within 15 calendar days of receipt by the United States of this notice, the United States may request from Defendants, the proposed Acquirer, other third parties, or the divestiture trustee additional information concerning the proposed divestiture, the proposed Acquirer, and other prospective Acquirers. Defendants and the divestiture trustee must furnish the additional information requested within 15 calendar days of the receipt of the request unless the United States provides written agreement to a different period.

C. Within 45 calendar days after receipt of the notice required by Paragraph VI.A. or within 20 calendar days after the United States has been provided the additional information requested pursuant to Paragraph VI.B., whichever is later, the United States will provide written notice to LLA and

any divestiture trustee that states whether or not the United States, in its sole discretion, objects to Acquirer or any other aspect of the proposed divestiture. Without written notice that the United States does not object, a divestiture may not be consummated. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to LLA's limited right to object to the sale under Paragraph V.C. of this Final Judgment. Upon objection by LLA pursuant to Paragraph V.C., a divestiture by the divestiture trustee may not be consummated unless approved by the Court.

D. No information or documents obtained pursuant to this Section VI may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand-jury proceedings, for the purpose of evaluating a proposed Acquirer or securing compliance with this Final Judgment, or as otherwise required by law.

E. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Persons submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." See 28 CFR 16.7(b).

F. If at the time that a person furnishes information or documents to the United States pursuant to this Section VI, that person represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give that person ten calendar days' notice before divulging the material in any legal proceeding (other than a grand-jury proceeding).

## VII. Financing

Defendants may not finance all or any part of Acquirer's purchase of all or part of the Divestiture Assets or Acquirer's exercise of any options available under Paragraphs IV.J–IV.M of this Final Judgment.

## VIII. Asset Preservation Obligations

Defendants must take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by the Court. Defendants must take no action that would jeopardize the divestiture ordered by the Court.

## IX. Affidavits

A. Within 20 calendar days of the filing of the Complaint in this matter, and every 30 calendar days thereafter until the Divestiture Date, each Defendant must deliver to the United States an affidavit, signed by that Defendant's Chief Financial Officer and General Counsel, describing the fact and manner of that Defendant's compliance with this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits. Defendant AT&T's obligations under this Paragraph IX.A shall cease 30 calendar days after the closing of the Transaction.

B. Each affidavit must include: (1) The name, address, and telephone number of each person who, during the preceding 30 calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, an interest in the Divestiture Assets and describe in detail each contact with such persons during that period; (2) a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Divestiture Assets and to provide required information to prospective Acquirers; and (3) a description of any limitations placed by Defendants on information provided to prospective Acquirers. If the information set forth in the affidavit is true and complete, objection by the United States to information provided by Defendants to prospective Acquirers must be made within 14 calendar days of receipt of the affidavit.

C. Defendants must keep all records of any efforts made to divest the Divestiture Assets until one year after the Divestiture Date.

D. Within 20 calendar days of the filing of the Complaint in this matter, Defendants also must deliver to the United States an affidavit signed by each Defendant's Chief Financial Officer and General Counsel, that describes in

reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

E. If Defendants make any changes to the efforts and actions outlined in any earlier affidavits provided pursuant to Paragraph IX.D., Defendants must, within 15 calendar days after any change is implemented, deliver to the United States an affidavit describing those changes.

F. Defendants must keep all records of any efforts made to preserve the Divestiture Assets until one year after the divestiture has been completed.

## X. Appointment of Monitoring Trustee

A. Upon motion of the United States, which Defendants cannot oppose, the Court will appoint a monitoring trustee selected by the United States and approved by the Court.

B. The monitoring trustee will have the power and authority to monitor LLA's compliance with the terms of this Final Judgment and the Asset Preservation Stipulation and Order entered by the Court and will have other powers as the Court deems appropriate. The monitoring trustee will have no responsibility or obligation for operation of the Divestiture Assets.

C. LLA may not object to actions taken by the monitoring trustee in fulfillment of the monitoring trustee's responsibilities under any Order of the Court on any ground other than malfeasance by the monitoring trustee. Objections by LLA must be conveyed in writing to the United States and the monitoring trustee within ten calendar days of the monitoring trustee's action that gives rise to LLA's objection.

D. The monitoring trustee will serve at the cost and expense of LLA pursuant to a written agreement with LLA and on terms and conditions, including terms and conditions governing confidentiality requirements and conflict of interest certifications, that are approved by the United States.

E. The monitoring trustee may hire, at the cost and expense of LLA, any agents and consultants, including investment bankers, attorneys, and accountants, that are reasonably necessary in the monitoring trustee's judgment to assist with the monitoring trustee's duties. These agents or consultants will be solely accountable to the monitoring trustee and will serve on terms and conditions, including terms and conditions governing confidentiality requirements and conflict-of-interest

certifications, that are approved by the United States.

F. The compensation of the monitoring trustee and agents or consultants retained by the monitoring trustee must be on reasonable and customary terms commensurate with the individuals' experience and responsibilities. If the monitoring trustee and LLA are unable to reach agreement on the monitoring trustee's compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the monitoring trustee, the United States, in its sole discretion, may take appropriate action, including by making a recommendation to the Court. Within three business days of hiring any agents or consultants, the monitoring trustee must provide written notice of the hiring and the rate of compensation to LLA and the United States.

G. The monitoring trustee must account for all costs and expenses incurred.

H. LLA must use its best efforts to assist the monitoring trustee to monitor LLA's compliance with their obligations under this Final Judgment and the Asset Preservation Stipulation and Order. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, LLA must provide the monitoring trustee and agents or consultants retained by the monitoring trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets. LLA may not take any action to interfere with or to impede accomplishment of the monitoring trustee's responsibilities.

I. The monitoring trustee must investigate and report on LLA's compliance with this Final Judgment and the Asset Preservation Stipulation and Order. The monitoring trustee must provide periodic reports to the United States setting forth LLA's efforts to comply with their obligations under this Final Judgment and under the Asset Preservation Stipulation and Order. The United States, in its sole discretion, will set the frequency of the monitoring trustee's reports.

J. The monitoring trustee will serve until the expiration of this Final Judgment, unless the United States in its sole discretion, determines a shorter period is appropriate.

K. If the United States determines that the monitoring trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute.

## XI. Firewall

LLA must implement and maintain reasonable procedures to prevent competitively sensitive information from being disclosed, by or through implementation and execution of the obligations in this Final Judgment or any associated agreements, between LLA employees involved in LLA's relationship with Acquirer and any other employee of LLA. For example, the employees of LLA tasked with providing transition services must not share any competitively sensitive information of Acquirer with any other employee of LLA.

LLA must, within 30 business days of the entry of the Asset Preservation Stipulation and Order, submit to the United States (and, if one has been appointed, the monitoring trustee) a document setting forth in detail the procedures implemented to effect compliance with this Section XI. Upon receipt of the document, the United States will inform LLA within 30 business days whether, in its sole discretion, it approves of or rejects LLA's compliance plan. Within ten business days of receiving a notice of rejection, LLA must submit a revised compliance plan. The United States may request that this Court determine whether LLA's proposed compliance plan fulfills the requirements of this Section XI.

## XII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Asset Preservation Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendants, Defendants must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. To have access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable

convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendants must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section XII may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Defendants submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 CFR 16.7(b).

E. If at the time that Defendants furnish information or documents to the United States pursuant to this Section XII, Defendants represent and identify in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendants ten calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

## XIII. No Reacquisition

During the term of this Final Judgment, LLA may not reacquire any part of or any interest in the Divestiture Assets or any AT&T Aerial Fiber Core Segment purchased by Acquirer.

## XIV. Retention of Jurisdiction

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for

further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

## XV. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that a Defendant violated this Final Judgment before it expired, the United States may file an action against that Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years

following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this Section XV.

#### XVI. Expiration of Final Judgment

Unless the Court grants an extension, this Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and the continuation of this Final Judgment is no longer necessary or in the public interest.

#### XVII. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

United States District Judge

#### United States District Court for the District of Columbia

*United States of America, Plaintiff, v. Liberty Latin America LTD., et al.*  
Defendants.

Civil Action No. 1:20-cv-03064-TNM

#### Competitive Impact Statement

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the “APPA” or “Tunney Act”), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

#### I. Nature and Purpose of the Proceeding

Defendant Liberty Latin America Ltd. (“Liberty”) and Defendant AT&T Inc. (“AT&T”) entered into an agreement, dated October 9, 2019, pursuant to which Liberty would acquire the assets of AT&T’s wireless and wireline

telecommunications businesses in Puerto Rico and the United States Virgin Islands. The United States filed a civil antitrust Complaint on October 23, 2020, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order and proposed Final Judgment, which are designed to remedy the loss of competition in Puerto Rico alleged in the Complaint. Liberty does not compete with AT&T in the U.S. Virgin Islands. Under the proposed Final Judgment, which is explained more fully below, Liberty is required to divest the fiber-based Columbus network in the metropolitan San Juan area, and additional fiber assets, including fiber facilities and indefeasible rights of use, on Liberty’s fiber-optic network across the rest of Puerto Rico (the “Divestiture Assets”) to a third-party acquirer. Under the terms of the Asset Preservation Stipulation and Order, Defendants will take certain steps to ensure that the Divestiture Assets are operated as ongoing, economically viable competitive assets and will preserve and maintain the Divestiture Assets and AT&T’s aerial fiber-optic core network during the pendency of the required divestiture. In addition, the proposed Final Judgment requires Liberty to provide the acquirer with several options that would allow the acquirer to broaden the reach of its fiber-optic network.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

#### II. Description of the Events Giving Rise to the Alleged Violation

##### A. The Defendants and the Proposed Transaction

Liberty—a Bermuda corporation with its executive offices in Denver, Colorado—is a leading telecommunications provider in Latin America and the Caribbean. Across this region, Liberty provides video services,

internet access, and home telephony services to more than 6 million subscribers and provides mobile wireless service to approximately 3.6 million subscribers. Liberty generates approximately \$3.9 billion in annual revenues. Through its subsidiary Liberty Communications of Puerto Rico LLC (“LCPR”), Liberty operates the largest cable company in Puerto Rico. In 2016, Liberty expanded its Puerto Rico operations by acquiring Cable & Wireless Communications Plc, which controlled Columbus International Inc., a leading provider of fiber-based connectivity and telecommunications services on the island. Today, Liberty operates a network that includes more than 3,000 route miles of fiber-optic facilities in Puerto Rico. Liberty uses this network to provide fiber-based connectivity and telecommunications services to enterprise customers located throughout the island.

AT&T—a Delaware corporation headquartered in Dallas, Texas—is a leading provider of telecommunications, media, and technology services globally. AT&T generates approximately \$180 billion in annual revenues. Beyond its well-known mobile wireless and residential telecommunications businesses, AT&T is also one of the largest providers of telecommunications services to enterprise customers in the United States. AT&T entered the Puerto Rico market in 2009 through its acquisition of the wireless and wireline operations of Centennial Communications Corp. Today, AT&T provides fiber-based connectivity and telecommunications services to enterprise customers across Puerto Rico over a network that includes over 3,500 route miles of fiber-optic facilities.

On October 9, 2019, Liberty announced that it had agreed to purchase AT&T’s wireless and wireline telecommunications operations in Puerto Rico and the U.S. Virgin Islands for \$1.95 billion in cash. Upon closing of the transaction, Liberty would take ownership of certain AT&T assets in Puerto Rico, including its wireless and wireline networks, wireless spectrum, contracts, real estate, and most of AT&T’s customer relationships on the island.<sup>2</sup>

<sup>2</sup> The transaction does not include AT&T’s DIRECTV assets in Puerto Rico, any submarine cables and landing stations, certain “global” customer contracts, or spectrum in the 3650–3700 MHz and 39 GHz ranges.

## B. Anticompetitive Effects of the Proposed Transaction

### 1. Relevant Markets

As alleged in the complaint, the provision of fiber-based connectivity and telecommunications services to enterprise customers is a relevant product market under Section 7 of the Clayton Act. Wireline telecommunications services provided over fiber-optic networks generally provide a higher level of quality and reliability than other types of wireline telecommunications services, such as those provided over legacy copper telephone network facilities or coaxial cable facilities. Enterprise customers—including business of all sizes and other institutions, such as universities, hospitals, and government agencies—generally require higher-quality and more-reliable telecommunications services than the residential telecommunications services that are purchased by consumers. For example, many enterprise customers require very high levels of dedicated bandwidth to allow them to transmit large volumes of data among their offices, and many require services that offer penalty-backed service quality guarantees in order to ensure business continuity. Fiber-based services often carry these features. Accordingly, many enterprise customers depend on fiber-based services to enable their day-to-day operations.

Enterprise customers that purchase fiber-based connectivity and telecommunications services would not turn to other connectivity technologies (such as copper or coaxial cable) in sufficient numbers to make a small but significant increase in price of fiber-based connectivity and telecommunications services unprofitable for a hypothetical monopolist provider of these services. Thus, as alleged in the Complaint, the provision of fiber-based connectivity and telecommunications services to enterprise customers constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. 18.

The Complaint alleges that the relevant geographic market under Section 7 of the Clayton Act is no larger than the island of Puerto Rico. The relevant geographic market is best defined by the locations of the customers who purchase fiber-based connectivity and telecommunications services. Enterprise customers located in Puerto Rico purchase fiber-based connectivity and telecommunications services from providers that can provide service to their locations. Enterprise

customers located in Puerto Rico are unlikely to move their offices or other buildings in order to purchase fiber-based connectivity and telecommunications services from firms that do not offer service to their locations. For these reasons, a hypothetical monopolist of fiber-based connectivity and telecommunications services for enterprise customers in Puerto Rico likely would increase its prices in that market by at least a small but significant and non-transitory amount. Therefore, Puerto Rico is a relevant geographic market and “section of the country” within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

### 2. Competitive Effects

Liberty and AT&T possess two of the three most extensive fiber-based networks in Puerto Rico. Each owns thousands of last-mile fiber connections, fiber facilities in municipalities across the island, and a fiber-optic “ring” that connects the municipalities to one another. The only other provider with a comparable fiber-based network is the incumbent local telephone company on the island, Puerto Rico Telephone Company, Inc., which does business as “Claro.”

Together, Liberty, AT&T, and Claro account for the vast majority of sales of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. While other providers offer service in Puerto Rico, they collectively account for a small fraction of sales. These smaller providers generally do not own networks of sufficient scale to enable them to compete effectively in many parts of the island. In light of the large share of enterprise customers served by Liberty, AT&T, and Claro, this market is highly concentrated as that term is defined by the U.S. Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines.<sup>3</sup>

As alleged in the Complaint, Liberty and AT&T compete directly with one another in this highly concentrated market. For many buildings on the island, Liberty and AT&T are either the only two providers, or two of only three providers, that own a last-mile fiber connection to the building. For many other buildings, Liberty and AT&T are the only two providers, or two of only three providers, with fiber located close

enough to the building to be able to construct such a connection economically. Some enterprise customers purchase service for individual locations. Many customers, however, have multiple locations spread throughout Puerto Rico and demand service from a single provider that can serve all of their locations over its network. Given the breadth of their networks, Liberty and AT&T compete particularly closely for these customers.<sup>4</sup>

Competition between Liberty and AT&T for enterprise customers takes several forms. In some instances, Liberty or AT&T offers promotional rates or discounts in order to attract customers away from the other. In other instances, customers can extract concessions from Liberty or AT&T by threatening to switch to the other. Liberty or AT&T may also construct new fiber facilities in order to attract customers away from the other. Enterprise customers throughout Puerto Rico have experienced the benefit of this competition in the form of lower prices and higher-quality services.

According to the Complaint, without the proposed remedy, the acquisition of AT&T’s wireline telecommunications operations in Puerto Rico by Liberty would represent a loss of this competition. The highly concentrated market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico would become even more concentrated, leading to a presumption under the Horizontal Merger Guidelines that the proposed transaction would likely enhance market power.<sup>5</sup> The loss of Liberty and AT&T as independent competitors would leave many customers with only one alternative provider and others with no competitive choice at all. This change would likely result in increased prices and lower-quality services for enterprise customers across the island.

The entry of new competitors in the relevant market is unlikely to prevent or remedy the proposed transaction’s anticompetitive effects. Barriers to entry

<sup>4</sup> A provider that does not own a last-mile connection to a particular customer location can serve enterprise customers at that location by purchasing a last-mile connection from a wholesale provider. However, providers that do not own island-wide networks, including a significant number of last-mile connections, are limited in their competitiveness because they are reliant on their wholesale providers for fiber-based connectivity and constrained by the terms set by those providers.

<sup>5</sup> See Horizontal Merger Guidelines at 19 (explaining that “[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power”).

<sup>3</sup> See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, at 19 (issued Aug. 19, 2020) (defining “highly concentrated markets” as those in which the Herfindahl-Hirschman Index exceeds 2500), available at <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

include (i) the substantial amount of time and expense required to construct a fiber-optic network, (ii) the need for a firm seeking to construct such a network to obtain the permits and approvals required to do so, (iii) the significant level of expertise required to successfully offer telecommunications services to enterprise customers, and (iv) the need for a provider to establish a brand and reputation that would allow enterprise customers to entrust the provider with supporting their day-to-day operations. In addition, the proposed transaction would be unlikely to generate verifiable, merger-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that are likely to occur.

### III. Explanation of the Proposed Final Judgment

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. Paragraph IV.A of the proposed Final Judgment requires Liberty, within 30 calendar days after the entry of the Asset Preservation Stipulation and Order by the Court, to divest the Divestiture Assets, subject to extension if regulatory approval from another government entity is required.<sup>6</sup> The assets must be divested in such a way as to satisfy the United States in its sole discretion that they can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the acquirer.

Liberty has reached an agreement to divest the Divestiture Assets to WorldNet Telecommunications, Inc. ("WorldNet"). The terms of the proposed Final Judgment govern the divestiture to WorldNet and also would govern in the event that Defendants were to divest the Divestiture Assets to a different acquirer approved by the United States.

<sup>6</sup> See Proposed Final Judgment ¶ 4.B. In this instance, the United States expects that Defendants will be required to seek approval from the Federal Communications Commission, which will likely affect the timing of the divestiture.

#### A. Divestiture Assets

The Divestiture Assets include the Columbus Divestiture Assets, the LCPR Divestiture Assets, and the LCPR IRU.

The Columbus Divestiture Assets include the fiber-optic Columbus network in the San Juan metropolitan area. Liberty acquired this network as part of its 2016 acquisition of Cable & Wireless Communications and currently uses it to serve enterprise customers. The Columbus Divestiture Assets include the accounts of enterprise customers that Liberty serves over this network, subject to limited exceptions.

The LCPR Divestiture Assets include certain components of Liberty's LCPR network, which is distinct from the Columbus network. Liberty uses the LCPR network both to provide fiber-based services to enterprise customers and to serve Liberty's other customers in Puerto Rico, such as residential cable customers, which Liberty will continue serving after closing of the divestiture. The LCPR Divestiture Assets include the accounts of enterprise customers to which Liberty provides fiber-based services over the LCPR network, subject to limited exceptions, as well as Liberty's network facilities that are used to serve those customers exclusively. The LCPR Divestiture Assets do not include shared network facilities that are used by Liberty both to serve the customers being transferred and to serve Liberty's other customers on the island. These shared network facilities are covered by the LCPR IRU.

The LCPR IRU provides the acquirer with an indefeasible right to use these shared assets to provide fiber-based connectivity and telecommunications services for a fixed term of years. Paragraph IV.E of the proposed Final Judgment specifies, among other things, that the LCPR IRU must include all rights and interests necessary to enable the acquirer to provide such services; must provide the acquirer with repair, maintenance, and installation capabilities of the same quality and speed that LCPR utilizes for its own network; and must not require Acquirer to pay a monthly or other recurring fee to preserve or make use of its rights.

#### B. Acquirer Options

The proposed Final Judgment also requires Liberty to provide the acquirer with several options that would allow the acquirer to broaden the reach of its fiber-optic network. Paragraph IV.J requires Liberty to provide the acquirer with the option to acquire AT&T's aerial fiber-optic core network on a segment-by-segment basis within three years after the closing of the divestiture.

Paragraph IV.K requires Liberty to maintain the full economic viability, marketability, and competitiveness of these segments until Liberty makes them available for the acquirer to purchase. Paragraph IV.L requires Liberty to provide the acquirer with the option to attach fiber-optic facilities to Liberty's telephone poles at any time during the term of the Final Judgment on commercially reasonable terms comparable to those found in Liberty's other pole attachment agreements. Paragraph IV.M requires Liberty to provide the acquirer with the option to acquire space in Liberty's underground conduit and deploy fiber optic facilities therein at any time within three years of the closing of the divestiture. The acquirer may choose to use these options to expand the fiber-optic network that it acquires as part of the Divestiture Assets and reduce its reliance on the LCPR IRU over time.

#### C. Other Obligations

In order to preserve competition and facilitate the success of the acquirer, the proposed Final Judgment contains additional obligations for the Defendants.

Paragraph IV.N requires Liberty to facilitate the acquirer's efforts to hire certain employees. Specifically, this paragraph requires Liberty to provide the acquirer with organization charts and information relating to certain employees and to make them available for interviews. It also provides that Liberty must not interfere with any negotiations by the acquirer to hire these employees. In addition, for employees who elect employment with the Acquirer, Liberty must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all compensation and benefits that those employees have fully or partially accrued, and provide all benefits that those employees otherwise would have been provided had those employees continued employment with Liberty, including but not limited to any retention bonuses or payments. In addition, the Defendants may not solicit to hire any employees who elect employment with the acquirer, unless that individual is terminated or laid off by the acquirer or the acquirer agrees in writing that the Defendants may solicit or hire that individual. The non-solicitation period runs for six months from the date of the divestiture.

Paragraph IV.P facilitates the transfer to the acquirer of customers and other contractual relationships that are included within the Divestiture Assets. Liberty must transfer all contracts,



agreements, and relationships to the Acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or other transfer.

Paragraph IV.R of the proposed Final Judgment requires Liberty, at the acquirer's option, to enter into a transition services agreement for back office, billing, provisioning, human resources, accounting, employee health and safety, and information technology services and support for the Divestiture Assets for a period of up to 18 months. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six months.

Paragraph IV.S prohibits Liberty from initiating customer-specific communications to solicit any customer transferred to the acquirer in connection with the divestiture for a period of one year following the divestiture. Liberty may respond to inquiries initiated by such customers and enter into negotiations at the request of such customers, but it must maintain a log of any such inquiries and requests. Liberty must also ensure that its construction contractors do not initiate any communications with such customers, except in specified circumstances. This paragraph does not prevent Liberty from initiating customer-specific communications with any AT&T customer with respect to those services provided by AT&T to such customer as of the closing of Liberty's acquisition of AT&T's operations. This paragraph will help the acquirer establish and maintain important customer relationships.

Paragraph XI.A requires Liberty to implement a firewall to prevent the acquirer's information from being used by other parts of Liberty's business. Specifically, Liberty must implement and maintain reasonable procedures to prevent competitively sensitive information from being disclosed, by or through implementation and execution of the obligations in the Final Judgment or any associated agreements, between Liberty's employees involved in Liberty's relationship with Acquirer and any other employee of Liberty. Under Paragraph XI.B, Liberty must, within 30 days of the entry of the Asset Preservation Stipulation and Order, submit a document setting forth in detail the procedures implemented to effect compliance with Section XI. The United States will determine, in its sole discretion, whether to approve or reject Liberty's proposed compliance plan.

#### *D. Monitoring Trustee*

The proposed Final Judgment provides that the United States may appoint a monitoring trustee with the power and authority to investigate and report on Liberty's compliance with the terms of the proposed Final Judgment and the Asset Preservation Stipulation and Order during the pendency of the divestiture, including the terms governing the sale of the Divestiture Assets and the options described above. The monitoring trustee will not have any responsibility or obligation for the operation of Liberty's business. The monitoring trustee will serve at Liberty's expense, on such terms and conditions as the United States approves, and Liberty must assist the monitoring trustee in fulfilling its obligations. The monitoring trustee will provide periodic reports to the United States and will serve until the expiration of the Final Judgment, unless the United States, in its sole discretion, determines a shorter period is appropriate.

#### *E. Divestiture Trustee*

If Liberty does not accomplish the divestiture within the period prescribed in Paragraph IV.A of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Liberty will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the divestiture trustee and the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

#### *F. Enforcement Provisions*

The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph XV.A provides that the United States retains and reserves all rights to enforce the Final Judgment,

including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XV.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to restore competition that the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XV.C of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XV.C provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendants will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XV.D states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an

investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XVI of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

#### IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

#### V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw

its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to: Scott Scheele, Chief, Telecommunications and Broadband Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW, Suite 7000, Washington, DC 20530, *ATR.TEL-Information@usdoj.gov*.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

#### VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Liberty's acquisition of AT&T's wireless and wireline assets in Puerto Rico and the U.S. Virgin Islands. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

#### VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and

modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at \*3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993

F.2d at 1577 (quotation marks omitted). “The court should bear in mind the *flexibility* of the public interest inquiry: the court’s function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.” *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19–2232 (TJK), 2020 WL 1873555, at \*7 (D.D.C. Apr. 14, 2020). More demanding requirements would “have enormous practical consequences for the government’s ability to negotiate future settlements,” contrary to congressional intent. *Id.* at 1456. “The Tunney Act was not intended to create a disincentive to the use of the consent decree.” *Id.*

The United States’ predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft*, 56 F.3d at 1461 (recognizing courts should give “due respect to the Justice Department’s . . . view of the nature of its case”); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (“In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.”) (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting “the deferential review to which the government’s proposed remedy is accorded”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (“A district court must accord due respect to the government’s prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case”). The ultimate question is whether “the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest.’” *Microsoft*, 56 F.3d at 1461 (quoting *W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court

must simply determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at \*20 (“[T]he ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged”). Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Public Law 108–237 § 221, and added the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). “A court can make its public interest determination based on the competitive impact statement and response to public comments alone.” *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

#### VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 9, 2020

Respectfully submitted,

/s/ Matthew Jones

Matthew Jones (DC Bar #1006602),  
U.S. Department of Justice, Antitrust  
Division, 450 Fifth Street NW, Suite 7000,  
Washington, DC 20530, Telephone: (202)

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Matthew.Jones3@usdoj.gov.

[FR Doc. 2020–25171 Filed 11–13–20; 8:45 am]

BILLING CODE 4410–11–P

## NATIONAL COUNCIL ON DISABILITY

### Sunshine Act Meetings

**TIME AND DATES:** The Members of the National Council on Disability (NCD) will hold a quarterly business meeting on Thursday, November 19, 2020, 10:00 a.m.–4:00 p.m., Eastern Standard Time, via teleconference. Registration is not required.

**PLACE:** This meeting will occur via teleconference. Interested parties are encouraged to join the meeting in a listen-only status using the following call-in information: Teleconference number: 1–800–353–6461; Conference ID: 9807341; Conference Title: NCD Meeting; Host Name: Neil Romano. In the event of teleconference disruption or failure, attendees can follow the meeting by accessing the Communication Access Realtime Translation (CART) link provided. CART is text-only translation that occurs real time during the meeting and is not an exact transcript.

**MATTERS TO BE CONSIDERED:** The Chairman will provide a report followed by a discussion and vote on policy priorities for fiscal year 2021 and fiscal year 2022. Additional reports will be provided by the Executive Director and representatives from the Executive Committee prior to adjournment for lunch. Following lunch, Chair Catherine Lhamon of the United States Commission on Civil Rights will share research findings and recommendations from their recent report titled, “Subminimum Wages: Impacts on the Civil Rights of People with Disabilities.” A panel presentation will follow on successful transitions from 14(c) subminimum wage employment. Council Members will then provide committee reports on research projects currently in progress. The meeting will close with public comment.

**AGENDA:** The times provided below are approximations for when each agenda item is anticipated to be discussed (all times Eastern Standard Time):

#### Thursday, November 19

10:00–10:10 a.m. Welcome and Call to Order

10:10–10:35 a.m. Introductions, New Council Members Get Acquainted

10:35–11:15 a.m. Chairman’s Report, Future Work of the Council

11:15–11:35 a.m. Executive Committee Reports

- 11:35–11:45 a.m. Executive Director's Report
- 11:45–1:00 p.m. Adjournment for Lunch  
*Note:* CART and Phone Line will Disconnect
- 1:00–1:30 p.m. Presentation by Chair Catherine Lhamon of the U.S. Commission on Civil Rights regarding its latest report, "Subminimum Wages: Impact on the Civil Rights of People with Disabilities"
- 1:30–2:30 p.m. Successful Transitions from 14(c) Subminimum Wage Employment
- 2:30–3:30 p.m. Committee Reports on current Research Projects
1. Progress Report on COVID–19
  2. Durable Medical Equipment report
  3. Disparate Treatment of Puerto Rico Residents in Federal Programs
  4. Examining Medicaid Reimbursement for Oral Healthcare of People with I/DD report
- 3:30–4:00 p.m. Public Comment
- 4:00 p.m.—Adjournment

*Public Comment:* Your participation during the public comment period provides an opportunity for us to hear from you—individuals, businesses, providers, educators, parents and advocates. Your comments are important in bringing attention to the issues in your community. Priority will be given to those who register their intent to provide comment in advance by sending an email to [PublicComment@ncd.gov](mailto:PublicComment@ncd.gov) with the subject line "Public Comment" with your name, organization, state, and topic of comment included in the body of your email. Full-length written public comments may also be sent to that email address. All emails to register for public comment at the quarterly meeting must be received by Wednesday, November 18, 2020.

Each person will be given three minutes to present comment. If you are presenting as a group and prefer to choose a spokesperson, your group representative will be given six minutes to provide comment. To ensure your comments are accurately reflected and become part of the public record, NCD requests electronic submission prior to the meeting or immediately after to [PublicComment@ncd.gov](mailto:PublicComment@ncd.gov).

**CONTACT PERSON FOR MORE INFORMATION:** Anne Sommers, NCD, 1331 F Street NW, Suite 850, Washington, DC 20004; 202–272–2004 (V), or [asommers@ncd.gov](mailto:asommers@ncd.gov).

*Accommodations:* A CART streamtext link has been arranged for this meeting. The web link to access CART (in English) is: <https://www.streamtext.net/player?event=NCD-QUARTERLY>. If you

require additional accommodations, please notify Anthony Simpson by sending an email to [asimpson.cntr@ncd.gov](mailto:asimpson.cntr@ncd.gov) as soon as possible and no later than 24 hours prior to the meeting.

Due to last-minute confirmations or cancellations, NCD may substitute agenda items without advance public notice.

Dated: November 10, 2020.

**Sharon M. Lisa Grubb,**

*Executive Director.*

[FR Doc. 2020–25278 Filed 11–12–20; 11:15 am]

**BILLING CODE 8421–02–P**

## THE NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

#### Submission for OMB Review, Comment Request, Proposed Collection Requests: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

**AGENCY:** Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

**ACTION:** Submission for OMB Review, comment request.

**SUMMARY:** The Institute of Museum and Library Services announces the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments as part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery. IMLS has submitted a Generic Information Collection Request (Generic ICR entitled "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" to OMB for approval under the Paperwork Reduction Act (PRA). A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **FOR FURTHER INFORMATION CONTACT** section below on or before December 14, 2020.

OMB is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

**ADDRESSES:** Comments should be sent to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316.

**FOR FURTHER INFORMATION CONTACT:** Matthew Birnbaum, PhD., Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Birnbaum can be reached by telephone at 202–653–4760, by email at [mbirnbaum@imls.gov](mailto:mbirnbaum@imls.gov), or by teletype (TTY/TDD) for persons with hearing difficulty at 202–653–4614.

**SUPPLEMENTARY INFORMATION:** The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to work together to transform the lives of individuals and communities. To learn more, visit [www.imls.gov](http://www.imls.gov).

*Current Actions:* The Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback, we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield

quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations; provide an early warning of issues with service; and/or focus attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. They will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

This action is to seek approval for the information collection for the Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery for the next three years.

The 60-day notice for the Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery, was published in the **Federal Register** on September 14, 2020 (85 FR 56639). One comment was received and acknowledged.

*Agency:* Institute of Museum and Library Services.

*Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

*Type of Review:* Renewal.

*OMB Number:* 3137 0081.

*Agency Number:* 3137.

*Affected Public:* Individuals and Households; Businesses and

Organizations; State, Local or Tribal Governments; Museums; Libraries.

*Average Expected Annual Number of Activities:* 11.

*Annual Responses:* 9,854.

*Frequency of Response:* Once per request.

*Average Minutes per Response:* 56 minutes.

*Burden Hours:* 2,376.4 hours.

*Total Annual Costs:* \$69,153.82.

Dated: November 10, 2020.

**Kim Miller,**

*Senior Grants Management Specialist,  
Institute of Museum and Library Services.*

[FR Doc. 2020–25215 Filed 11–13–20; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL SCIENCE FOUNDATION

### Sunshine Act Meeting

The National Science Board's External Engagement Committee's Subcommittee on Honorary Awards, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice of the scheduling of a teleconference for the transaction of National Science Board business, as follows:

**TIME & DATE:** November 17, 2020 from 3:00–4:00 p.m. EST.

**PLACE:** This meeting will be held by teleconference through the National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** (1) Subcommittee Chair's opening remarks; (2) Review and discuss candidates for the 2021 National Science Board Honorary Awards—the Vannevar Bush Award and the NSB Public Service Award; and subcommittee Chair's closing remarks.

**CONTACT PERSON FOR MORE INFORMATION:**

Point of contact for this meeting is: Kyscha Slater-Williams, 2415 Eisenhower Ave., Alexandria, VA 22314, [kslater@nsf.gov](mailto:kslater@nsf.gov), (703) 292–7000.

**Chris Blair,**

*Executive Assistant to the National Science Board Office.*

[FR Doc. 2020–25273 Filed 11–12–20; 11:15 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

[NRC–2020–0231]

### Risk-Informed, Performance-Based Fire Protection for Existing Light-Water Nuclear Power Plants

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Draft regulatory guide; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG–1360, “Risk-Informed, Performance-Based Fire Protection for Existing Light-Water Nuclear Power Plants.” This regulatory guide (RG) describes an approach that is acceptable to the NRC staff to meet the regulatory requirements in the NRC’s regulations and the National Fire Protection Association (NFPA) Standard 805, “Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants,” 2001 Edition, which is incorporated by reference in the NRC’s regulations.

**DATES:** Submit comments by December 31, 2020. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

**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–2020–0231. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: [Jennifer.Borges@nrc.gov](mailto:Jennifer.Borges@nrc.gov). For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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:**

Shivani Mehta, Office of Nuclear Reactor Regulation, telephone: 301-415-0860, email: [Shivani.Mehta@nrc.gov](mailto:Shivani.Mehta@nrc.gov); Charles Moulton, Office of Nuclear Reactor Regulation, telephone: 301-415-2751, email: [Charles.Moulton@nrc.gov](mailto:Charles.Moulton@nrc.gov); or Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301-415-3104, email: [Michael.Eudy@nrc.gov](mailto:Michael.Eudy@nrc.gov). All are staff of the 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-2020-0231 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking website*: Go to <https://www.regulations.gov> and search for Docket ID NRC-2020-0231.
- *NRC's Agencywide Documents Access and Management System (ADAMS)*: You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1-800-397-4209, 301-415-4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov).
- *Attention*: The PDR, where you may examine and purchase copies of public documents, is currently closed. You may submit your request to the PDR via email at [PDR.Resource@nrc.gov](mailto: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-2020-0231 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. Additional Information**

The NRC is issuing for public comment a draft guide in the NRC's "Regulatory Guide" series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The DG, titled "Risk-Informed, Performance-Based Fire Protection for Existing Light-Water Nuclear Power Plants," is temporarily identified by its task number, DG-1360 (ADAMS Accession No. ML20231A856). The draft guide DG-1360 is a proposed Revision 2 of RG 1.205. This revision of the guide (Revision 2) addresses new information identified since the guide was previously revised in 2009. This RG updates the previous staff positions and endorsements made regarding earlier versions of Nuclear Energy Institute (NEI) guidance documents, NEI-04-02, "Guidance for Implementing a Risk-Informed, Performance-Based Fire Protection Program Under 10 CFR 50.48(c)," and NEI 00-01, "Guidance for Post Fire Safe Shutdown Circuit Analysis." This revision endorses NEI 04-02, Revision 3, issued 2019, and portions of NEI-00-01, Revision 4, issued 2019, and includes guidance concerning fire-induced circuit failures.

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML20231A891). The staff develops a regulatory analysis to assess the value of issuing or revising a regulatory guide as well as alternative courses of action.

Backfitting, Forward Fitting, and Issue Finality

DG-1360, if finalized, would incorporate the latest information concerning risk-informed, performance-based fire protection programs and supporting guidance. Issuance of DG-1360, if finalized, would not constitute backfitting, as that term is defined in

section 50.109 of title 10 of *Code of Federal Regulations* (CFR), "Backfitting," and as described in NRC Management Directive 8.4, "Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests"; constitute forward fitting, as that term is defined and described in Management Directive 8.4; or affect the issue finality of any approval issued under 10 CFR part 52. As explained in DG-1360, applicants and licensees would not be required to comply with the positions set forth in DG-1360.

Dated: November 9, 2020.

For the Nuclear Regulatory Commission.

**Meraj Rahimi,**

*Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2020-25173 Filed 11-13-20; 8:45 am]

**BILLING CODE 7590-01-P**

**NUCLEAR REGULATORY COMMISSION**

[NRC-2020-0230]

**Fire Protection for Nuclear Power Plants**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Draft regulatory guide; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG-1359, "Fire Protection for Nuclear Power Plants." This regulatory guide (RG) describes an approach that is acceptable to the NRC staff to meet the regulatory requirements in the NRC's regulations governing a civilian nuclear power generating plant's fire protection program (FPP).

**DATES:** Submit comments by December 31, 2020. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

**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-2020-0230. Address questions about NRC docket IDs in

*Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov*. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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:**

Shivani Mehta, Office of Nuclear Reactor Regulation, telephone: 301–415–0860, email: *Shivani.Mehta@nrc.gov*; Charles Moulton, Office of Nuclear Reactor Regulation, telephone: 301–415–2751, email: *Charles.Moulton@nrc.gov*; or Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301–415–3104, email: *Michael.Eudy@nrc.gov*. All are staff of the 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–2020–0230 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2020–0230.

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

- *Attention:* The PDR, where you may examine and purchase 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–2020–0230 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.

*Additional Information*

The NRC is issuing for public comment a draft guide in the NRC’s “Regulatory Guide” series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency’s regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The DG, titled “Fire Protection for Nuclear Power Plants,” is temporarily identified by its task number, DG–1359 (ADAMS Accession No. ML20231A835). The draft guide DG–1359 is a proposed Revision 4 of RG 1.189. This revision of the guide (Revision 4) addresses new issues identified since the guide was previously revised and released in 2018. This includes incorporation of the latest guidance on fire-induced circuit failures, multiple high impedance failures, open secondary circuits on current transformers, and shorting switches. Updates also include partial endorsements of Nuclear Energy Institute (NEI) 00–01, “Guidance for Post Fire Safe Shutdown Circuit Analysis,” Revision 4, issued September 2016, and guidance based on NUREG/CR–7150, “Joint Assessment of Cable Damage and Quantification of Effects from Fire (JACQUE–FIRE),” Volumes 1,

2, and 3 (ADAMS Accession Nos. ML12313A105, ML14141A129, and ML17331B098.)

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML20231A874). The staff develops a regulatory analysis to assess the value of issuing or revising a regulatory guide as well as alternative courses of action.

**II. Backfitting, Forward Fitting, and Issue Finality**

DG–1359, if finalized, would provide the most recent guidance acceptable to the NRC staff for compliance with section 50.48(a) and (b) of title 10 of the *Code of Federal Regulations* (10 CFR) and 10 CFR part 50, appendix R, “Fire Protection Program for Nuclear Power Facilities Operating Prior to January 1, 1979.” Issuance of DG–1359, if finalized, would not constitute backfitting, as that term is defined in 10 CFR 50.109, “Backfitting,” and as described in NRC Management Directive 8.4, “Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests”; constitute forward fitting, as that term is defined and described in Management Directive 8.4; or affect the issue finality of any approval issued under 10 CFR part 52. As explained in DG–1359, applicants and licensees would not be required to comply with the positions set forth in DG–1359.

Dated: November 9, 2020.

For the Nuclear Regulatory Commission.

**Meraj Rahimi,**

*Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2020–25175 Filed 11–13–20; 8:45 am]

**BILLING CODE 7590–01–P**

**PENSION BENEFIT GUARANTY CORPORATION**

**Proposed Submission of Information Collection for OMB Review; Comment Request; Disclosure of Termination Information**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of intent to request extension of OMB approval.

**SUMMARY:** Pension Benefit Guaranty Corporation (“PBGC”) intends to request that the Office of Management and Budget (“OMB”) extend approval, under the Paperwork Reduction Act, of a collection of information on the disclosure of termination information under its regulations for distress terminations, and for PBGC-initiated

terminations. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

**DATES:** Comments must be submitted on or before January 15, 2021.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the website instructions for submitting comments.

- *Email:* [paperwork.comments@pbgc.gov](mailto:paperwork.comments@pbgc.gov). Refer to Disclosure of Termination Information or OMB control number 1212-0065 in the subject line.

- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to the Disclosure of Termination Information. All comments received will be posted without change to PBGC's website, <http://www.pbgc.gov>, including any personal information provided.

Copies of the collection of information may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, or calling 202-326-4040 during normal business hours. TTY users may call the Federal relay service toll-free at 800-877-8339 and ask to be connected to 202-326-4040.

**FOR FURTHER INFORMATION CONTACT:**

Melissa Rifkin ([rifkin.melissa@pbgc.gov](mailto:rifkin.melissa@pbgc.gov)), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington DC 20005-4026; 202-229-6563. (TTY users may call the Federal relay service toll-free at 800-877-8339 and ask to be connected to 202-229-6563.)

**SUPPLEMENTARY INFORMATION:** Sections 4041 and 4042 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C § 1301-1461, govern the termination of single-employer defined benefit pension plans that are subject to Title IV of ERISA. A plan administrator may initiate a distress termination pursuant to section 4041(c), and PBGC may itself initiate proceedings to terminate a pension plan under section 4042 if PBGC determines that certain conditions are present. Section 506 of the Pension Protection Act of 2006

amended sections 4041 and 4042 of ERISA. These amendments require that, upon a request by an affected party, a plan administrator must disclose information it has submitted to PBGC in connection with a distress termination filing, and that a plan administrator or plan sponsor must disclose information it has submitted to PBGC in connection with a PBGC-initiated termination. The provisions also require PBGC to disclose the administrative record relating to a PBGC-initiated termination upon request by an affected party.

PBGC estimates that approximately 70 plans will terminate as distress or PBGC-initiated terminations each year. PBGC further estimates that two participants or other affected parties of every nine distress terminations or PBGC-initiated terminations filed will annually make requests for termination information, or 2/9 of 70 (approximately 16 plans per year). PBGC estimates that the hour burden for each request will be about 20 hours. The total annual hour burden is estimated to be 320 hours (16 plans x 20 hours). PBGC expects that the staff of plan administrators and sponsors will perform the work in-house and that no work will be contracted to third parties. Therefore, the annual cost burden is estimated to be \$0.

The existing collection of information was approved under OMB control number 1212-0065 (expires March 31, 2021). PBGC intends to request that OMB extend its approval of this collection of information for 3 years. 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.

PBGC is soliciting public comments to—

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodologies 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.

Issued in Washington, DC.

**Stephanie Cibinic,**

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

[FR Doc. 2020-25213 Filed 11-13-20; 8:45 am]

**BILLING CODE 7709-02-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90379; File No. SR-CboeBZX-2020-079]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

November 9, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 2, 2020, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") is filing with the Securities and Exchange Commission ("Commission") a proposed rule change to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), 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

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.



proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform ("BZX Options"), effective November 2, 2020.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 18% of the market share and currently the Exchange represents less than 8% of the market share.<sup>3</sup> Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange's fee schedule sets forth standard rebates and rates applied per contract. For example, the Exchange assesses a standard rebate of \$0.29 per contract for Market Maker orders that add liquidity in Penny Pilot Securities and a standard rebate of \$0.40 per contract in Non-Penny Pilot Securities. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, as discussed in further detail in the following paragraphs, which provides Members opportunities to qualify for higher rebates or reduced fees where certain

volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria. For example, the Exchange currently offers 10 Market Maker Penny Add Volume Tiers ("MM Penny Add Tier") under footnote 6 of the fee schedule which provide rebates between \$0.33 and \$0.46 per contract for qualifying Market Maker orders which meet certain add liquidity thresholds and yield fee code PM.<sup>4</sup>

The Exchange proposes to adopt two new MM Penny Add Tiers, specifically Tiers 9 and 10.<sup>5</sup> First, the Exchange proposes to adopt new MM Penny Add Tier 9, which will provide Members an additional opportunity and alternative means to receive an enhanced rebate for meeting the corresponding proposed criteria. Particularly, proposed MM Penny Add Tier 9 would provide an enhanced rebate of \$0.43 per contract where a Member (1) has an ADAV<sup>6</sup> in Market Maker orders greater than or equal to 0.15% of average OCV;<sup>7</sup> (2) has a Step Up ADAV in Market Maker orders from September 2020 greater than or equal to 0.10% of average OCV; (3) has on BZX Equities an ADV<sup>8</sup> greater than or equal to 0.60% of average TCV;<sup>9</sup> and (4) has on BZX Equities a Step Up ADV from September 2020 greater than or equal to 0.05% of average TCV. Proposed MM Penny Add Tier 10 would provide an enhanced rebate of \$0.44 per contract where a Member (1) has an ADAV in Market Maker orders greater than or equal to 0.20% of average OCV; (2) has a Step Up ADAV in Market Maker orders from September 2020 greater than or equal to 0.15% of average OCV; (3) has on BZX Equities an ADV greater than or equal to 0.60% of average TCV; and (4) has on BZX

<sup>4</sup> Orders yielding fee code PM are Market Maker orders that add liquidity in Penny Pilot securities.

<sup>5</sup> The Exchange would renumber current MM Penny Add Tiers 9 and 10 to MM Penny Add Tiers 11 and 12, respectively.

<sup>6</sup> "ADAV" means average daily added volume calculated as the number of contracts added.

<sup>7</sup> "OCV" means the total equity and ETF options volume that clears in the Customer range at the Options Clearing Corporation ("OCC") for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

<sup>8</sup> "ADV" means average daily volume calculated as the number of shares added to, removed from, or routed by, the Exchange, or any combination or subset thereof, per day. ADV is calculated on a monthly basis.

<sup>9</sup> "TCV" means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

Equities a Step Up ADV from September 2020 greater than or equal to 0.10% of average TCV.<sup>10</sup> The Exchange believes the proposed tiers, along with the existing tiers, continue to provide an incremental incentive for Members to strive for the highest tier levels, which provide increasingly higher rebates for such transactions. Additionally, the Exchange notes two of the prongs of the proposed criteria in both tiers are similar to the criteria set forth in MM Penny Add Tier 9.<sup>11</sup> Particularly, those thresholds include a threshold relating to ADAV in Market Maker orders and a cross-asset threshold, which is designed to incentivize Members to achieve certain levels of participation on both the Exchange's options and equities platform ("BZX Equities"). The Exchange also proposes to add step-up ADAV thresholds (one relating to just options volume and the other equities volume), both of which are designed to encourage growth (*i.e.*, Members must increase their relative liquidity each month over a predetermined baseline (in this case the month being September 2020)). Overall, the proposed enhanced rebates and corresponding criteria is designed to encourage Members to increase their order flow, thereby contributing to a deeper and more liquid market, which benefits all market participants and provides greater execution opportunities on the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>12</sup> in general, and furthers the requirements of Section 6(b)(4),<sup>13</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow to

<sup>10</sup> The Exchange also proposes to add the proposed rebate amounts to the Standard Rates Table. The Exchange notes that although current MM Penny Add Tier 9 offers a rebate of \$0.44 per share, the Exchange inadvertently omitted to add that rate to the Standard Rates Table previously.

<sup>11</sup> See BZX Options Fees Schedule, current Tier 9 of the Market Maker Penny Add Volume Tiers (footnote 6).

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(4).

<sup>3</sup> See Cboe Global Markets U.S. Options Market Volume Summary (October 29, 2020), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members.

In particular, the Exchange believes the proposed Market Maker Penny Add Volume Tiers are reasonable because they provides additional opportunities for Members to receive a higher rebate by providing alternative criteria for which they can reach. The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges,<sup>14</sup> including the Exchange,<sup>15</sup> and are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon Members achieving certain volume and/or growth thresholds. These competing pricing schedules, moreover, are presently comparable to those that the Exchange provides.

Moreover, the Exchange believes the proposed MM Penny Add Tiers 9 and 10 are a reasonable means to encourage Members to increase their liquidity on the Exchange and also their participation on BZX Equities. The Exchange believes that adopting tiers with alternative criteria to the existing Market Maker Volume Tiers may encourage those Members who could not previously achieve the criteria under existing Market Maker Volume Tiers 9 and 10 (proposed to be renumbered to Tiers 11 and 12) to increase their order flow on BZX Options and Equities. For example, the proposed tiers would provide an opportunity for Members who have an ADAV in Market Makers Orders of at least 0.15% of average OCV, but less than the more stringent 0.50% of

average OCV (the requirement under current Tier 9, *i.e.* new Tier 11), to receive a higher rebate than they may currently receive but slightly lower than the rebate they would receive for reaching the more stringent criteria under current Tier 9 (new Tier 11), if they also meet the threshold requirement based on BZX Equities participation and can grow a modest amount since September 2020. Similarly, for Market Makers that participate on both BZX Options and Equities, and do not currently meet the 1.00% ADAV threshold under current Tier 9 (*i.e.*, new Tier 11), but can or do meet the proposed equities ADV threshold, the proposed tier may incentivize those participants to grow their options volume in order to receive enhanced rebates. Increased liquidity benefits all investors by deepening the Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange also believes that proposed enhanced rebates are reasonable based on the difficulty of satisfying the tiers' criteria and ensures the proposed rebates and thresholds appropriately reflect the incremental difficulty to achieve the existing MM Penny Add Tiers. The proposed enhanced rebate amounts also do not represent a significant departure from the enhanced rebates currently offered under the Exchange's existing MM Penny Add Tiers. Indeed, the proposed enhanced rebate amount under proposed MM Penny Add Tier 9 (\$0.43) is incrementally higher than current Tiers 7 and 8 (\$0.42), which the Exchange believes offer slightly less stringent criteria than the proposed Tier 9, but is incrementally lower than the rebate offered under existing Tier 9 (*i.e.*, new Tier 11) (\$0.44), which the Exchange believes is more stringent than the proposed criteria under proposed Tier 9. Similarly, the proposed enhanced rebate amount under proposed MM Penny Add Tier 10 (\$0.44) is the same as current Tier 9 (*i.e.*, new Tier 11) (\$0.44), which the Exchange believes reflects a similar level of difficulty but using alternative types of criteria. The Exchange also notes that the proposed rebates remain within the range of the enhanced rebates offered under the current MM Penny Add Tiers (*i.e.*, \$0.33–\$0.46).

The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because it applies uniformly to all Market Makers.

Additionally, a number of Market Makers have a reasonable opportunity to satisfy proposed Tier 9's criteria, which the Exchange believes is less stringent than the existing Market Maker Add Penny Tiers 9 and 10 (new Tiers 11 and 12) and proposed Tier 10. The Exchange also believes a number of Market-Makers have a reasonable opportunity to satisfy proposed Tier 10's criteria, which the Exchange believes has a similar level of difficulty to current Tier 10 (new Tier 12) but using alternative types of criteria. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular Market Maker qualifying for the proposed tiers, the Exchange anticipates that approximately two Market Makers will be able to compete for and achieve the proposed criteria in either proposed Tier 9 or Tier 10; however, the proposed tiers are open to any Market-Maker that satisfies the applicable tier's criteria. The Exchange believes the proposed tiers could provide an incentive for other Members to submit additional liquidity on BZX Options and Equities to qualify for the proposed enhanced rebates. To the extent a Member participates on the Exchange but not on BZX Equities, the Exchange does believe that the proposal is still reasonable, equitably allocated and non-discriminatory with respect to such Member based on the overall benefit to the Exchange resulting from the success of BZX Equities. Particularly, the Exchange believes such success allows the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, whether they participate on BZX Equities or not. The proposed pricing program is also fair and equitable in that membership in BZX Equities is available to all market participants, which would provide them with access to the benefits on BZX Equities provided by the proposed change, even where a member of BZX Equities is not necessarily eligible for the proposed enhanced rebates on the Exchange.

The Exchange lastly notes that it does not believe the proposed tiers will adversely impact any Member's pricing or ability to qualify for other tiers. Rather, should a Member not meet the proposed criteria, the Member will merely not receive the proposed enhanced rebates, and has ten alternative choices (including eight with criteria the Exchange believes is less stringent) to aim to achieve under the MM Penny Add Tiers. Furthermore, the proposed enhanced rebates would apply

<sup>14</sup> See *e.g.*, Choe EDGX U.S. Options Exchange Fee Schedule, Footnote 2, Market Maker Volume Tiers, which provide reduced fees between \$0.01 and \$0.17 per contract for Market Maker Penny and Non-Penny orders where Members meet certain volume thresholds.

<sup>15</sup> See *e.g.*, Choe BZX U.S. Options Exchange Fee Schedule, Footnotes 6 and 7, Market Maker Penny Pilot and Non-Penny Pilot Volume Tiers which provide enhanced rebates for Market Maker orders where Members meet certain volume thresholds.

to all Members that meet the required criteria under proposed tiers.

#### *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 intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>16</sup>

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change applies uniformly to all Market Makers. As discussed above, to the extent a Member participates on the Exchange but not on BZX Equities, the Exchange notes that the proposed change can provide an overall benefit to the Exchange resulting from the success of BZX Equities. Such success enables the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, whether they participate on BZX Equities or not. The proposed pricing program is also fair and equitable in that membership in BZX Equities is available to all market participants. Additionally, the proposed change is designed to attract additional order flow to the Exchange and BZX Equities. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages Members to send orders, thereby contributing to robust levels of liquidity, which benefits all market participant.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange

operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 18% of the market share. Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>17</sup> The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . ."<sup>18</sup> Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

<sup>17</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>18</sup> *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>19</sup> and paragraph (f) of Rule 19b-4<sup>20</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2020-079 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBZX-2020-079. 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

<sup>16</sup> Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f).

Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2020-079 and should be submitted on or before December 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-25182 Filed 11-13-20; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90383; File No. SR-BX-2020-033]

### Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing of Proposed Rule Change To Utilize the FIX Protocol To Submit Orders to BX's Price Improvement Auction Mechanism

November 9, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 27, 2020, Nasdaq BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("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 Options 3, Section 7(d)(1)(A) relating to "Financial Information eXchange" or "FIX" in connection with offering BX Participants the ability to utilize FIX to submit orders to its Price Improvement Auction ("PRISM") mechanism.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/bx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to offer BX Participants a manner in which to send messages through FIX, to other BX Participants, for the specific purpose of requesting another BX Participant submit an "Initiating Order"<sup>3</sup> along with the sender's PRISM Order<sup>4</sup> into the Price Improvement Auction ("PRISM") mechanism for execution pursuant to Options 3, Section 13. Specifically, the Exchange proposes to amend BX Options 3, Section 7(d)(1)(A) relating to "Financial Information eXchange" or "FIX" in connection with this offering. This functionality would provide an additional workflow to BX Participants seeking to enter paired orders into PRISM. This proposal does not amend the PRISM rule within Options 3, Section 13 in connection with offering Participants the ability to submit a Request for PRISM through FIX.

FIX is an interface that allows Participants and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders and responses to and from the Exchange. Features include the following: (1) Execution messages; (2) order messages; and (3) risk protection

triggers and cancel notifications.<sup>5</sup> Today, all BX Participants utilize FIX to submit orders to BX.

This proposal would expand the capabilities of the FIX protocol to allow a BX Participant (sender) to utilize FIX to send a message to other BX Participants (responders) with an order the sender represents as agent ("PRISM Order") on behalf of a Public Customer, broker dealer or other entity requesting the responders provide a contra-side Initiating Order (a "response") and begin a PRISM auction (collectively a "Request for PRISM").<sup>6</sup> Today, Participants communicate their desire to have their orders paired in other ways,<sup>7</sup> which may be less efficient. This proposal would permit BX Participants to streamline their workflow and utilize FIX as a tool to message a Request for PRISM to all BX Participants that opted to receive these notifications, as described below. If a BX Participant desires to respond to the request, the BX Participant would add an Initiating Order to the sender's PRISM Order and submit the paired order directly into PRISM, through FIX, for processing in accordance with Options 3, Section 13. BX Participants may elect to "opt in" to receive Requests for PRISM. BX Participants that do not elect to "opt in" will not receive such requests. Once a BX Participant elects to receive Requests for PRISM, they would receive all requests from any BX Participant submitting a Request for PRISM. The BX Participant cannot elect to only receive requests from certain Participants and the sender may not elect to send the request to a select group of BX Participants.

Specifically, the Request for PRISM created by the BX Participant would be systematized so that a BX Participant may add an Initiating Order to the previously submitted sender PRISM Order and directly submit the PRISM Order through FIX. The Exchange will set a certain time period up to one second<sup>8</sup> within which the PRISM Order must be submitted or it would otherwise cancel or book pursuant to the sending

<sup>5</sup> See Options 3, Section 7(d)(1)(A).

<sup>6</sup> The Request for PRISM, if accepted and submitted into PRISM, would become the "PRISM Order" pursuant to Options 3, Section 13.

<sup>7</sup> This proposal represents an alternative to the other methods of submitting an order which may include: telephone, electronically using an external order management system, or utilizing instant message.

<sup>8</sup> The Exchange will initially set the time period to 100 milliseconds to respond to the Request for PRISM or otherwise not respond before the Request for PRISM would become unavailable. The Exchange will post the time period on its System settings page.

<sup>21</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> An Initiating Order is an order executed against principal interest or against any other order it represents as agent. See Options 3, Section 13.

<sup>4</sup> A PRISM Order is an order submitted by a BX Participant that it represents as agent on behalf of a Public Customer, broker dealer, or any other entity, electronically, for execution. See Options 3, Section 13.

Participant's instructions, as described in more detail below.

The Request for PRISM would include the price, size, symbol, side and instruction for handling of the order, in the event there are no responses. A response must match the PRISM Order and may not improve the price, or the response will be rejected. A response may be configured to improve the PRISM Order stop price<sup>9</sup> pursuant to Options 3, Section 13(ii)(A)(1)(c). The configuration would apply if this response initiated a PRISM auction.

BX Participants are not obligated to respond to the request. If a BX Participant elects not to respond they would ignore the request. If no BX Participant responds, pursuant to the sender's instruction, the PRISM Order would be placed on the Order Book as a Limit Order or cancelled. In any event, no order would be submitted into the PRISM mechanism in the instance that no BX Participant responded to the request.

By way of example, BX Firm A elects to send a Request for PRISM. BX Firm A would enter a Request for PRISM with a PRISM Order, for example an order to sell 100 contracts in AAPL at \$1.00 with an instruction to enter the order on the Order Book if no one responds with an Initiating Order into PRISM. This Request for PRISM is entered into FIX. The Request for PRISM would be sent to all BX Participants who opted in to receive this request, also a timer not to exceed one second would commence. Assume in this example that 3 firms responded (Firm B, C, and D, in that order of response) with each firm willing to buy 100 contracts<sup>10</sup> in AAPL at \$1.00 and they respond within 50 milliseconds. The System would process Firm B's Initiating Order along with the PRISM Order by entering the paired order, through FIX, into PRISM for execution pursuant to Options 3, Section 13. The System would send the other 2 responders (C and D) a reject message.

Assume the same example, that Firm B had responded that it was willing to buy 100 contracts in AAPL at \$1.00, and Firm B also configured the response with a No Worse Than price. Because in this example Firm B's Initiating Order, along with the PRISM Order was sent into PRISM for execution pursuant to Options 3, Section 13, the No Worse Than price would be considered in the allocation and the Initiating Order will

auto-match unrelated orders and PANs that provide the PRISM Order price improvement up to the No Worse Than price.

Assume the same example, except in this scenario no Participant responds during the timer, the Initiating Order would post to the Order Book as a Limit Order and be handled in accordance with Options 3, Section 10 (Order Book Allocation) pursuant to the Participant's instructions. The System would disseminate a PRISM notification to all Participants if a responder submitted an Initiating Order into the PRISM mechanism. The System would retain an audit trail of the Request for PRISM and the responses, if any, received.

As noted above, a Request for PRISM would be sent to all BX Participants that elected to opt in to receive these requests. Unlike the workflow today, wherein a Participant may call one or multiple members to enter into a PRISM Order, all BX Participants that opted in would receive any Request for PRISM. The System will submit the first Initiating Order response received, during the timer, into a PRISM. Once the recipient of a Request for PRISM has responded to the Request for PRISM by adding the Initiating Order, the PRISM may not be cancelled. The sender may not cancel a Request for PRISM once that Request for PRISM has been sent. The identity of the sender and recipients would not be known to any party. Further, the Exchange would not disclose a list of Participants that opted in to receive Requests for PRISM.

The Exchange believes this new FIX feature will enhance the workflow of BX Participants desiring to enter orders into PRISM for execution and price improvement. The Exchange believes that this new functionality will offer market participants another method to directly engage with other BX Participants to locate an Initiating Order for submission of a paired order into the PRISM mechanism.

The Exchange proposes to amend Options 3, Section 7(d)(1)(A) to add the following sentence to the description of the FIX protocol, "In addition, a BX Participant may elect to utilize FIX to send a message and PRISM Order, as defined within Options 3, Section 13, to all BX Participants that opt in to receive Requests for PRISM requesting that it submit the sender's PRISM Order with responder's Initiating Order, as defined within Options 3, Section 13, into the Price Improvement Auction ('PRISM') mechanism, pursuant to Options 3, Section 13 ('Request for PRISM')."

(a) BX Participants must "opt in" to receive Requests for PRISM. A Participant who opts in to receive

Requests for PRISM will receive all requests from a Participant submitting a Request for PRISM.

(b) The Exchange will set a certain time period up to one second within which a recipient of a Request for PRISM may utilize FIX to submit the sender's PRISM Order, along with an Initiating Order (a "response") into the System for execution into PRISM pursuant to Options 3, Section 13. The System will permit the first responder to start a PRISM Auction and will send a reject message to subsequent responders. A response must match the PRISM Order and may not improve the price, or the response will be rejected. A response may be configured to improve the PRISM Order stop price pursuant to Options 3, Section 13(ii)(A)(1)(c); the configuration would apply if this response initiated a PRISM auction. If no BX Participant responds to the Request for PRISM, the PRISM Order would be placed on the Order Book as a Limit Order or cancelled, consistent with the sending Participant's instruction.

(c) A Request for PRISM will be sent simultaneously to all BX Participants who opted in to receive Requests for PRISM.

(d) Once the recipient of a Request for PRISM has responded to the Request for PRISM by adding the Initiating Order, the PRISM may not be cancelled.

(e) The sender may not cancel a Request for PRISM once that Request for PRISM has been sent.

(f) The identity of the sender and recipients will not be known to any party. The Exchange will not disclose a list of Participants that opted in to receive Requests for PRISM.

(g) It would be deemed conduct inconsistent with just and equitable principles of trade and a violation of Options 9, Section 1, and other Exchange Rules, to utilize non-public information in connection with a Request for PRISM to a Participant's economic advantage.

BX will employ surveillances to prevent misuse of non-public information specifically related to a Request for PRISM. Today, Options 3, Section 13(iv)<sup>11</sup> and (v)<sup>12</sup> describes

<sup>11</sup> BX Options 3, Section 13(iv) provides, "A pattern or practice of submitting multiple orders in response to a PAN at a particular price point that exceed, in the aggregate, the size of the PRISM Order, will be deemed conduct inconsistent with just and equitable principles of trade and a violation of General 9, Section 1."

<sup>12</sup> BX Options 3, Section 13(v) provides, "A pattern or practice of submitting unrelated orders or quotes that cross the stop price, causing a PRISM Auction to conclude before the end of the PRISM Auction period will be deemed conduct inconsistent with just and equitable principles of

<sup>9</sup> BX Options 3, Section 13(ii)(A)(1) permits Participants to submit a No Worse Than price.

<sup>10</sup> As noted above, a response must match the PRISM Order and may not improve the price, or the response will be rejected.

certain activity prohibited by BX related to PRISM.

#### Implementation

The Exchange intends to begin implementation of the proposed rule change by June 30, 2021. The Exchange will issue an Options Trader Alert to Participants with the date of implementation.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>14</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by proposing another method for BX Participants to submit PRISM Orders, while effectively reducing certain workflow. In particular, the proposal provides greater flexibility for Participants submitting orders into PRISM, specifically providing an avenue for BX Participants desiring to send orders to the PRISM mechanism to locate an Initiating Order to pair their PRISM Order with and participate in a PRISM Auction. The Exchange also believes the proposal will provide an opportunity for Participants to achieve better handling of orders by providing Participants with an ability to solicit interest from any BX Participant who opts in to receive a Request for PRISM. A BX Participant sending a Request for PRISM via FIX would have the opportunity to have their order responded to by a broader array of market participants in a more direct fashion. Adopting this proposal and providing the ability for BX Participants to anonymously solicit interest from other BX Participants desiring to enter a Initiating Order into PRISM will promote just and equitable principles of trade and foster cooperation and coordination with persons engaged in facilitating transactions in securities. Any BX Participant may respond to a PRISM Auction and therefore all BX

Participants benefit from the ability to interact with additional order flow that this functionality would generate as a result of matching PRISM Orders to Initiating Orders, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system.

Today, Participants communicate their desire to have their orders paired in other ways,<sup>15</sup> which may be less efficient. For example, today parties on trading floors negotiate paired orders prior to entry into a trading crowd.<sup>16</sup> This proposal would permit BX Participants to streamline their workflow and utilize FIX as a tool to message a Request for PRISM to all BX Participants opting to receive these requests. This proposal would not amend the manner in which PRISM operates. There are no amendments proposed to BX Options 3, Section 13 herein. This feature, which expands the FIX protocol offering to allow any BX Participant to send a Request for PRISM to all BX Participants opting to receive these requests, would offer BX Participants a manner in which to effectively communicate an interest to initiate a PRISM Auction. The functionality, which systematizes the Request for PRISM for streamlined entry to PRISM through FIX, provides an avenue for BX Participants who have no order flow arrangements to locate interest. If no one responds to the Request for PRISM, then the sending Participant may elect to have the System post the PRISM Order to the Order Book as a Limit Order or cancel the PRISM Order. If a Participant responds to a Request for PRISM then the paired order will be entered into PRISM by the System and any BX Participant may respond. All BX Participants benefit from the ability to interact with order flow on BX.

Permitting Participants to opt in to receive a Request for PRISM is consistent with the Act and promotes free and open markets because anyone can opt in and participate. Also, if a BX Participant does not want to opt in, it prevents Participants from receiving unwanted solicitations. Once a Participant elects to receive Requests for

PRISM, they would receive a request from any BX Participant.<sup>17</sup> The Exchange believes that it is consistent with the Act to not allow Participants to selectively exclude interest from certain Participants, if they chose to utilize this workflow. Additionally, the Exchange believes that no BX Participant should be required to accept solicitations of interest from other Participants if they elect not to receive such notifications.

The identity of the sender and the recipients would not be known to any party. The Exchange believes that it is consistent with the Act to not disclose the identities of any party as the Exchange believes that anonymity will prevent potential manipulation that may result if the Request for PRISM is not responded to and eventually rests on the Order Book as a Limit Order. Further, parties may feel free to solicit interest without disclosing information as the identity of the sender will remain unknown. Finally, selectively responding to certain senders would be avoided by not disclosing identifying information about the parties. The Exchange would permit BX Participants to opt in and subsequently opt out as they desire. The Exchange would not disclose the parties that have opted in to further create an anonymous communication among BX Participants.

The PRISM auction will be governed by Options 3, Section 13. Any paired order entered into PRISM must comply with the required price to commence the auction and NBBO requirements to prevent trade-through as provided for within Options 3, Section 13. The auction eligibility requirements apply to all paired orders entered into PRISM even those that were submitted as a result of a Request for PRISM.

BX will employ surveillances to prevent misuse of non-public information specifically related to a Request for PRISM similar to the manner in which it employs surveillances today to ensure that information available in auctions is not misused. The Exchange would have information regarding the Request for PRISM and would be able to monitor entries into both the Order Book and PRISM Auction. Today, Options 3, Section 13(iv)<sup>18</sup> and (v)<sup>19</sup> describes certain activity prohibited by BX related

trade and a violation of General 9, Section 1. It will also be deemed conduct inconsistent with just and equitable principles of trade and a violation of General 9, Section 1 to engage in a pattern of conduct where the Initiating Participant breaks up a PRISM Order into separate orders for the purpose of gaining a higher allocation percentage than the Initiating Participant would have otherwise received in accordance with the allocation procedures contained in subparagraph (ii)(E) and (ii)(F) above."

<sup>13</sup> 15 U.S.C. 78f(b)

<sup>14</sup> 15 U.S.C. 78f(b)(5).

<sup>15</sup> This proposal represents an alternative to the other methods of submitting an order which may include: telephone, electronically using an external order management system, or utilizing instant message.

<sup>16</sup> See PHLX Options 8, Section 30(c) which provides that a Phlx member or member organization representing an order in options ("originating order") may solicit another member, member organization or nonmember broker-dealer outside the trading crowd ("solicited party") to participate in the transaction on a proprietary basis, provided the paired order is exposed.

<sup>17</sup> While Participants will have a certain time period, up to one second, to act if they elect to participate in the Request for PRISM, the Participant also may elect not to respond. If no recipient Participants respond this would cause the cancellation of the initial Request for PRISM and no order would be submitted into the PRISM mechanism.

<sup>18</sup> See note 11 above.

<sup>19</sup> See note 12 above.

to PRISM in addition to Options 3, Section 22. Participants receiving such Requests for PRISM may not utilize the information to a Participant's economic advantage as provided for in proposed Options 3, Section 7(d)(1)(A)(1)(f). The Exchange notes the requests are subject to the restrictions noted within Options 3, Section 22, Limitations on Order Entry, as well as restriction noted with Options 3, Section 13. The communications that would occur, through FIX, would be available to the Exchange and these communications would be maintained. The Exchange would have information regarding the Request for PRISM and would be able to monitor entries into both the Order Book and PRISM Auction.

Broker-dealers are required to obtain best execution of customer orders,<sup>20</sup> including taking into account price improvement opportunities. All broker-dealers have a duty to obtain best execution when representing orders on an agency basis.

The Exchange believes that this proposal removes impediments to and perfects the mechanism of a free and open market and a national market system by promoting a more efficient workflow to seek to pair BX Participants who desire to initiate a PRISM Auction with Initiating Orders. This functionality permits Participants to further pair buyers and sellers for the purpose of executing transactions on its facility. Further, this proposal promotes competition by allowing Participants to seek the best execution through the Request for PRISM which offers a means for BX Participants to effectively solicit all BX Participants to locate interest for participation in a PRISM Order. Finally, the Exchange believes this proposal protect investors and the public interest by creating an auditable method of surveilling Requests for PRISM.

Price improvement auctions are widely recognized by market participants as invaluable, both as a tool to access liquidity, and a mechanism to help meet their best execution obligations. The proposed rule change will further the ability of BX Participants to submit orders into PRISM. Finally, the proposal serves as a competitive response to price improvement auctions on other options exchanges by providing for another manner in which BX Participants may solicit interest for the purpose of entering a paired order into PRISM in a more widespread fashion. The Exchange

believes the Request for PRISM will attract more liquidity in PRISM.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange's proposal offers all BX Participants the ability to send a Request for PRISM, through FIX, to any BX Participant who opts in to receive such requests.

The proposed rule creates a new modality for Participants to send orders to BX Participants for representation. Today, all BX Participants utilize FIX to submit orders to BX and all Participants who utilize FIX may submit orders into PRISM. Any Participant may respond to the PRISM Auction.

The Exchange notes that it is providing BX Participants an ability to anonymously solicit interest for the purpose of entering a paired order into PRISM. Today, BX Participants locate interest by other methods. This functionality would allow all BX Participants another method to enter a paired order into PRISM by anonymously permitting a solicitation of interest to seek an Initiating Order to pair with their PRISM Order. The Exchange believes that this functionality will allow a greater number of BX Participants to utilize PRISM. Any BX Participant may contact other market participants to continue to solicit interest, as is the case today. The Exchange believes that this proposal will benefit all BX Participants by offering an increased opportunity to trade on the Exchange.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2020-033 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2020-033. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BX-2020-033 and should be submitted on or before December 7, 2020.

<sup>20</sup> The duty of best execution requires broker-dealers to periodically assess the quality of competing markets to assure that order flow is directed to the markets providing the most beneficial terms for their customer orders.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020–25180 Filed 11–13–20; 8:45 am]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90367; File No. SR–NSCC–2020–802]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of No Objection to Advance Notice To Enhance National Securities Clearing Corporation’s Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Make Certain Other Changes to Procedure XV

November 6, 2020.

#### I. Introduction

On March 16, 2020, National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) advance notice SR–NSCC–2020–802 (“Advance Notice”) pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (“Clearing Supervision Act”)<sup>1</sup> and Rule 19b–4(n)(1)(i)<sup>2</sup> under the Securities Exchange Act of 1934 (“Exchange Act”)<sup>3</sup> to enhance the calculation of certain components of the Clearing Fund formula.<sup>4</sup> The Advance

Notice was published for comment in the **Federal Register** on April 15, 2020.<sup>5</sup> The Commission received comments on the proposal.<sup>6</sup> On May 15, 2020, the Commission requested further information for consideration of the Advance Notices, pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act (“RFI”),<sup>7</sup> which tolled the Commission’s period of review of the Advance Notices until 60 days from the date the information required by the Commission was received by the Commission.<sup>8</sup> On September 9, 2020, the Commission received responses to the RFI from NSCC.<sup>9</sup> This publication serves as notice of no objection to the Advance Notice.

#### II. The Advance Notice

##### A. Background

NSCC provides clearing, settlement, risk management, central counterparty services, and a guarantee of completion for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities, and unit investment trust transactions in the U.S. markets. A key tool that NSCC uses to manage its credit exposure to its Members is collecting an appropriate Required Fund Deposit (*i.e.*, margin) from each Member.<sup>10</sup> A Member’s Required Fund Deposit is designed to mitigate potential losses to NSCC associated with liquidation of the Member’s portfolio in the event of a

Member default.<sup>11</sup> The aggregate of all NSCC Members’ Required Fund Deposits (together with certain other deposits required under the Rules) constitutes NSCC’s Clearing Fund, which NSCC would access should a Member default and that Member’s Required Fund Deposit, upon liquidation, be insufficient to satisfy NSCC’s losses.<sup>12</sup>

Each Member’s Required Fund Deposit consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC, as identified within NSCC’s Rules.<sup>13</sup> Generally, the largest component of Members’ Required Fund Deposits is the volatility component. The volatility component is designed to reflect the amount of money that could be lost on a portfolio over a given period within a 99% confidence level. This component represents the amount assumed necessary to absorb losses while liquidating the portfolio.

NSCC’s methodology for calculating the volatility component of a Member’s Required Fund Deposit depends on the type of security and whether the security has sufficient pricing or trading history for NSCC to perform statistical analysis. Generally, for most securities (*e.g.*, equity securities), NSCC calculates the volatility component using, among other things, a parametric Value at Risk (“VaR”) model, which results in a “VaR Charge.”<sup>14</sup> However, the VaR model generally relies on predictability, and this model may be less reliable for measuring market risk of securities that exhibit illiquid characteristics. More specifically, the VaR model relies on assumptions that are based on historical observations of security prices. Securities that exhibit illiquid characteristics, which generally have low trading volumes or are not traded frequently may not present sufficient instances of price observations to allow

Rule Change. Securities Exchange Act Release No. 89949 (September 22, 2020), 85 FR 60854 (September 28, 2020) (SR–NSCC–2020–003).

<sup>5</sup> Securities Exchange Act Release No. 88615 (April 9, 2020), 85 FR 21037 (April 15, 2020) (SR–NSCC–2020–802) (“Notice of Filing”).

<sup>6</sup> Comments are available at <https://www.sec.gov/comments/sr-nsc-2020-003/srnscc2020003-7108527-215929.pdf>. All but one of the comments were submitted with respect to the Proposed Rule Change. *Supra* note 4. Because the proposals contained in the Advance Notice and the Proposed Rule Change are the same, all public comments received on the proposal were considered regardless of whether the comments were submitted with respect to the Advance Notice or the Proposed Rule Change.

<sup>7</sup> 12 U.S.C. 5465(e)(1)(D).

<sup>8</sup> See 12 U.S.C. 5465(e)(1)(E)(ii) and (G)(ii); see Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled “Commission’s Request for Additional Information,” available at <https://www.sec.gov/rules/sro/nsc-an/2020/34-88615-request-for-info.pdf>.

<sup>9</sup> See 12 U.S.C. 5465(e)(1)(E)(ii) and (G)(ii); see Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled “Response to the Commission’s Request for Additional Information,” available at <https://www.sec.gov/rules/sro.shtml>.

<sup>10</sup> Terms not defined herein are defined in NSCC’s Rules and Procedures (“Rules”), available at [http://www.dtcc.com/~media/Files/Downloads/legal/rules/nsc\\_rules.pdf](http://www.dtcc.com/~media/Files/Downloads/legal/rules/nsc_rules.pdf). See Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the Rules.

<sup>11</sup> Under NSCC’s Rules, a default would generally be referred to as a “cease to act” and could encompass a number of circumstances, such as a member’s failure to make a Required Fund Deposit in a timely fashion. See Rule 46 (Restrictions on Access to Services), *supra* note 10.

<sup>12</sup> See Rule 46 (Restrictions on Access to Services), *supra* note 10.

<sup>13</sup> See Procedure XV, *supra* note 10.

<sup>14</sup> Specifically, NSCC calculates the VaR Charge as the greatest of (1) the larger of two separate calculations that utilize the VaR model, (2) a gap risk measure calculation based on the largest non-index position in a portfolio that exceeds a concentration threshold, which addresses concentration risk that can be present in a member’s portfolio, and (3) a portfolio margin floor calculation based on the market values of the long and short positions in the portfolio, which addresses risks that might not be adequately addressed with the other volatility component calculations. See Sections I.(A)(1)(a)(i) and I.(A)(2)(a)(i) of Procedure XV, *supra* note 10.

<sup>21</sup> 17 CFR 200.30–3(a)(12).

<sup>1</sup> 12 U.S.C. 5465(e)(1).

<sup>2</sup> 17 CFR 240.19b–4(n)(1)(i).

<sup>3</sup> 15 U.S.C. 78a *et seq.*

<sup>4</sup> NSCC also filed related proposed rule change with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder, seeking approval of proposed changes to their rules necessary to implement the Advance Notices (“Proposed Rule Change”). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. The Proposed Rule Change was published in the **Federal Register** on March 21, 2020. Securities Exchange Act Release No. 88474 (March 25, 2020), 85 FR 17910 (March 31, 2020) (SR–NSCC–2020–003). On May 15, 2020, the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change. Securities Exchange Act Release No. 88885 (May 15, 2020), 85 FR 31007 (May 21, 2020) (SR–NSCC–2020–003). On June 24, 2020, the Commission issued an order instituting proceedings to determine whether to approve or disapprove the Proposed Rule Changes. Securities Exchange Act Release No. 89145 (June 24, 2020), 85 FR 39244 (June 30, 2020) (SR–NSCC–2020–003). On September 22, 2020, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed



the VaR model to provide a precise measure of market risk for such securities. Accordingly, for securities that do not have sufficient pricing or trading history to perform statistical analysis, NSCC applies a haircut to calculate the volatility component, in lieu of the VaR-based calculation.

### *B. Current Practice for Determining Volatility Component for Illiquid Securities and UITs*

Two types of securities for which NSCC uses a haircut to calculate the volatility component are securities that NSCC deems to be “Illiquid Securities” and UITs. NSCC’s Rules currently define an Illiquid Security as a security that is (i) not traded on or subject to the rules of a national securities exchange registered under the Exchange Act, or (ii) an OTC Bulletin Board<sup>15</sup> or OTC Link issue.<sup>16</sup> Based on its interpretation of that definition, NSCC considers securities that are not listed on the national securities exchanges, *i.e.*, those exchanges which are covered by certain third party data/pricing vendors, to be Illiquid Securities.<sup>17</sup> UITs are redeemable securities, or units, issued by investment companies that offer fixed security portfolios for a defined period of time.

Under NSCC’s current rules, Illiquid Securities and UITs are subject to haircut-based charges to calculate the volatility component of a Member’s Required Fund Deposit based upon two distinct but related rationales. Specifically, Illiquid Securities are considered “securities that are less amenable to statistical analysis, such as OTC Bulletin Board or Pink Sheet issues

or issues trading below a designated dollar threshold (*e.g.*, five dollars),” and UITs are considered “securities that are amenable to generally accepted statistical analysis only in a complex manner.”<sup>18</sup> Based on these determinations, NSCC considers Illiquid Securities and UITs as categories of securities that tend to exhibit illiquid characteristics, such as low trading volumes or infrequent trading.<sup>19</sup> NSCC therefore calculates the volatility component for these two categories of securities by multiplying the absolute value of a given position by a percentage that is (1) not less than 10% for securities that are less amenable to statistical analysis, including Illiquid Securities,<sup>20</sup> and (2) not less than 2% for securities that are amenable to generally accepted statistical analysis only in a complex manner, including UITs.

In addition to using the haircut-based volatility charge for Illiquid Securities, NSCC currently can also apply an additional charge (an “Illiquid Charge”) for certain positions in Illiquid Securities that exceed volume thresholds set forth in the Rules.<sup>21</sup> NSCC represents that the Illiquid Charge was designed to address a situation where the defaulting Member may have a relatively large position in an Illiquid Security, which would increase the risk that NSCC might face losses when liquidating the Member’s position in these securities due to the securities’ lack of marketability and other characteristics.<sup>22</sup>

<sup>18</sup> A security that is less amenable to statistical analysis generally lacks pricing or trading history upon which to perform statistical analysis. A security that is amenable to generally accepted statistical analysis only in a complex manner generally may have pricing or trading history, but further calculations upon the pricing or trading history would be required to perform statistical analysis.

<sup>19</sup> Because the VaR model generally relies on predictability, this model may be less reliable for measuring market risk of securities that exhibit illiquid characteristics.

<sup>20</sup> NSCC currently calculates the volatility charge for IPOs, which have fewer than 31 business days of trading history over the past 153 business days, by applying a haircut of 15% and all other Illiquid Securities by applying a haircut of 20%. See Notice of Filing, *supra* note 5, 85 FR at 21042.

<sup>21</sup> Specifically, the Illiquid Charge applies to Illiquid Positions as defined under NSCC’s Rules. The Rules specify the applicable thresholds that result in an Illiquid Position determination. For example, where a Member’s net buy position in an Illiquid Security exceeds a threshold no greater than 100 million shares, that position may become subject to the Illiquid Charge. However, NSCC’s rules also provide for certain offsets and credit risk considerations that will be considered when determining whether a position in an Illiquid Security should be considered an Illiquid Position and, thus, subject to the additional Illiquid Charge. See Rule 1 and Sections I.(A)(1)(h) and I.(A)(2)(f) of Procedure XV, *supra* note 10.

<sup>22</sup> See Notice of Filing, *supra* note 5, 85 FR at 21038. See also Securities Exchange Act Release

NSCC states that it regularly assesses its market and credit risks, as such risks are related to its margin methodologies, to evaluate whether margin levels are commensurate with the particular risk attributes of each relevant product, portfolio, and market.<sup>23</sup> Based on such assessments, NSCC seeks to refine its current approach to risk managing Member positions in Illiquid Securities and UITs. More specifically, NSCC proposes to (1) revise the definition of Illiquid Security, (2) adopt specific exclusions from the VaR model, and corresponding haircut-based methods for determining volatility components for positions in Illiquid Securities and UITs, (3) eliminate the existing Illiquid Charge, and (4) make certain conforming changes regarding municipal and corporate bonds and Family-Issued Securities.<sup>24</sup>

### *C. Proposed Revision to the Definition of Illiquid Security*

Under the Advance Notice, NSCC proposes a new definition of Illiquid Security that would consist of three particular categories of securities. As noted further below, application of the new definition of Illiquid Security would capture a broader set of securities than the current definition.

#### *(i) Securities Not Listed on a Specified Securities Exchange*

The first category of the new definition of Illiquid Securities would include any security that is not listed on a “specified securities exchange.” For purposes of this definition, NSCC’s Rules would define a “specified securities exchange” as a national securities exchange that has established listing services and is covered by industry pricing and data vendors.<sup>25</sup> NSCC would make the determination of whether a security falls in this category on a daily basis. NSCC represents that this new definition would reflect the process that it currently employs to determine whether a security is not traded on or subject to the rules of a national securities exchange registered under the Securities Exchange Act of 1934, as amended.<sup>26</sup>

No. 80597 (May 4, 2017), 82 FR 21863 (May 10, 2017) (SR–NSCC–2017–001) (order approving proposed rule change to describe the illiquid charge that may be imposed on Members).

<sup>23</sup> See Notice of Filing, *supra* note 5, 85 FR at 21039.

<sup>24</sup> The term “Family-Issued Security” means a security that was issued by a Member or an affiliate of that Member. See Rule 1, *supra* note 10.

<sup>25</sup> NSCC has stated that the exchanges that would initially be specified securities exchanges are those listed in note 17. See *supra* note 17.

<sup>26</sup> See Notice of Filing, *supra* note 5, 85 FR at 21040. Based on historic performances, NSCC

<sup>15</sup> The OTC Bulletin Board is an inter-dealer quotation system that is used by subscribing members of the Financial Industry Regulatory Authority (“FINRA”) to reflect market making interest in eligible securities (as defined in FINRA’s Rules). See <http://www.finra.org/industry/otcbb/otc-bulletin-board-otcbb>.

<sup>16</sup> OTC Link is an electronic inter-dealer quotation system that displays quotes from broker-dealers for many over-the-counter securities. See <https://www.otcmarkets.com>.

<sup>17</sup> NSCC represents that it utilizes multiple third-party vendors to price its eligible securities. NSCC believes that national securities exchanges covered by these third party vendors tend to list securities that exhibit liquid characteristics such as having more available public information, larger trading volumes and higher capitalization. See Notice of Filing, *supra* note 5, 85 FR at 21040. The exchanges that have established listing services that the vendors cover for this purpose are: New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., The Nasdaq Stock Market and Cboe BZX Exchange, Inc. NSCC represents that Members’ Clearing Fund Summary reports, available through the DTCC Risk Portal, identify securities within their portfolio by the ticker symbol and indicate whether those securities are considered Illiquid Securities for purposes of the calculation of the Illiquid Charge. See *id.*

## (ii) Micro-Capitalization Securities and ADRs Subject to an Illiquidity Ratio

The second category of the new definition of Illiquid Securities would apply to certain securities that are listed on a specified securities exchange. Specifically, the types of securities that would potentially be considered as Illiquid Securities under this second category either (i) have a market capitalization that is considered by NSCC to be a micro-capitalization (“micro-capitalization” or “micro-cap”) as of the last business day of the prior month, or (ii) are American depository receipts (“ADRs”).<sup>27</sup> To determine whether these securities qualify as Illiquid Securities, NSCC would apply, on a monthly basis, an illiquidity ratio test to these two sets of securities.

## 1. Micro-Capitalization Definition

Initially, NSCC would define “micro-capitalization” as market capitalization of less than \$300 million. Changes to this threshold amount of \$300 million would not be subject to any particular period of review, but would occur when NSCC determines changes may be appropriate.<sup>28</sup> NSCC believes that using market capitalization to consider whether a security is illiquid, in conjunction with the illiquidity ratio test, is appropriate because securities with a market capitalization below a certain threshold tend to exhibit illiquid characteristics such as limited trading volumes and a lack of public information.<sup>29</sup>

## 2. ADRs

With respect to ADRs, NSCC believes that subjecting these securities to the

believes the national securities exchanges that the vendors cover are appropriate for determining if a security exhibits characteristics of liquidity because such exchanges tend to list securities that exhibit liquid characteristics such as having more available public information, larger trading volumes, and higher capitalization. *See id.*

<sup>27</sup> ADRs are securities that represent shares of non-U.S. companies that are held by a U.S. depository bank outside of the United States. Each ADR represents one or more shares of foreign stock or a fraction of a share.

<sup>28</sup> Any changes to the micro-cap threshold would be subject to NSCC’s model risk management governance procedures as set forth in the Clearing Agency Model Risk Management Framework (“Model Risk Management Framework”). *See* Notice of Filing, *supra* note 5, 85 FR at 21040. *See* Securities Exchange Act Release No. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File No. SR-NSCC-2017-008) (describes the adoption of the Model Risk Management Framework of NSCC which sets forth the model risk management practices of NSCC) and Securities Exchange Act Release No. 84458 (October 19, 2018), 83 FR 53925 (October 25, 2018) (File No. SR-NSCC-2018-009) (amends the Model Risk Management Framework). NSCC would notify Members of any changes to the micro-capitalization threshold by Important Notice.

<sup>29</sup> *See* Notice of Filing, *supra* note 5, 85 FR at 21040.

illiquidity ratio test to determine whether a particular ADR is an Illiquid Security is appropriate because the market capitalization of an ADR may be difficult to calculate. This is because of challenges associated with the day-to-day fluctuation of the conversion rate of an ADR into the relevant local security, which in turn makes it difficult to price the ADR.<sup>30</sup> Without knowing the market capitalization of the ADR, it is therefore difficult to determine whether an ADR represents a non-micro-cap issuer.

## 3. Application of the Illiquidity Ratio and the Illiquidity Ratio Test to Micro-Cap Securities and ADRs

The proposal would define the illiquidity ratio for a security as the ratio of the security’s daily price return divided by the average daily trading amount<sup>31</sup> of such security over the prior 20 business days. In addition, if NSCC is unable to retrieve data to calculate the illiquidity ratio for a security on any day, NSCC would use a default value for that day for the security (*i.e.*, the security would be treated as illiquid for that day).

In order to classify a micro-cap security or ADR as “illiquid,” NSCC then takes the illiquidity ratio calculated for these securities and applies an illiquidity ratio test. The test functions as follows: NSCC determines whether the security’s median illiquidity ratio of the prior six months exceeds a threshold that is set to the 99th percentile of the illiquidity ratio of all non-micro-cap common stock using the prior six months of data. Where such a threshold is exceeded, NSCC will designate the relevant security as an Illiquid Security. NSCC performs this exercise, and thereby determines the set of micro-cap securities and ADRs to be considered Illiquid Securities, on a monthly basis.

The illiquidity ratio test is designed to measure the level of a security’s price movement relative to its level of trading activity. For example, given the same dollar amount of trading activity, a larger price movement typically indicates less liquidity. Conversely, for price movement of a given magnitude, a smaller dollar amount of trading activity would indicate less liquidity.

Securities that are exchange-traded products (“ETPs”) with market capitalization of less than \$300 million could be classified as illiquid upon application of the illiquidity test. However, ETPs and ADRs would be

<sup>30</sup> *See id.*

<sup>31</sup> The daily trading amount equals the daily trading volume multiplied by the end-of-day price. *See id.*

excluded when calculating the illiquidity ratio threshold. ETPs are excluded because the underlying common stocks that make up the ETPs are already included in the calculation. ADRs are excluded because it is difficult to determine whether an ADR represents a non-micro-cap issuer. An ADR’s market capitalization may be difficult to calculate due to the fact that, as noted above, each ADR often converts to a different number of shares of a local security. The threshold used in the illiquidity ratio test will be determined by NSCC on a monthly basis using the prior six months of data.

## (iii) Securities With Limited Trading History

The third category of the new definition of Illiquid Security would include securities that are listed on a specified securities exchange and, as determined by NSCC on a monthly basis, have fewer than 31 business days of trading history over the past 153 business days on such exchange. NSCC represents that it has historically used such time period to identify initial public offerings (“IPOs”) which tend to exhibit illiquid characteristics due to their limited trading history, thereby making it an appropriate time period to use for the purposes of determining a security’s liquidity, and IPOs would likely constitute most of the securities that would fall into this category.<sup>32</sup>

## D. Proposed Haircut-Based Volatility Charge Specifically Applicable to Illiquid Securities and UITs

## (i) Haircut-Based Volatility Charge Applicable to Illiquid Securities

As proposed in the Advance Notice, NSCC would expressly exclude Illiquid Securities when calculating the volatility component of a Required Fund Deposit using the VaR model and instead would apply a haircut-based volatility charge specifically to Illiquid Securities. To determine the appropriate volatility charge, NSCC would group Illiquid Securities by price level.<sup>33</sup> NSCC generally would calculate one haircut-based volatility charge for short and long positions together. However, with respect to an Illiquid Security that is a sub-penny security, NSCC would calculate the haircut-based volatility

<sup>32</sup> *See* Notice of Filing, *supra* note 5, 85 FR at 21042.

<sup>33</sup> The price level groupings would be subject to NSCC’s model risk management governance procedures set forth in the Model Risk Management Framework. *See* Notice of Filing, *supra* note 5, 85 FR at 21043; *see also* Model Risk Management Framework, *supra* note 28.

charge for short positions and long positions separately.<sup>34</sup>

The haircut percentage applicable to each group of Illiquid Securities would be determined at least annually. The applicable percentage, and the decision of how often the applicable percentage is determined, would be subject to NSCC's model risk management governance procedures set forth in the Model Risk Management Framework.<sup>35</sup> NSCC states that a number of important considerations consistent with the model risk management practices adopted by NSCC could prompt more frequent haircut review, such as material deterioration of a Member's backtesting performance, market events, market structure changes, and model validation findings.<sup>36</sup>

The haircut percentage would be the highest of the following percentages: (1) 10%, (2) a percent benchmarked to be sufficient to cover the 99.5th percentile of the historical 3-day returns of each group of Illiquid Securities in each Member's portfolio, and (3) a percent benchmarked to be sufficient to cover the 99th percentile of the historical 3-day returns of each group of Illiquid Securities in each Member's portfolio after incorporating a fixed transaction cost equal to one-half of the estimated bid-ask spread.<sup>37</sup> The look-back period for purposes of calibrating the applicable percentage would be no less than five years and would initially be five years to be consistent with the historical data set used in model development. The look-back period may be adjusted by NSCC as necessary consistent with the model risk management practices adopted by NSCC to respond to, for example, market

<sup>34</sup> NSCC states that the different treatment for Illiquid Securities that are sub-penny securities is appropriate because short positions in sub-penny securities have unlimited upside market price risk, as the price of a security may increase and could potentially subject NSCC to losses under its trade guaranty. NSCC further states the proposal would allow NSCC to calculate a haircut-based volatility charge that accounts for this risk of such price movements. Further, NSCC states that sub-penny securities are typically issued by companies with low market capitalization, and may be susceptible to market manipulation, enforcement actions, or private litigation. See Notice of Filing, *supra* note 5, at 85 FR at 21043; Letter from Timothy J. Cuddihy, Managing Director, DTCC Financial Risk Management (September 3, 2020) ("NSCC Letter") at 10.

<sup>35</sup> See Notice of Filing, *supra* note 5, 85 FR at 21042; see also Model Risk Management Framework, *supra* note 28.

<sup>36</sup> See *id.*

<sup>37</sup> If NSCC needs to liquidate a defaulting Member's portfolio, it may incur a transaction cost which represents bid-ask spreads. Bid-ask spreads account for the difference between the observed market price that a buyer is willing to pay for a security and the observed market price for which a seller is willing to sell that security.

events that impact liquidity in the market and Member backtesting deficiencies.<sup>38</sup>

#### (ii) Haircut-Based Volatility Charge Applicable to UITs

Similar to its proposed approach to risk managing Illiquid Securities, NSCC would exclude UITs from calculating the volatility component of the Required Fund Deposit using the VaR model, and instead would assign a percentage to be used in the calculation of a haircut-based volatility charge. UITs are less suited to application of the VaR model because they generally have a limited trading history, which does not provide the type of pricing data that allows for application of the VaR model. NSCC would review the percentage used in this calculation at least annually.

The haircut percentage applicable to UITs would be the highest of (1) 2%, and (2) the 99.5th percentile of the historical 3-day returns for the group of UITs within each Member's portfolio using a look-back period of no less than 5 years. The applicable percentage, and the decision of how often the applicable percentage is determined, would be subject to NSCC's model risk management governance procedures set forth in the Model Risk Management Framework.<sup>39</sup>

#### (iii) Revisions to Description of Securities Not Amenable to Generally Accepted Statistical Analysis or Amenable to Statistical Analysis Only in a Complex Manner

NSCC proposes to revise the existing language in its Rules relating to securities that are either less amenable to statistical analysis or amenable to statistical analysis only in a complex manner.<sup>40</sup> Because Illiquid Securities and UITs would each have specific haircut-based volatility charges pursuant to the Advance Notice, these sections would no longer apply to Illiquid Securities or UITs. Furthermore,

<sup>38</sup> Adjustments to the look-back period would be subject to NSCC's model risk management governance procedures set forth in the Model Risk Management Framework. See Notice of Filing, *supra* note 5, 85 FR at 21042–43; see also Model Risk Management Framework, *supra* note 28.

<sup>39</sup> See Notice of Filing, *supra* note 5, 85 FR at 21043; see also Model Risk Management Framework, *supra* note 28.

<sup>40</sup> NSCC represents that it also would remove the phrase "such as OTC Bulletin Board or Pink Sheet issues or issues trading below a designated dollar threshold (e.g., five dollars)" from the existing language relating to securities that are less amenable to statistical analysis. While this language was intended as an example of these types of securities, NSCC now believes that the example inadequately describes all of the securities that are less amenable to statistical analysis and may be misleading. See Notice of Filing, *supra* note 5, 85 FR at 21043.

NSCC represents that the proposed definition of Illiquid Security would effectively encompass all securities that are currently considered as securities that are less amenable to statistical analysis.<sup>41</sup> However, NSCC believes that it should preserve this category of securities within its Rules because NSCC may find it necessary to calculate margin charges for certain securities that do not constitute Illiquid Securities or UITs and instead would continue to fall under this category.

Further, NSCC represents that certain fixed income securities, such as preferred stocks,<sup>42</sup> would continue to fall into the category of securities that are amenable to statistical analysis only in a complex manner. Thus, these types of securities would still be subject to a haircut-based charge. The application of a haircut percentage to any new security, using these categories, would be subject to NSCC's model risk management governance procedures set forth in the Model Risk Management Framework.<sup>43</sup>

#### E. Proposed Elimination of the Illiquid Charge

NSCC proposes to eliminate the existing Illiquid Charge (and the corresponding definition of Illiquid Position), which may be imposed as an additional charge in the volatility component that is applied to Illiquid Securities as securities that are less amenable to statistical analysis. NSCC represents that because the current haircut-based volatility charge that is applied to Illiquid Securities uses fixed percentages for all such securities (15% for IPOs and 20% for the rest of Illiquid Securities), the Illiquid Charge was added to cover some of the risks that the current volatility charge did not cover. NSCC also represents that the proposal would address the risks presented by positions in Illiquid Securities more adequately than the Illiquid Charge, and that therefore the Illiquid Charge would no longer be needed.<sup>44</sup>

#### F. Proposed Conforming Changes

NSCC proposes to make two conforming changes to harmonize the Rules in light of the proposed amendments discussed above. First, the current Rules state that securities less amenable to statistical analysis or amenable to statistical analysis only in

<sup>41</sup> See Notice of Filing, *supra* note 5, 85 FR at 21043.

<sup>42</sup> See Notice of Filing, *supra* note 5, 85 FR at 21044.

<sup>43</sup> See *id.*; see also Model Risk Management Framework, *supra* note 28.

<sup>44</sup> See Notice of Filing, *supra* note 5, 85 FR at 21044.

a complex manner “other than municipal and corporate bonds” shall be excluded from the VaR Charge.<sup>45</sup> NSCC believes that this drafting is unclear regarding whether municipal and corporate bonds are excluded from this section of the Rules. Moreover, the reference to municipal and corporate bonds is not necessary in this portion of the Rules because a different subsection of the Rules<sup>46</sup> provides separately for haircut-based volatility charges for municipal and corporate bonds. The proposal would therefore remove this reference to municipal and corporate bonds from this section of the Rules.

Second, the Rules currently provide that Family-Issued Securities are excluded from calculation of the volatility component using the VaR model because the specific haircut-based volatility charge for such securities is provided in a separate subsection. However, the separate subsection only refers to “long Net Unsettled Positions in Family-Issued Securities.”<sup>47</sup> Based on the current drafting of the Rules, NSCC believes that it is unclear how positions in Family-Issued Securities would be treated.<sup>48</sup> In practice, NSCC states that currently, short positions in Family-Issued Securities whose volatility is less amenable to statistical analysis are subject to the haircut set forth in Sections I.(A)(1)(a)(ii) and I.(A)(2)(a)(ii) of Procedure XV, and those short positions in Family-Issued Securities that meet particular volume thresholds are subject to the Illiquid Charge.<sup>49</sup> NSCC proposes to revise the Rules to expressly reference its current practice that long positions in Family-Issued Securities would be excluded from the VaR Charge but subject to the haircut-based volatility charge exclusively applicable to such securities in a separate provision of the Rules. In addition, determination of the appropriate margin for short positions in Family-Issued Securities would continue to be covered by the haircut-based volatility charge in Sections I.(A)(1)(a)(ii) and I.(A)(2)(A)(ii) as

securities that are less amenable to statistical analysis.

### III. Discussion and Commission Findings

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, the stated purpose of the Clearing Supervision Act is instructive: To mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for SIFMUs and strengthening the liquidity of SIFMUs.<sup>50</sup>

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe regulations containing risk management standards for the payment, clearing, and settlement activities of designated clearing entities engaged in designated activities for which the Commission is the supervisory agency.<sup>51</sup> Section 805(b) of the Clearing Supervision Act provides the following objectives and principles for the Commission’s risk management standards prescribed under Section 805(a):<sup>52</sup>

- To promote robust risk management;
- To promote safety and soundness;
- To reduce systemic risks; and
- To support the stability of the broader financial system.

Section 805(c) provides, in addition, that the Commission’s risk management standards may address such areas as risk management and default policies and procedures, among others areas.<sup>53</sup>

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act and Section 17A of the Exchange Act (the “Clearing Agency Rules”).<sup>54</sup> The Clearing Agency Rules require, among other things, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for its operations and risk management practices on an ongoing basis.<sup>55</sup> As such, it is appropriate for the Commission to review advance notices against the Clearing Agency Rules and the objectives and principles of these

risk management standards as described in Section 805(b) of the Clearing Supervision Act. As discussed below, the Commission believes the proposal in the Advance Notice is consistent with the objectives and principles described in Section 805(b) of the Clearing Supervision Act,<sup>56</sup> and in the Clearing Agency Rules, in particular Rule 17Ad–22(e)(4)(i), (e)(6)(i), and (e)(23)(ii).<sup>57</sup>

#### A. Consistency With Section 805(b) of the Clearing Supervision Act

The Commission believes that the Advance Notice is consistent with the stated objectives and principles of Section 805(b) of the Clearing Supervision Act.<sup>58</sup> Specifically, the Commission believes that the changes proposed in the Advance Notice are consistent with promoting robust risk management, promoting safety and soundness, reducing systemic risks, and supporting the broader financial system.<sup>59</sup>

The Commission believes that the proposal is consistent with promoting robust risk management. First, as described in Section II.C above, NSCC proposes to revise the definition of “Illiquid Securities” to broaden the scope of securities that will be considered as Illiquid Securities for assessing margin requirements, including by providing specific objective criteria that would lead to a security being considered an “Illiquid Security.” Revising the definition of Illiquid Securities to specifically include a broader set of these types of

<sup>56</sup> 12 U.S.C. 5464(b).

<sup>57</sup> 17 CFR 240.17Ad–22(e)(4)(i), (e)(6)(i), and (e)(23)(ii).

<sup>58</sup> 12 U.S.C. 5464(b).

<sup>59</sup> Several of the issues raised by the commenters are directed at the Proposed Rule Change and will be addressed in that context. These comments generally relate to the proposal’s impact on competition, its consistency with the Exchange Act, and its effect on capital formation. See Letter from Christopher R. Doubek, CEO, Alpine Securities Corporation (April 21, 2020) (“Alpine Letter”) at 3; Letter from John Busacca, Founder, The Securities Industry Professional Association (April 23, 2020) (“SIPA Letter”) at 5–6; Letter from Charles F. Lek, Lek Securities Corporation (April 30, 2020) (“Lek Letter”) at 1; Letter from Kimberly Unger, The Security Traders Association of New York, Inc. (June 30, 2020) (“STANY Letter”) at 1 (commenting on impact on competition). See Letter from James C. Snow, Chief Compliance Officer, Wilson-Davis & Co., Inc. (July 29, 2020) (“Wilson II Letter”) at 2–7; Letter from Daniel Zinn, General Counsel and Cass Sanford, Associate General Counsel, OTC Markets Group Inc. (June 26, 2020) (“OTC I Letter”) at 4–5 (commenting on the application of Section 17A(b)(3)(F) of the Exchange Act). See Alpine Letter at 3; Wilson II Letter at 2–7; STANY Letter at 1 (commenting on capital formation). The Commission’s evaluation of the Advance Notice is conducted under the Clearing Supervision Act and, as noted above, generally considers whether the proposal will mitigate systemic risk and promote financial stability.

<sup>45</sup> Sections I.(A)(1)(a)(ii) and I.(A)(2)(a)(ii) of Procedure XV, *supra* note 10.

<sup>46</sup> Section I.(A)(1)(a)(iii) of Procedure XV, *supra* note 10.

<sup>47</sup> *Id.* In addition, the current Rules exclude “family issued security” from the current definition of Illiquid Security, which is subject to Illiquid Charge, providing that the term is provided in Procedure XV, although Procedure XV does not provide such definition.

<sup>48</sup> See Notice of Filing, *supra* note 5, 85 FR at 21041.

<sup>49</sup> See Notice of Filing, *supra* note 5, 85 FR at 21042 and 21044 n. 52.

<sup>50</sup> See 12 U.S.C. 5461(b).

<sup>51</sup> 12 U.S.C. 5464(a)(2).

<sup>52</sup> 12 U.S.C. 5464(b).

<sup>53</sup> 12 U.S.C. 5464(c).

<sup>54</sup> 17 CFR 240.17Ad–22. See Securities Exchange Act Release No. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (S7–08–11). See also Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14) (“Standards for Covered Clearing Agencies”). NSCC is a “covered clearing agency” as defined in Rule 17Ad–22(a)(5).

<sup>55</sup> *Id.*

securities within the definition of Illiquid Securities would allow NSCC to apply a haircut to determine the volatility component for such securities, thereby avoiding reliance on assumptions employed by the VaR model. As described above in Section II.A., the method that NSCC currently uses to calculate the volatility component of the margin for most securities (*i.e.*, the VaR model) yields a less accurate measure of market risk for securities with illiquid characteristics because the VaR model is a model-based calculation, which generally relies on predictability. More specifically, the VaR model relies on assumptions that are based on historical observations of security prices. Securities that exhibit illiquid characteristics, which generally have low trading volumes or are not traded frequently, may not provide sufficient price observations for the VaR model to provide an appropriate measure of market risk.

In addition, as described in Section II.D above, NSCC proposes to specifically exclude Illiquid Securities and UITs from application of the VaR model and change the haircut-based volatility component of the Clearing Fund formula that is applicable to positions in Illiquid Securities and UITs. Currently, in order to calculate the volatility component, fixed percentages are applied to two general categories of securities that encompass Illiquid Securities and UITs, *i.e.*, (1) securities that are less amenable to statistical analysis, and (2) securities that are amenable to generally accepted statistical analysis only in a complex manner. The proposal would apply a specific percentage developed for Illiquid Securities and UITs. Moreover, for Illiquid Securities, instead of using the current fixed haircut percentages, the proposal would group such securities by price level and apply a different haircut percentage based on the specific price group. Illiquid Securities that are sub-penny securities would be separately grouped by long or short position to more accurately reflect different levels of risk presented by long and short positions of such securities (*i.e.*, a higher level of risk is associated with the short positions in sub-penny securities). By allowing for the application of a haircut more precisely tailored to Illiquid Securities (grouped by price level and as long or short positions) and UITs, this change should result in margin amounts that are more commensurate with the risk attributes of these types of securities, thereby limiting NSCC's credit exposure to Members holding positions in such

securities in a more precise manner.<sup>60</sup> Also, the proposal's provision that NSCC regularly assess appropriate haircut percentages to cover its credit risks would require NSCC to take account of changing circumstances and allow NSCC to respond more effectively to such changing circumstances.

NSCC's backtesting results and Member impact studies indicate that Illiquid Securities, particularly low-priced Illiquid Securities, are more likely to have reduced backtesting coverage, which indicates that NSCC does not collect sufficient margin to cover additional risk present in those securities.<sup>61</sup> Specifically, the Commission has considered NSCC's analyses and understands that the proposal's revised definition of Illiquid Securities and the corresponding new haircut methodology for determining the margin for Illiquid Securities would improve its backtesting coverage from 96.2% to 99.5% for the asset group that exhibited the lowest average backtesting coverage percentages (*i.e.*, short positions in sub-penny securities and securities priced between one cent and one dollar), consistent with the high degree of confidence required by the Commission's rules for coverage of exposures to participants.<sup>62</sup> The Commission believes that this improved backtesting coverage demonstrates that NSCC's proposal would result in margin levels that better reflect the risks and particular attributes of the Member's portfolio.

Accordingly, the Commission believes that these proposed changes for determining what constitutes an Illiquid Security and the adoption of a specific haircut methodology for Illiquid Securities and UITs would be consistent with promoting robust risk management because the proposed methodology would enable NSCC to more precisely manage the relevant risks than the current methodology.

The Commission also believes that the proposal is consistent with the promotion of safety and soundness at NSCC. As summarized above, the proposed changes are designed to allow

<sup>60</sup> In addition, the proposal would eliminate the existing Illiquid Charge, which would be replaced by the haircut-based charges on Illiquid Securities as described in Section II.E. Because the proposal would address the risks presented by positions in Illiquid Securities more adequately than the Illiquid Charge, the Illiquid Charge would no longer be needed.

<sup>61</sup> Backtesting refers to an ex-post comparison of actual outcomes, *i.e.*, the actual margin collected, with expected outcomes derived from the use of margin models.

<sup>62</sup> NSCC also provided additional information regarding the improvements in backtesting coverage for other asset groups in confidential exhibits.

NSCC to collect sufficient margin amounts that are more precisely tailored to the nature of the risks presented by positions in securities with illiquid characteristics. By doing so, the proposed methodology would help provide NSCC with a more precisely determined level of resources to limit its exposure in the event of a Member default. Such an increase in NSCC's available financial resources would decrease the likelihood that losses arising out of a member default would exceed NSCC's prefunded resources and threaten the safety and soundness of NSCC's ongoing operations. Accordingly, the Commission believes that the proposal would be consistent with promoting safety and soundness at NSCC.<sup>63</sup>

Finally, the Commission believes that the proposal is consistent with reducing systemic risk and supporting the broader financial system. As discussed above, in a Member default scenario, NSCC would access its Clearing Fund should the defaulted Member's own Required Fund Deposit be insufficient to satisfy losses caused by the liquidation of that Member's portfolio. With the proposed changes, NSCC seeks to collect margin at levels that better reflect the risks presented by positions in securities that exhibit illiquid characteristics. By collecting margin that more accurately reflects the risk characteristics of such securities, NSCC would be in a better position to absorb losses in connection with a Member default, and could thereby reduce the possibility that NSCC would need to mutualize among the non-defaulting Members losses arising out of a Member default. Reducing the potential for loss mutualization could, in turn, reduce the potential knock-on effects to non-defaulting Members, their customers, and the broader market arising out of a Member default. The Commission believes, therefore, that the proposal would be consistent with reducing systemic risk and supporting the stability of the broader financial system.

For the reasons stated above, the Commission believes the changes proposed in the Advance Notice are consistent with Section 805(b) of the Clearing Supervision Act.

<sup>63</sup> The Commission believes that NSCC's proposal to make certain clarifying changes regarding the applicability of particular sections to municipal and corporate bonds and Family-Issued Securities is also consistent with promoting safety and soundness at NSCC because these changes would eliminate potential uncertainty within NSCC's Rules. Such changes should result in clear and coherent Rules, which should help enhance the ability of NSCC and its Members to more effectively plan for and manage their risks.

### B. Consistency With Rule 17Ad–22(e)(4)(i)

Rule 17Ad–22(e)(4)(i) under the Exchange Act requires that each covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.<sup>64</sup>

Several commenters question whether NSCC has adequately demonstrated that its proposal is consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act by showing the insufficiency of NSCC's current margin methodology and whether the increase in margin is necessary.<sup>65</sup> Two commenters state that NSCC has not demonstrated that its current margin requirements are insufficient to cover credit risks to its Members.<sup>66</sup>

In response, NSCC states that the proposal is designed to provide a more accurate measure of the risks associated with Illiquid Securities and to cover in full the risks presented by Members to NSCC.<sup>67</sup> To demonstrate why the proposed revision to its methodology for assessing margin on Illiquid Securities is necessary to address the risk presented by such securities, NSCC relies upon the results of recent backtesting analyses. Specifically, NSCC examines the backtesting coverage for a historical time period under both the current and proposed margin methodologies. Based on this analysis, NSCC represents that the proposal would help NSCC to address the risk presented by Illiquid Securities and that it would improve the lowest average backtesting coverage with respect to Illiquid Securities from 96.2% to 99.5% for the asset group that exhibited the lowest average backtesting coverage percentages (*i.e.*, short positions in sub-penny securities and securities priced between one cent and one dollar).<sup>68</sup>

NSCC further states that its backtesting results and Member impact studies indicate that Illiquid Securities, particularly low-priced Illiquid Securities, are more likely to present additional risk.<sup>69</sup>

NSCC notes that the proposed changes to its methodology produce a more accurate haircut calculation by factoring in price levels, resulting in margin levels that better reflect the risks and particular attributes of Member portfolios.<sup>70</sup> NSCC represents that the enhanced methodology for identifying Illiquid Securities and the calculation of the haircut-based volatility component applicable to these securities and UITs improve the risk-based methodology, which in turn, better manage its credit exposures to Members.<sup>71</sup>

The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act.<sup>72</sup> Specifically, the proposal to revise the definition of Illiquid Securities would help NSCC to better identify securities that may present credit exposures unique to such securities for purposes of applying an appropriate margin charge. Additionally, the proposal would provide additional criteria that use more objective factors to determine what constitutes an Illiquid Security. These factors consider a security's listing status, trading history, and market capitalization, and would result in a more accurate classification of securities with illiquid characteristics being considered as Illiquid Securities. In addition, the proposal to base the calculation of the haircut-based volatility charge applied to positions in Illiquid Securities and UITs on those securities' price level and risk profile would enable NSCC to collect and maintain sufficient resources to cover its credit exposures to each participant whose portfolio contains positions in Illiquid Securities and/or UITs with a high degree of confidence. The Commission has reviewed and analyzed NSCC's analysis of the improvements in its backtesting coverage, which demonstrate that the proposal would result in better backtesting coverage and, therefore, less credit exposure to its Members. Finally, the proposal requires NSCC to review and determine the haircut percentages at least annually. Accordingly, the Commission believes that the proposal would enable NSCC to better manage its credit risks by allowing it to respond regularly and more effectively to any material

deterioration of backtesting performances, market events, market structure changes, or model validation findings.

In response to comments that NSCC has not demonstrated that current margin requirements are insufficient to cover credit risks to its Members, the Commission disagrees. In considering these comments, the Commission thoroughly reviewed and considered (i) the Advance Notice, including the supporting exhibits that provided confidential information on the performance of the proposed revision to the definition of an Illiquid Security and the use of a revised haircut-based methodology applicable to both Illiquid Securities and UITs, three rounds of impact analysis, and backtesting coverage results; (ii) the comments received; and (iii) the Commission's own understanding of the performance of the current margin methodology, with which the Commission has experience from its general supervision of NSCC, compared to the proposed margin methodology. Based on its review of these materials, the Commission believes that the proposal would, in fact, better enable NSCC to cover its credit exposure to Members and meet the applicable Commission regulatory requirements. Specifically, the Commission has considered the results of NSCC's backtesting coverage analyses, which indicate that the current margin methodology results in backtesting coverage that does not meet NSCC's targeted confidence level. The analyses also indicate that the proposal would result in improved backtesting coverage that meets NSCC's targeted coverage level. Therefore, the Commission believes that the proposal would provide NSCC with a more precise margin calculation designed to meet the applicable regulatory requirements for margin coverage.

Therefore, for the reasons discussed above, the Commission believes that the changes proposed in the Advance Notice are reasonably designed to enable NSCC to effectively identify, measure, monitor, and manage its credit exposure to Members, consistent with Rule 17Ad–22(e)(4)(i).<sup>73</sup>

### C. Consistency With Rule 17Ad–22(e)(6)(i)

Rule 17Ad–22(e)(6)(i) under the Exchange Act requires that each covered clearing agency that provides central counterparty services establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit

<sup>64</sup> 17 CFR 240.17Ad–22(e)(4)(i).

<sup>65</sup> See Lek Letter at 1; STANY Letter at 1; OTC I Letter at 2.

<sup>66</sup> See STANY Letter at 1; OTC I Letter at 2.

<sup>67</sup> See NSCC Letter at 6.

<sup>68</sup> *Id.* at 5; 17 CFR 240.17Ad–22(e)(4)(i). NSCC also notes that this improvement in coverage level would allow it to meet the high degree of confidence referenced in Rule 17Ad–22(e)(4)(i). *Id.* As stated above, the volatility component of the margin collected by NSCC is designed to reflect the amount of money that could be lost on a portfolio over a given period within a 99% confidence level, and NSCC has established a 99% target backtesting confidence level. See, e.g., Procedure XV, Section LB(3), *supra* note 10.

<sup>69</sup> See NSCC Letter at 5.

<sup>70</sup> See NSCC Letter at 5–6.

<sup>71</sup> See NSCC Letter at 6.

<sup>72</sup> 17 CFR 240.17Ad–22(e)(4)(i).

<sup>73</sup> 17 CFR 240.17Ad–22(e)(4)(i).

exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.<sup>74</sup>

Several commenters suggest that the proposal does not reflect the actual risk attributes of the securities to which it would apply.<sup>75</sup> For example, two commenters state that treating as Illiquid Securities all securities that are not listed on a “specified securities exchange,” which would be defined as a national securities exchange that has established listing services and is covered by industry pricing and data vendors, is not tailored to accurately capture securities that present the defined liquidation and marketability risks, noting that many large international companies’ securities are traded in the OTC marketplace.<sup>76</sup> One commenter states that the proposal is unwarranted because the existing margin has always been enough to cover a defaulting Member’s losses, and accordingly, the current margin should be enough to cover the risks presented by Members’ portfolios.<sup>77</sup> One commenter states that NSCC has not justified a \$300 million market capitalization requirement for all exchange-listed stocks, and that this threshold does not consider the actual risks facing NSCC.<sup>78</sup> Another commenter states that ETPs and ADRs, which are products typically offered by large banks and brokerages, are excluded from the definition of an Illiquid Security, and that such exclusion shows a bias against small Members.<sup>79</sup> In addition, one commenter states that the proposal bears no relationship to a Member’s actual credit rating.<sup>80</sup>

In response to comments regarding treating as Illiquid Securities all securities that are not listed on a national securities exchange that has established listing services and is covered by industry pricing and data

vendors, NSCC states that securities that trade on a national securities exchange tend to trade with greater frequency in higher volumes than other venues, and national securities exchanges are subject to price and volume reporting regimes that assure greater accuracy of price and volume information.<sup>81</sup> NSCC further states that securities that are not listed on a national securities exchange may trade without being registered with the Commission and have less reliable price and volume information.<sup>82</sup>

In addition, NSCC explains that it included the second element of the proposed definition’s criteria, “covered by industry pricing and data vendors,” to ensure that NSCC is able to access and utilize quality third party pricing data to derive returns in order to calculate the appropriate margin.<sup>83</sup> NSCC further explains that the commercial availability of reliable information from independent, third party sources is critical to ensuring that NSCC can rely on end of day and intraday pricing in order to accurately manage risk positions consistent with its Rules.<sup>84</sup> Accordingly, NSCC believes that the use of “specified securities exchange” as defined in the proposal is an appropriate basis for determining whether a security is an Illiquid Security.<sup>85</sup>

Regarding the comments that many large international companies’ securities are traded in the OTC marketplace, NSCC acknowledges that the proposed definition of Illiquid Securities would cover the securities of some large, well-capitalized issuers not listed on a specified securities exchange.<sup>86</sup> However, NSCC states that the proposal is designed to appropriately address risk in part by grouping Illiquid Securities by price level, and sub-penny securities by long or short position.<sup>87</sup> Accordingly, not all Illiquid Securities would be given the same haircut or have the same margin requirements or result in a higher deposit than would be required under the current Rules.<sup>88</sup>

The Commission understands that, as described above, the proposal as a whole is designed to enable NSCC to more effectively address the risks presented by Members’ positions in securities with illiquid characteristics, including Illiquid Securities and UITs. As such, NSCC seeks to produce margin

levels that are more commensurate with the particular risk attributes of these securities, including the risk of increased transaction and market costs to NSCC to liquidate or hedge due to lack of liquidity or marketability of such positions. The Commission believes that the proposal would improve NSCC’s ability to consider, and produce margin levels commensurate with, the risks and particular attributes of Illiquid Securities and UITs.

First, by expanding and refining the definition of Illiquid Securities, the Commission believes that NSCC should be able to better identify those securities that may exhibit illiquid characteristics. Specifically, the proposal would ensure that three separate categories of securities are included in the definition of an Illiquid Security, and all three categories are calibrated to take into account specific and objective factors that are indicative of a security’s liquidity. For example, the second category of the proposed definition of an Illiquid Security would apply an illiquidity ratio to micro-cap securities and ADRs to get a more precise measure of their liquidity. Moreover, consistent with NSCC’s current practice for determining the margin for securities in an initial public offering, the third category of the proposed definition would consider the frequency of a security’s trading, to take into account that infrequent trading reduces the amount of price and volume information available to measure market risk.

In addition, the Commission believes that the proposed changes to the haircut-based volatility charges to base the calculation on the price level and risk profile of the applicable security would help NSCC to more effectively measure the risks that are particular to Illiquid Securities and UITs. Based on its analysis of the backtesting and impact analyses and its understanding of the proposed definition of an Illiquid Security, the Commission believes that the differentiated haircut percentages are reasonably designed to cover NSCC’s exposures to Members more appropriately than the current fixed percentage approach because NSCC designed the variable haircut percentages to reflect specific risks presented by Illiquid Securities by price level and by UITs. The Commission also believes that it is reasonable to separate long and short positions of sub-penny securities in order to reflect the different risk levels presented by such positions.

Taken together, the Commission believes that the proposal should permit NSCC to calculate a haircut-based volatility charge that is more

<sup>74</sup> 17 CFR 240.17Ad-22(e)(6)(i).

<sup>75</sup> See Alpine Letter; OTC I Letter; STANY Letter; and Letter from Daniel Zinn, General Counsel and Cass Sanford, Associate General Counsel, OTC Markets Group Inc. (July 21, 2020) (“OTC II Letter”).

<sup>76</sup> See OTC II Letter at 5; STANY Letter at 3.

<sup>77</sup> See Lek Letter at 1. Lek also states that net capital should be considered solely as additional insurance for agency firms, and that NSCC should include the margin that Lek collects from its customers when computing Lek’s capital. *Id.* However, this issue is beyond the scope of this proposal and is not addressed herein.

<sup>78</sup> See STANY Letter at 3.

<sup>79</sup> See SIPA Letter.

<sup>80</sup> See Alpine Letter at 4.

<sup>81</sup> See NSCC Letter at 8.

<sup>82</sup> See NSCC Letter at 8–9.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

appropriately designed to address the risks presented by the positions in Illiquid Securities and UITs.

In response to the comment questioning whether the proposal is necessary because “the existing margin has always been enough to cover”<sup>89</sup> a defaulting Member’s losses, the Commission does not agree that the fact that margin has historically been sufficient to cover a defaulting Member’s losses obviates the need for the changes proposed in the Advance Notice. As an initial matter, credit exposures are not measured only by those events that have actually happened, but also include events that could potentially occur in the future. For this reason, a risk-based margin system is required to cover potential future exposure to participants.<sup>90</sup> Potential future exposure is, in turn, defined as the maximum exposure estimated to occur at a future point in time with an established single-tailed confidence level of at least 99% with respect to the estimated distribution of future exposure.<sup>91</sup> Thus, to be consistent with its regulatory requirements, NSCC must consider potential future exposure, which includes, among other things, losses associated with the liquidation of a defaulted member’s portfolio. As demonstrated by the backtesting analysis discussed above, under its current margin methodology, NSCC is not achieving its 99% targeted confidence level for asset groups that are Illiquid Securities. Based on its review of the Advance Notice, in conjunction with the Commission’s supervisory observations, the Commission believes that the proposed changes would better enable NSCC to collect margin commensurate with the different levels of risk that Members pose to NSCC as a result of their particular trading activity in Illiquid Securities and UITs. Further, the Commission believes the amount of margin NSCC would collect under the proposed changes would help NSCC better manage its credit exposures to its Members and those exposures arising from its payment, clearing, and settlement processes.

<sup>89</sup> See Lek Letter at 1.

<sup>90</sup> 17 CFR 240.17Ad-22(e)(6)(iii) (requiring a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, calculates margin sufficient to cover its potential future exposure to participants in the interval between the last margin collection and the close out of positions following a participant default).

<sup>91</sup> 17 CFR 240.17Ad-22(a)(13).

In response to the comment asserting that a \$300 million market capitalization requirement for all exchange-listed stocks is not justifiable, the Commission disagrees with this interpretation of the proposal. Not all securities that fall under the market capitalization threshold under the proposal would be deemed to be Illiquid Securities or require a higher margin compared to the current Rules. As set forth in the proposal, the determination of whether a micro-cap security is an Illiquid Security does not rely solely on capitalization. By contrast, under the proposal, the initial determination of whether a security is a micro-cap security would employ a \$300 million threshold,<sup>92</sup> and a micro-cap security would then be subject to the illiquidity ratio test described in Section II.C(ii)3 above to take into account the security’s liquidity and determine whether it is an Illiquid Security. Therefore, depending on the liquidity of the issuer, there could be instances where a security with less than \$300 million in market capitalization would not constitute an Illiquid Security.

In response to the comments stating that treating all securities that are not listed on a specified exchange as Illiquid Securities is not tailored to accurately capture securities that present the defined liquidation and marketability risks, the Commission disagrees. This proposal does not change the current treatment of securities that are not listed on a specified securities exchange, because the current Rules define Illiquid Securities to include securities that are not traded on a national securities exchange. Further, the Commission believes that this distinction is appropriate. Securities that are quoted on the OTC market differ from those listed on national securities exchanges.<sup>93</sup> In particular, the average OTC security issuer is smaller, and their securities trade less, on average, than securities traded on a national securities exchange.<sup>94</sup> Moreover, issuers of quoted OTC securities tend to have a lower market capitalization than those with securities listed on a national securities

<sup>92</sup> NSCC represents that the initial threshold is set at \$300 million because it is based on prevailing thresholds for market capitalization categories in the industry. See NSCC Letter at 9; Notice of Filing, *supra* note 5, 85 FR at 21040 n. 24 (citing, as an example of the prevailing views, <https://www.sec.gov/reportspubs/investor-publications/investorpubs/microcapstockhtm.html>).

<sup>93</sup> Publication or Submission of Quotations Without Specified Information, Final Rule; Exchange Act Release No. 89891, at 218 (September 16, 2020), available at <https://www.sec.gov/rules/final/2020/33-10842.pdf>.

<sup>94</sup> See *id.*

exchange,<sup>95</sup> and many quoted OTC securities are illiquid.<sup>96</sup> Quoted OTC securities are characterized by significantly lower dollar trading volumes than listed stocks, even for securities of similar size as measured by market capitalization.<sup>97</sup>

In response to the comment that ETPs and ADRs are exempt from the definition of Illiquid Securities, the Commission disagrees. The Proposed Rule Change would not exclude all ETPs and ADRs by category from the definition of Illiquid Securities. Instead, the proposal would only exclude ETPs and ADRs when calculating the illiquidity ratio threshold for purposes of the second test under the definition of an Illiquid Security (*i.e.*, the median of the illiquidity ratio threshold based on non-micro-cap common stocks). An ETP or an ADR could be determined to be an Illiquid Security, and NSCC would apply a haircut to ETPs and ADRs in the same manner as other Illiquid Securities.

Finally, in response to the comment that the proposal bears no relationship to a Member’s actual credit rating, the Commission disagrees that such a relationship is necessary in order to design an accurate and appropriate margin methodology for the securities that a Member holds. Neither the proposal, nor NSCC’s margin methodology more broadly, is designed to calculate the volatility component based on a Member’s credit rating but rather on the risks presented by each security. Therefore, the Member’s credit rating is not relevant to the determination of the appropriate volatility component of the margin for a particular security.<sup>98</sup>

Accordingly, the Commission believes the proposal is consistent with Rule 17Ad-22(e)(6)(i) under the Exchange Act because it is designed to assist NSCC in maintaining a risk-based

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 220.

<sup>97</sup> See *id.* at 218–19.

<sup>98</sup> The Alpine Letter also questions whether the Credit Risk Rating Matrix (“CRRM”) will continue to be used in the margin calculation for Illiquid Securities. See Alpine Letter at 3. NSCC responds that the calculation of the appropriate haircuts for Illiquid Securities, including calculation of the appropriate volume thresholds, does not consider the Member’s CRRM rating. The CRRM rating currently is used in determining the Illiquid Position subject to NSCC’s Illiquid Charge, which will be eliminated upon implementation of the proposal. See NSCC Letter at 7–8. Going forward, the CRRM would continue to be used in general credit risk monitoring of members, but would not be used for the determination of the volatility component of the margin for a particular security. See Securities Exchange Act Release No. 80734 (May 19, 2017), 82 FR 24177 (May 25, 2017) (order approving proposed rule changes to enhance the CRRM).



margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of portfolios that exhibit illiquid risk attributes.<sup>99</sup>

*D. Consistency With Rule 17Ad–22(e)(23)(ii)*

Rule 17Ad–22(e)(23)(ii) under the Exchange Act requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the covered clearing agency.<sup>100</sup>

The majority of commenters express concerns regarding the method for determining the proposed volatility component for Illiquid Securities being confidential. Several commenters express concern that the proposal does not explain how the haircut-based volatility charge will be calculated and that the proposal does not allow Members to review the proposed margin equations, models, and calculations.<sup>101</sup> Other commenters state that the proposal does not allow Members to predict the financial consequences and operating impacts of their activities, and the impact on their liquidity needs.<sup>102</sup>

In response, NSCC states that the language of the proposal is reasonably transparent and clear enough to enable Members to determine the Member's Required Fund Deposit.<sup>103</sup> NSCC states that the proposed parameters are definitive and non-discretionary to enable application on an algorithmic basis.<sup>104</sup> For example, a security that is an ADR or has a micro-capitalization of less than \$300 million would be subject

to the illiquidity ratio test, which would be provided in the Rules, to determine whether it is an Illiquid Security. In addition, NSCC states that, because haircuts would be applied according to the price level of the Illiquid Securities, Members should be able to more easily determine the applied margin impact per the current market price of the security.<sup>105</sup>

NSCC also represents that it maintains the NSCC Risk Management Reporting application on the Participant Browser Service (“PBS”) and the NSCC Risk Client Portal (“Portal”) to improve transparency of Members' Clearing Fund requirements.<sup>106</sup> NSCC states that the PBS is a member-accessible website portal for accessing reports and other disclosures. NSCC further states that the Risk Management Reporting application enables a Member to view and download Clearing Fund requirement information and component details, including issue-level Clearing Fund information related to start of day volatility charges and mark-to-market, intraday exposure, and other components.<sup>107</sup> NSCC represents that the application enables a Member to view, for example, a portfolio breakdown by asset type, including the amounts attributable to the parametric VaR model and the amounts associated with Illiquid Securities.<sup>108</sup> NSCC also represents that Members are able to view and download spreadsheets that contain market amounts for current clearing positions and the associated volatility charges.<sup>109</sup>

In addition, NSCC represents that the Portal provides members the ability, for information purposes, to view and analyze certain risks relating to their portfolio, including calculators to assess the risk and clearing fund impact of certain activities and to compare their portfolio to historical and average values. For example, it allows Members to review both hourly and 15-minute intra-day snapshots to monitor fluctuations in the volatility and exposure in their portfolios to help Members to anticipate potential intraday margin calls. The intervals are available through 7:00 p.m. to provide additional reports that may help Members to forecast next-day margin requirements.<sup>110</sup>

NSCC further represents that it maintains the NSCC Client Calculator on the Portal that provides functionality

to Members to enter ‘what-if’ position data and to recalculate their volatility charges to determine margin impact pre-trade.<sup>111</sup> NSCC specifically states that this calculator allows Members to see the impact to the volatility charge if specific transactions are executed, or to anticipate the impact of an increase or decrease to a current clearing position.<sup>112</sup> NSCC represents that the Client Calculator portfolio detail can be downloaded to modify a current margin portfolio, and then allow Members to upload the portfolio to run a margin calculation, and permit Members to view position level outputs in order to make informed risk management and execution decisions.<sup>113</sup>

Finally, NSCC states that it conducted member outreach in connection with the proposal described in the Advance Notice. NSCC represents that, in 2019 and 2020, NSCC distributed three rounds of impact studies to Members impacted by the change to communicate revisions to the methodology and discuss specific portfolio impacts by reviewing charts and quantitative results.<sup>114</sup> NSCC further represents that it has performed outreach to Members with details for this proposal for the past two years, which allowed Members to understand and ask questions about the proposal.<sup>115</sup>

NSCC states that it has also posted an NSCC Risk Margin Component Guide (“Guide”) on the Portal which provides descriptions of some of the components used in NSCC's current risk-based methodology, including the volatility charges, mark-to-market charges, fail charges for CNS transactions, a charge for Family-Issued Securities to mitigate wrong way risk, a charge for Illiquid Positions, a charge to mitigate day over day margin differentials, a coverage component and a backtesting charge.<sup>116</sup> NSCC represents that the Guide will be updated to reflect the changes in methodology set forth in the proposal.<sup>117</sup>

The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(23)(ii) and is designed to provide sufficient information to enable Members to identify and evaluate the risks and other material costs they incur by participating in NSCC. The changes described in the proposal would be reflected in NSCC's Rules and therefore publicly available to NSCC's Members

<sup>99</sup> 17 CFR 240.17Ad–22(e)(6)(i).

<sup>100</sup> 17 CFR 240.17Ad–22(e)(23)(ii).

<sup>101</sup> See Alpine Letter at 2; SIPA Letter at 4–5; OTC I Letter at 2–3; OTC II Letter at 3–4; Wilson II Letter at 7. Wilson II also asserts that NSCC has failed to meet the requirements of Rule 17Ad–22(e)(23)(iii) for failing to quantify the current inadequate market capitalization, median illiquidity ratios, and how those factors would be improved under the proposal. However, Rule 17Ad–22(e)(23)(iii) requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to publicly disclose relevant basic data on transaction volume and values. This rule does not require a covered clearing agency to disclose the specific information that the commenter seeks because the information described by the commenter is not the basic data on transaction volumes and values required by the rule. Moreover, NSCC publicly provides data on transaction volumes and values in its quantitative disclosures, which are available at <https://www.dtcc.com/legal/policy-and-compliance>.

<sup>102</sup> See Letter from James C. Snow, President/CCO, Wilson-Davis & Co., Inc. (May 1, 2020) (“Wilson I Letter”) at 2–3; STANY Letter at 2.

<sup>103</sup> See NSCC Letter at 6.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See NSCC Letter at 7.

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

and prospective members for application to their own portfolios. Specifically, the proposed rule text would reflect the two sets of changes in the proposal. First, the proposed rule text would define the types of securities that would constitute “Illiquid Securities” as three particular categories of securities, as described in Section II.C(i), (ii), and (iii). By reviewing the definitions of an Illiquid Security, NSCC’s members should be able to understand the types of factors that would cause a security to be considered an Illiquid Security, all of which are ascertainable, such as its trading history (including whether it is traded on an exchange or not and, if so, on which exchange), its market capitalization, and the type of security (*i.e.*, whether it is an ADR). The specific parameters of the illiquidity ratio test would also be reflected in NSCC’s Rules, thereby enabling a Member to determine whether a security that is an ADR or has a micro-capitalization of less than \$300 million would be an Illiquid Security.

Second, the proposed rule text would provide that NSCC would apply a haircut to Illiquid Securities to determine the appropriate volatility component, with Illiquid Securities grouped by price level to determine the appropriate haircut to apply to a particular security. The proposed rule text would further specify that the haircut percentage would be the highest of the three percentages as provided in Section II.D(i), and would be determined at least annually.

Additionally, if a Member had questions with respect to a particular security, it could use the various client-facing tools described above to determine whether a security would be considered an Illiquid Security. Taken together, the Division believes that the proposal, which would be reflected in NSCC’s Rules, in conjunction with the various client-facing tools, provides sufficient information to Members to understand the operation of the haircut-based volatility charges and how such charges would apply to particular transactions. The Commission further believes that NSCC provided sufficient information to Members to identify and evaluate the risks and other material costs they would incur due to securities with illiquid characteristics under the proposal.

For these reasons, the Commission disagrees with the comments stating that the proposal lacks details and does not explain how the haircut-based volatility charge will be calculated, and that the proposal does not allow Members to predict the impact on their activities. The Commission

acknowledges that, as some commenters have noted, the proposal does not provide or specify the actual models or calculations that NSCC would use to determine the appropriate haircut or what constitutes an Illiquid Security. However, when adopting the CCA Standards, the Commission declined to adopt a commenter’s view that a covered clearing agency should be required to provide, at least quarterly, its methodology for determining initial margin requirements at a level of detail adequate to enable participants to replicate the covered clearing agency’s calculations, or, in the alternative, that the covered clearing agency should be required to provide a computational method with the ability to determine the initial margin associated with changes to each respective participant’s portfolio or hypothetical portfolio, participant defaults and other relevant information. The Commission stated that “[m]andating disclosure of this frequency and granularity would be inconsistent with the principles-based approach the Commission is taking in Rule 17Ad–22(e).”<sup>118</sup> Consistent with that approach, the Commission does not believe that Rule 17Ad–22(e)(23)(ii) would require NSCC to disclose its actual margin methodology, so long as NSCC has provided sufficient information for its Members to understand the potential costs and risks associated with participating in NSCC for clearing Illiquid Securities.

For the reasons discussed above, the Commission believes that the proposals in the Advance Notice would enable NSCC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide sufficient information to enable Members to identify and evaluate the risks, fees, and other material costs they incur as NSCC’s Members, consistent with Rule 17Ad–22(e)(23)(ii).<sup>119</sup>

#### IV. Conclusion

*It is therefore noticed*, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission DOES NOT OBJECT to Advance Notice (SR–NSCC–2020–802) and that NSCC is AUTHORIZED to implement the proposal as of the date of this notice or the date of an order by the Commission approving proposed rule change SR–NSCC–2020–003, whichever is later.

<sup>118</sup> See Standards for Covered Clearing Agencies, *supra* note 54, 81 FR at 70845.

<sup>119</sup> 17 CFR 240.17Ad–22(e)(23)(ii).

By the Commission.

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90381; File No. SR–CboeBZX–2020–080]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Add Certain Fees Related to the Listing and Trading of Options Contracts on the Mini-SPX Index (“XSP”) and Update Certain Other Language in the Fee Schedule

November 9, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on November 2, 2020, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) proposes to add certain fees related to the listing and trading of options contracts on the Mini-SPX Index (“XSP”) and update certain other language in the fee schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), 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

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

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

On November 2, 2020, the Exchange's equity options platform ("BZX Options") plans to begin listing XSP options for trading.<sup>3</sup> Accordingly, the Exchange proposes to amend its Fee Schedule for BZX Options, effective November 2, 2020, to: (1) Adopt fee codes for XSP options that add or remove liquidity on the Exchange or are routed away from the Exchange; and (2) update applicable fee codes for certain volume tiers to include fee codes for XSP options. Additionally, the Exchange proposes to update the fees schedule to reflect the recent adoption of the Penny Program on a permanent basis.

Adoption of Fee Codes for Orders in XSP

The Exchange first proposes to adopt fee codes for various orders in XSP options in the Fees and Associated Fees table in the Fee Schedule, as follows:

- Proposed fee code XA is appended to all Professional orders in XSP that add liquidity and are provided a rebate of \$0.25 per contract;
- Proposed fee code XC is appended to all Customer orders in XSP that remove liquidity and are assessed a fee of \$0.50 per contract;
- Proposed fee code XF is appended to all Firm, Broker Dealer and Joint Back Office ("JBO") orders in XSP that add liquidity and are provided a rebate of \$0.25 per contract;
- Proposed fee code XM is appended to all Market Maker orders in XSP that add liquidity and are provided a rebate of \$0.29 per contract;
- Proposed fee code XN is appended to all Away Market Maker orders in XSP that add liquidity and are provided a rebate of \$0.26 per contract;
- Proposed fee code XO is appended to all Customer orders in XSP that are routed away from the Exchange and executed at another exchange and are assessed a fee of \$0.29 per contract. The Exchange notes that XSP is a proprietary product which is traded exclusively on the Exchange and the Exchange's

affiliated options exchange, Cboe Exchange, Inc. ("Cboe Options"),<sup>4</sup> therefore, orders in XSP are routed to execute on Cboe Options;

- Proposed fee code XP is appended to all Non-Customer orders in XSP that remove liquidity and are assessed a fee of \$0.50 per contract;
- Proposed fee code XR is appended to all Non-Customer orders in XSP that are routed away from the Exchange and executed at another exchange and are assessed a fee of \$0.90 per contract; and
- Proposed fee code XY is appended to all Customer orders in XSP that add liquidity and are provided a rebate of \$0.25 per contract.

Addition of XSP Fee Codes to Volume Tiers

The Exchange next proposes to add certain fee codes for XSP, as proposed, to the list of fee codes applicable to certain volume tiers currently in the Fee Schedule. The proposed rule change adds fee code XY (Customer orders in XSP that add liquidity) to the list of fee codes in footnote 1<sup>5</sup> applicable to the Customer Penny Add Volume<sup>6</sup> Tiers.<sup>7</sup> Currently, the eight Customer Penny Add Volume Tiers provide Members' orders yielding the applicable fee codes (currently, PY, appended to Customer orders that add liquidity in Penny Program Securities) an opportunity to receive an additional rebate, ranging from \$0.35 to \$0.53 per contract, where a Member reaches certain volume thresholds (by submitting both Penny and non-Penny Program orders) over OCV<sup>8</sup> and/or TCV<sup>9</sup> that vary per tier.

<sup>4</sup> The Exchange notes that, on November 2, 2020, the Exchange's affiliated options exchange, Cboe EDGX Exchange, Inc. ("EDGX Options"), plans to delist XSP options. The Exchange's affiliated options exchange, Cboe C2 Exchange, Inc. ("C2") may also list and trade XSP options but does not currently do so.

<sup>5</sup> And appends footnote 1 to fee code XY in the Fee Codes and Associated Fees table.

<sup>6</sup> The Exchange adds the term "Volume" to the title of this tier in order to make it consistent with the titles of the Penny Add Volume Tiers applicable to other market participant orders (e.g., the Market-Maker Penny Add Volume Tiers).

<sup>7</sup> The Exchange also proposes to update the title of each of the Penny Pilot Tiers and Non-Penny Pilot Tiers to remove the term "Pilot" in order to reflect the adoption of the Penny Pilot Program on a permanent basis (as described in detail below) and to additionally reflect the proposed inclusion, and any future potential inclusion, of classes with a minimum increment of a penny that are not in the Penny Interval Program (such as XSP).

<sup>8</sup> "OCC Customer Volume" or "OCV" means the total equity and ETF options volume that clears in the Customer range at the Options Clearing Corporation ("OCC") for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

<sup>9</sup> "TCV" means total consolidated volume calculated as the volume reported by all exchanges

The proposed rule change adds fee code XF (Firm/Broker Dealer/JBO orders in XSP that add liquidity) to the list of fee codes in footnote 2<sup>10</sup> applicable to the Firm, Broker Dealer, and Joint Back Office Penny Add Volume Tiers. Currently, the two Firm, Broker Dealer, and Joint Back Office Penny Add Volume Tiers provide Members' orders yielding the applicable fee codes (currently, PF, appended to Firm/Broker Dealer/JBO orders that add liquidity in Penny Program Securities) an opportunity to receive an additional rebate of \$0.38 or \$0.46 per contract, where a Member reaches certain volume thresholds (by submitting both Penny and non-Penny Program orders) over average OCV that vary per tier.

The proposed rule change adds fee codes XM (Market Maker orders in XSP that add liquidity) and XN (Away Market Maker orders in XSP that add liquidity) to the list of fee codes in footnote 4<sup>11</sup> applicable to the NBBO Setter Tiers. Currently, the five NBBO Setter Tiers provide Members' orders yielding the applicable fee codes (currently, PN and PM, appended to Away Market Maker and Market Maker orders, respectively, that add liquidity in Penny Program Securities) an opportunity to receive an additional rebate, ranging between \$0.01 and \$0.05 per contract, where a Member reaches certain volume thresholds (by submitting both Penny and non-Penny Program orders) over average OCV that vary per tier.

The proposed rule change also adds fee code XM to the list of fee codes in footnote 6<sup>12</sup> applicable to the Market Maker Penny Add Volume Tiers. Currently, the ten Market Maker Penny Add Volume Tiers provide Members' orders yielding the applicable fee codes (currently, PM) an opportunity to receive an additional rebate, ranging between \$0.33 and \$0.46 per contract, where a Member reaches certain volume thresholds (by submitting both Penny and non-Penny Program orders) over average OCV and/or TCV that vary per tier.

The proposed rule change adds fee code XA (Professional orders in XSP that add liquidity) to the list of fee codes

to the consolidated transaction reporting plan for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

<sup>10</sup> And appends footnote 2 to fee code XF in the Fee Codes and Associated Fees table.

<sup>11</sup> And appends footnote 4 to fee codes XM and XN in the Fee Codes and Associated Fees table.

<sup>12</sup> And appends footnote 6 to fee code XM in the Fee Codes and Associated Fees table.

<sup>3</sup> See Rule 29.11(a).

in footnote 9<sup>13</sup> applicable to the Professional Penny Add Volume Tiers. Currently, the four Professional Penny Add Volume Tiers provide Members' orders yielding the applicable fee codes (currently, PA, appended to Professional orders that add liquidity in Penny Program Securities) an opportunity to receive an additional rebate, ranging between \$0.42 and \$0.48 per contract, where a Member reaches certain volume thresholds (by submitting both Penny and non-Penny Program orders) over average OCV that vary per tier.

Lastly, the proposed rule change also adds fee code XN to the list of fee codes in footnote 10<sup>14</sup> applicable to the Away Market Maker Penny Add Volume Tiers. Currently, the two Away Market Maker Penny Add Volume Tiers provide Members' orders yielding the applicable fee codes (currently, PN) an opportunity to receive an additional rebate of \$0.38 and \$0.45 per contract, where a Member reaches certain volume thresholds (by submitting both Penny and non-Penny Program orders) over average OCV that vary per tier.

Overall, the Exchange believes the proposed additions of Customer, Professional, Firm/Broker Dealer/JBO, Market Maker and Away Market Maker orders in XSP to be eligible to receive rebates offered per the respective Penny Add Volume Tiers, as well as Market Maker and Away Market Maker orders in XSP to be eligible to receive rebates offered per the NBBO Setter Tiers, will provide Members an additional opportunity to receive an enhanced rebate for meeting the corresponding tier criteria. As a result, the proposed change provides an additional incentive for Members to increase their order flow to the Exchange, including their order flow that establishes a new NBBO, thereby contributing to a deeper and more liquid market and providing greater execution opportunities, which benefits all market participants by creating a more robust and well-balanced market ecosystem.

#### Updates Regarding Permanent Penny Program

The proposed rule change also updates the term "Penny Pilot" throughout the Fee Schedule to reflect the recent adoption of the pilot program on a permanent basis.<sup>15</sup> More specifically, April 1, 2020 the Commission approved an amendment

the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (the "OLPP") to make permanent the Penny Pilot Program, and the Exchange accordingly conformed its Rules to the OLPP Program by deleting Interpretation and Policy .01 to Rule 21.5 (the "Penny Pilot Rule"), replacing it with Rule 21.5(d) (Requirements for Penny Interval Program). As a result, the proposed rule change now updates the Fee Schedule to reflect the permanent Penny Program, as follows:

- Replaces "Pilot" with "Program", where applicable, in Standard Rates table and in the description of fee codes PA, PC, PF, PM, PN, PP, PY, RN and RQ in the Fee Codes and Associated Fees table;
- Amends the term "Penny Pilot Securities" to reflect the definition of "Penny Program Securities" in the Definition section and updates the definition to reflect Rule 21.5(d), which now governs the Penny Program; and
- Removes the term "Pilot" from the volume tiers in footnotes 1 through 3 and 6 through 13.<sup>16</sup>

The Exchange believes that the proposed rule change will provide additional clarity in the Fee Schedule by updating references to the current permanent Penny Program and the corresponding Rule that now governs the program. The Exchange notes that the proposed rule change does not alter the securities eligible for the Penny Program nor any of the rates currently assessed for Penny Program Securities.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>17</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>18</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5)<sup>19</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in

securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed fee codes in connection with orders in XSP options are reasonable, equitable and not unfairly discriminatory. Specifically, the Exchange believes the proposed fee codes for orders XSP are reasonable because they correspond with the current standard fee codes in place for orders in Penny Program Securities. The Exchange notes that, although XSP is not included in the Penny Program, it likewise trades in increments of \$0.01. As a result, the Exchange believes it is reasonable to: Offer a rebate of \$0.25 for Professional (XA), Firm/Broker Dealer/JBO (XF) and Customer (XY) orders that add liquidity in XSP as this is the standard rebate currently offered for Professional (PA), Firm/Broker Dealer/JBO (PF) and Customer (PY) orders that add liquidity in Penny Program securities; to assess a charge of \$0.50 for Customer (XC) and Non-Customer (XP) orders that remove liquidity in XSP as this is the standard fee currently assessed for Customer (PC) and Non-Customer (PP) that remove liquidity in Penny Program securities; to offer a rebate of \$0.29 for Market Maker orders that add liquidity in XSP (XM) as this is the standard rebate currently offered for Market Maker orders that add liquidity in Penny Program securities (PM); to offer a rebate of \$0.26 for Away Market Maker orders that add liquidity in XSP (XN) as this is the standard rebate currently offered for Away Market Maker orders that add liquidity in Penny Program securities (PN); and to assess a fee of \$0.90 in Non-Customer orders that are routed away in XSP (XR) as this is the standard fee currently assessed for Non-Customer orders routed away in Penny Program securities (RN). In addition to this, the Exchange believes that the proposed fee of \$0.29 assessed for Customer orders routed in XSP is reasonable because it combines the standard fee for Customer orders routed to Cboe Options (RP, which is assessed \$0.25) and the rate assessed by Cboe Options for Customer orders in XSP (\$0.04).<sup>20</sup> Specifically, the Exchange believes that the routing fee for Customer orders in XSP to Cboe Options is reasonable because it

<sup>13</sup> And appends footnote 9 to fee code XA in the Fee Codes and Associated Fees table.

<sup>14</sup> And appends footnote 10 to fee code XN in the Fee Codes and Associated Fees table.

<sup>15</sup> See Securities Exchange Act Release No. 89079 (June 17, 2020), 85 FR 37708 (June 23, 2020) (SR-CboeBZX-2020-051).

<sup>16</sup> See *supra* note 4.

<sup>17</sup> 15 U.S.C. 78f.

<sup>18</sup> 15 U.S.C. 78f(b)(4).

<sup>19</sup> 15 U.S.C. 78f.(b)(5).

<sup>20</sup> See Cboe Options Fees Schedule, Rate Table—All Products Excluding Underlying Symbol List A, fee code CC.

represents an approximation of the anticipated cost to the Exchange for routing orders to Cboe Options. The Exchange also notes that this combined rate is similar to the manner in which fee codes for routed Customer orders are currently provided in the Cboe Options Fees Schedule.<sup>21</sup> The Exchange notes too that routing through the Exchange is voluntary.

The Exchange also believes that it is equitable and not unfairly discriminatory to assess the different fees and rebates for different market participants' orders in XSP because, as described above, such standard fees and rebates are currently assessed for different market participants' orders in Penny Program securities. In addition to this, the Exchange believes that it is equitable and not unfairly discriminatory to generally provide higher enhanced rebates for Market Maker and Away Market Maker orders that add liquidity than for other market participant orders because Market Makers (including market makers at other exchanges), unlike other market participants, take on a number of obligations, including quoting obligations, that other market participants do not have. Further, these enhanced rebates offered to liquidity adding Market Makers and Away Market Maker orders are intended to incent increased provision of liquidity on the Exchange, thereby providing more trading opportunities for all market participants. An increase in general market making activity facilitates tighter spreads, which tend to signal additional corresponding increase in order flow from other market participants, ultimately incentivizing more overall order flow and improving liquidity levels and price transparency on the Exchange to the benefit of all market participants. Similarly, the Exchange believes that it is equitable and not unfairly discriminatory to provide a rebate for Customer, Firm/Broker Dealer/JBO and Professional orders that add liquidity because these participants also contribute order flow that enhances liquidity on the Exchange for the benefit of all market participants. For example, Customer liquidity benefits all market participants by providing more execution opportunities, in turn, attracting Market Maker order flow, which, as stated above, ultimately

enhances market quality on the Exchange to the benefit of all market participants. The Exchange also recognizes that Firms/Broker Dealers/JBOs can be an important source of liquidity when they facilitate their own customers' trading activity, thus, adding transparency and promoting price discovery to the benefit of all market participants, while Professionals generally provide a greater competitive stream of order flow (by definition, more than 390 orders in listed options per day on average during a calendar month), thus, providing increased competitive execution and improved pricing opportunities for all market participants. In addition to this, the Exchange believes that the proposed XSP fee amounts for each separate type of market participant are equitable and not unfairly discriminatory because they will be automatically and uniformly assessed to all such market participants, *i.e.* all Customer orders will be assessed the same amount, all Non-Customer orders will be assessed the same amount, all Professional orders will be assessed the same amount, and so on.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to apply fee codes XY, XF, XM, XA and XN to the respective Add Volume Penny Tiers, and XM and XN to the NBBO Setter Tiers, because the comparable corresponding fee codes for orders in Penny Program Securities are currently applied to such tiers and orders yielding those fee codes currently receive the additional rebates available. The Exchange believes that adding the proposed fee codes for orders in XSP to the corresponding Add Volume Penny Tiers, and NBBO Setter Tiers, is reasonably designed to incentivize Members to increase their overall order flow, including that which establishes a new NBBO, to meet the respective tiers in order to receive an additional rebate on their orders in XSP. As described above, different market participants provide distinct sources of liquidity to the Exchange, each of which contributes overall to supporting a more robust, well-balanced market ecosystem. Therefore, the Exchange believes it is reasonable to provide an additional opportunity for these market participants to receive a rebate on their qualifying orders in XSP as incentivize to increase order flow from each type of market participant.

Moreover, the Exchange believes that adding XSP fee codes as eligible for the additional rebates under the corresponding Add Volume Tiers, as well as the NBBO Setter Tiers, is equitable and not unfairly discriminatory because the rebates are

applied uniformly to all Members that submit orders in XSP yielding the applicable fee codes. The Exchange notes that the proposed addition of XSP fee codes as eligible to receive tiered pricing does not alter any of the current rebates offered under the Add Volume Penny Tiers or the NBBO Setter Tiers or any of the current criteria under such tiers, which therefore, does not impact any current opportunity for Members, nor any Member's ability, to reach the tiers.

Finally, the Exchange believes the proposed update to the Penny Program language and Rule reference in the Fee Schedule is reasonable, equitable and not unfairly discriminatory because it is intended to provide additional clarity in the Fee Schedule by updating references to the current permanent Penny Program and the corresponding Rule that now governs the program and does not alter the securities eligible for the Penny Program nor any of the rates currently assessed for Penny Program Securities.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange believes the proposed amendments to its Fee Schedule will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the XSP fee amounts for each separate type of market participant will be assessed equally to all such market participants. The Exchange notes that the same varying rates applicable to orders submitted by different market participants are currently in place for orders in Penny Program Securities (which, like XSP, trade in \$0.01 increments). While different fees are assessed to different market participants in some circumstances, the obligations and circumstances between these market participants differ, as discussed above. For example, Market Makers have quoting obligations that are not applicable to other market participants. In addition to this, the Exchange notes that all Members will continue to have the opportunity to meet the Add Volume Penny Tiers and the NBBO Setter Tiers and the rebates provided under each tier will be applied uniformly to Members' orders in XSP yielding the applicable fee codes.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in

<sup>21</sup> See generally Cboe Options Fees Schedule, Routing Fees table; see also Securities Exchange Act Release No. 87873 (December 31, 2019), 85 FR 754 (January 7, 2020) (SR-CBOE-2019-127), which explains that Cboe Options combines away market transaction fees, applicable transaction fees on Cboe Options and a \$0.15 routing charge for routed orders.

furtherance of the purposes of the Act because the proposed fees assessed and rebates offered apply to an Exchange proprietary product, which are traded exclusively on the Exchange and the Exchange's affiliated options exchange, Cboe Options.<sup>22</sup>

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>23</sup> and paragraph (f) of Rule 19b-4<sup>24</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2020-080 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBZX-2020-080. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use

only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2020-080 and should be submitted on or before December 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-25181 Filed 11-13-20; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-90384; File No. SR-BX-2020-032]

**Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing of Proposed Rule Change To Amend Options 4, Section 5, To Limit Short Term Options Series Intervals Between Strikes Which are Available for Quoting and Trading on BX**

November 9, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 6, 2020, Nasdaq BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission

("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Options 4, Section 5, "Series of Options Contracts Open for Trading." This proposal seeks to limit Short Term Options Series intervals between strikes which are available for quoting and trading on BX.

**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 Options 4, Section 5, "Series of Options Contracts Open for Trading." Specifically, this proposal seeks to limit the intervals between strikes for multiply listed equity options classes within the Short Term Options Series program that have an expiration date more than twenty-one days from the listing date.

Background

Today, BX's listing rules within Options 4, Section 5 permits the Exchange, after a particular class of options (call option contracts or put option contracts relating to a specific underlying stock, Exchange-Traded

<sup>22</sup> See *supra* note 4.

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>24</sup> 17 CFR 240.19b-4(f).

<sup>25</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Fund Share,<sup>3</sup> or ETN<sup>4</sup>) has been approved for listing and trading on the Exchange, to open for trading series of options therein. The Exchange may list series of options for trading on a

<sup>3</sup> Exchange-Traded Fund Share shall include shares or other securities that are traded on a national securities exchange and are defined as an “NMS stock” under Rule 600 of Regulation NMS, and that (i) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities, that hold portfolios of securities and/or financial instruments including, but not limited to, stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (the “Money Market Instruments”) (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments (ii) represent interests in a trust or similar entity that holds a specified non-U.S. currency or currencies deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust (“Currency Trust Shares”), (iii) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (“Commodity Pool ETFs”), (iv) represent interests in the SPDR® Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the ETFs Gold Trust, the ETFs Silver Trust, the ETFs Palladium Trust, the ETFs Platinum Trust or the Sprott Physical Gold Trust or (v) represents an interest in a registered investment company (“Investment Company”) organized as an open-end management company or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (“NAV”), and when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV (“Managed Fund Share”); provided the conditions within Options 4, Section 3(i)(A) and (B) are met. See Options 4, Section 3(i).

<sup>4</sup> Securities deemed appropriate for options trading shall include shares or other securities (“Equity Index-Linked Securities,” “Commodity-Linked Securities,” “Currency-Linked Securities,” “Fixed Income Index-Linked Securities,” “Futures-Linked Securities,” and “Multifactor Index-Linked Securities,” collectively known as “Index-Linked Securities” or “ETNs”) that are principally traded on a national securities exchange and an “NMS Stock” (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934), and represent ownership of a security that provides for the payment at maturity, as described within Options 4, Section 3(l)(i)(1)–(6). See Options 4, Section 3(l)(i).

weekly,<sup>5</sup> monthly<sup>6</sup> or quarterly<sup>7</sup> basis. Options 4, Section 5(d) sets forth the intervals between strike prices of series of options on individual stocks.<sup>8</sup> In

<sup>5</sup> The weekly listing program is known as the Short Term Options Series Program and is described within Supplementary Material .03 of Options 4, Section 5.

<sup>6</sup> The Exchange will open at least one expiration month for each class of options open for trading on the Exchange. See Options 4, Section 5(g). The monthly expirations are subject to certain listing criteria for underlying securities described within Options 4, Section 3. Monthly listings expire the third Friday of the month. The term “expiration date” when used in respect of a series of binary options other than event options means the last day on which the options may be automatically exercised. In the case of a series of event options (other than credit default options or credit default basket options) that are automatically exercised prior to their expiration date upon receipt by the Corporation of an event confirmation, the expiration date is the date specified by the listing Exchange; provided, however, that when an event confirmation is deemed to have been received by the Corporation with respect to such series of options, the expiration date will be accelerated to the date on which such event confirmation is deemed to have been received by the Corporation or such later date as the Corporation may specify. In the case of a series of credit default options or credit default basket options, the expiration date is the fourth business day after the last trading day for such series as such trading day is specified by the Exchange on which the series of options is listed; provided, however, that when an event confirmation is deemed to have been received by the Corporation with respect to a series of credit default options or single payout credit default basket options prior to the last trading day for such series, the expiration date for options of that series will be accelerated to the second business day following the day on which such event confirmation is deemed to have been received by the Corporation. “Expiration date” means, in respect of a series of range options expiring prior to February 1, 2015, the Saturday immediately following the third Friday of the expiration month of such series, and, in respect of a series of range options expiring on or after February 1, 2015 means the third Friday of the expiration month of such series, or if such Friday is a day on which the Exchange on which such series is listed is not open for business, the preceding day on which such Exchange is open for business. See The Options Clearing Corporation (“OCC”) By-Laws at Section 1.

<sup>7</sup> The quarterly listing program is known as the Quarterly Options Series Program and is described within Supplementary Material .04 of Options 4, Section 5.

<sup>8</sup> Except as otherwise provided in the Supplementary Material of Options 4, Section 5, the interval between strike prices of series of options on individual stocks will be: (1) \$2.50 or greater where the strike price is \$25.00 or less; (2) \$5.00 or greater where the strike price is greater than \$25.00; and (3) \$10.00 or greater where the strike price is greater than \$200.00.

The interval between strike prices of series of options on Exchange-Traded Fund Shares approved for options trading pursuant to Section 3(i) of this Options 4 shall be fixed at a price per share which is reasonably close to the price per share at which the underlying security is traded in the primary market at or about the same time such series of options is first open for trading on the Exchange, or at such intervals as may have been established on another options exchange prior to the initiation of trading on the Exchange.

Pursuant to Options 4, Section 5(e), notwithstanding any other provision regarding the interval of strike prices of series of options on

addition to those intervals, the Exchange may list series of options pursuant to the \$1 Strike Price Interval Program,<sup>9</sup> the \$0.50 Strike Program,<sup>10</sup> the \$2.50 Strike Price Program,<sup>11</sup> and the \$5 Strike Program.<sup>12</sup>

The Exchange’s proposal seeks to amend the listing of weekly series of options as proposed within new Supplementary Material .03(f) of Options 4, Section 5, by limiting the intervals between strikes in multiply listed equity options, excluding Exchange-Traded Fund Shares and ETNs, that have an expiration date more than twenty-one days from the listing date. This proposal does not amend monthly or quarterly listing rules nor does it amend the \$1 Strike Price Interval Program, the \$0.50 Strike Program, the \$2.50 Strike Price Program, or the \$5 Strike Program.

#### Short Term Options Series Program

Today, Supplementary Material .03 of Options 4, Section 5 permits BX to open for trading on any Thursday or Friday that is a business day (“Short Term Option Opening Date”) series of options on an option class that expires at the close of business on each of the next five Fridays that are business days and are not Fridays in which monthly options series or Quarterly Options Series expire (“Short Term Option Expiration Dates”), provided an option class has been approved for listing and trading on the Exchange.<sup>13</sup> Today, the

Exchange-Traded Fund Shares in this rule, the interval of strike prices on SPDR® S&P 500® ETF (“SPY”), iShares Core S&P 500 ETF (“IVV”), PowerShares QQQ Trust (“QQQ”), iShares Russell 2000 Index Fund (“IWM”), and the SPDR® Dow Jones® Industrial Average ETF (“DIA”) options will be \$1 or greater.

<sup>9</sup> The \$1 Strike Interval Program is described within Supplementary Material .01 of Options 4, Section 5.

<sup>10</sup> The \$0.50 Strike Interval Program is described within Supplementary Material .05 of Options 4, Section 5.

<sup>11</sup> The \$2.50 Strike Interval Program is described within Supplementary Material .02 of Options 4, Section 5.

<sup>12</sup> The \$5.00 Strike Interval Program is described within Supplementary Material .06 of Options 4, Section 5.

<sup>13</sup> The Exchange may have no more than a total of five Short Term Option Expiration Dates, not including any Monday or Wednesday SPY Expirations as provided below. If the Exchange is not open for business on the respective Thursday or Friday, the Short Term Option Opening Date will be the first business day immediately prior to that respective Thursday or Friday. Similarly, if the Exchange is not open for business on a Friday, the Short Term Option Expiration Date will be the first business day immediately prior to that Friday. With respect to Wednesday SPY Expirations, the Exchange may open for trading on any Tuesday or Wednesday that is a business day series of options on the SPDR S&P 500 ETF Trust (SPY) to expire on any Wednesday of the month that is a business day and is not a Wednesday in which Quarterly Options

Exchange may open up to thirty initial series for each option class that participates in the Short Term Option Series Program.<sup>14</sup> Further, if the Exchange opens less than thirty (30) Short Term Option Series for a Short Term Option Expiration Date, additional series may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying security moves substantially from the exercise price or prices of the series already opened.<sup>15</sup>

The Exchange may open for trading Short Term Option Series on the Short Term Option Opening Date that expire on the Short Term Option Expiration Date at strike price intervals of (i) \$0.50 or greater where the strike price is less than \$100, and \$1 or greater where the strike price is between \$100 and \$150 for all option classes that participate in

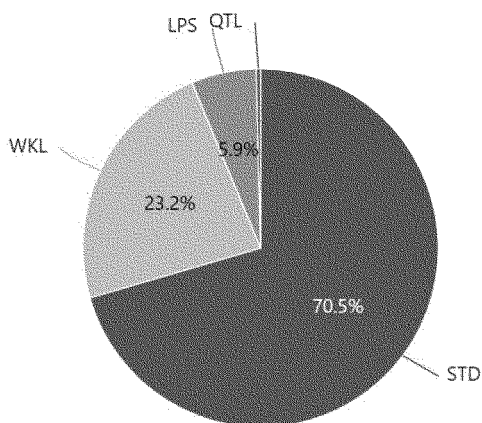
the Short Term Options Series Program; (ii) \$0.50 for option classes that trade in one dollar increments and are in the Short Term Option Series Program; or (iii) \$2.50 or greater where the strike price is above \$150. During the month prior to expiration of an option class that is selected for the Short Term Option Series Program (“Short Term Option”), the strike price intervals for the related non-Short Term Option (“Related non-Short Term Option”) shall be the same as the strike price intervals for the Short Term Option.<sup>16</sup>

The Exchange may select up to fifty currently listed option classes on which Short Term Option Series may be opened on any Short Term Option Opening Date. In addition to the fifty option class restriction, the Exchange may also list Short Term Option Series on any option classes that are selected by other securities exchanges that employ a similar program under their

respective rules. For each option class eligible for participation in the Short Term Option Series Program, the Exchange may open up to thirty Short Term Option Series for each expiration date in that class. The Exchange may also open Short Term Option Series that are opened by other securities exchanges in option classes selected by such exchanges under their respective short term option rules.<sup>17</sup>

BX notes that listings in the weekly program comprise a significant part of the standard listing in options markets. The below diagrams demonstrate the percentage of weekly listings as compared to Long-Term Option Series or LEAPs and quarterly listings in 2015 as compared to 2020. The weekly strikes increased 8.9% compound annual growth rate (“CAGR”) from 2015 as compared to a 4.3% CAGR for standard expirations using 3rd 2015 Friday expirations.

## 2015:



Series expire (“Wednesday SPY Expirations”). With respect to Monday SPY Expirations, the Exchange may open for trading on any Friday or Monday that is a business day series of options on the SPY to expire on any Monday of the month that is a business day and is not a Monday in which Quarterly Options Series expire (“Monday SPY Expirations”), provided that Monday SPY Expirations that are listed on a Friday must be

listed at least one business week and one business day prior to the expiration. The Exchange may list up to five consecutive Wednesday SPY Expirations and five consecutive Monday SPY Expirations at one time; the Exchange may have no more than a total of five Wednesday SPY Expirations and a total of five Monday SPY Expirations. Monday and Wednesday SPY Expirations will be subject to the

provisions of this Rule. See Supplementary Material .03 of Options 4, Section 5.

<sup>14</sup> See Supplementary Material .03 of Options 4, Section 5(c).

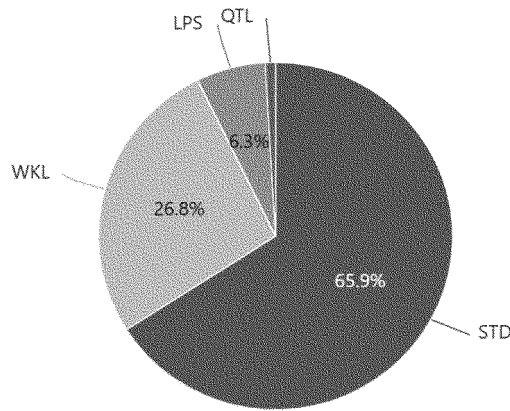
<sup>15</sup> See Supplementary Material .03 of Options 4, Section 5(d).

<sup>16</sup> See Options 4, Section 5(e).

<sup>17</sup> See Supplementary Material .03(a) of Options 4, Section 5.



2020:



Proposal

BX proposes to limit the intervals between strikes in options listed as part of the Short Term Option Series Program that have an expiration date more than twenty-one days from the listing date, by adopting proposed Supplementary Material .03(f) of

Options 4, Section 5 as well as proposed Supplementary Material .07 of Options 4, Section 5, with respect to listing Short Term Option Series in equity options, excluding Exchange-Traded Fund Shares and ETNs) (collectively “Strike Interval Proposal”). BX’s Strike Interval Proposal would limit the intervals between strikes by utilizing the

table proposed within Supplementary Material .07 of Options 4, Section 5. With the Strike Interval Proposal, BX would limit intervals between strikes for expiration dates of option series beyond twenty-one days utilizing the below three-tiered table which considers both the share price and average daily volume for the option series.<sup>18</sup>

| Tier | Average daily volume | Share price    |                        |                         |                          |                  |
|------|----------------------|----------------|------------------------|-------------------------|--------------------------|------------------|
|      |                      | Less than \$25 | \$25 to less than \$75 | \$75 to less than \$150 | \$150 to less than \$500 | \$500 or greater |
| 1    | greater than 5,000   | \$0.50         | \$1.00                 | \$1.00                  | \$5.00                   | \$5.00           |
| 2    | 1,000 to 5,000       | 1.00           | 1.00                   | 1.00                    | 5.00                     | 10.00            |
| 3    | 0 to 1,000           | 2.50           | 5.00                   | 5.00                    | 5.00                     | 10.00            |

The Share Price would be the closing price on the primary market on the last day of the calendar quarter. This value would be used to derive the column from which to apply strike intervals throughout the next calendar quarter. The Average Daily Volume would be the total number of options contracts traded in a given security for the applicable calendar quarter divided by the number of trading days in the applicable calendar quarter. Beginning on the second trading day in the first month of each calendar quarter, the Average Daily Volume shall be calculated by utilizing data from the prior calendar quarter based on Customer-cleared volume at OCC. For options listed on the first trading day of a given calendar quarter, the Average Daily Volume shall be calculated using the calendar quarter prior to the last trading calendar quarter.<sup>19</sup> In the event of a corporate

action, the Share Price of the surviving company would be utilized. These metrics are intended to align expectations for determining which strike intervals will be utilized. Finally, notwithstanding the limitations imposed by Options 4, Section 5 at proposed Supplementary Material .07, this Strike Interval Proposal does not amend the range of strikes that may be listed pursuant to Options 4, Section 5 at Supplementary Material .03, regarding the Short Term Option Series Program.

By way of example, if the Share Price for a symbol was \$142 at the end of a calendar quarter, with an Average Daily Volume greater than 5,000, thereby, requiring strike intervals to be listed \$1.00 apart, that strike interval would apply for the calendar quarter, regardless of whether the Share Price

changed to greater than \$150 during that calendar quarter.<sup>20</sup>

The proposed table within Supplementary Material .07 of Options 4, Section 5 takes into account the notional value of a security, as well as Average Daily Volume in the underlying stock, in order to limit the intervals between strikes in the Short Term Options listing program. The Exchange utilizes OCC Customer-cleared volume, as customer volume is an appropriate proxy for demand. The OCC Customer-cleared volume represents the majority of options volume executed on the Exchange that, in turn, reflects the demand in the marketplace. The options series listed on BX are intended to meet customer demand by offering an appropriate number of strikes. Non-Customer cleared OCC volume represents the supply side. The strike intervals for listing strikes in certain

<sup>18</sup> Additional information comparing the current listing program to this proposal is available at: <https://www.nasdaq.com/solutions/bx-options-strike-proliferation-proposal>.

<sup>19</sup> For example, options listed as of January 4, 2021 would be calculated on January 5, 2021 using

the Average Daily Volume from July 1, 2020 to September 30, 2020.

<sup>20</sup> The Exchange notes that any limits on intervals imposed by the Exchange’s Rules will continue to apply. In this example, the strikes would be in \$1 intervals up to \$150, which is the upper limit

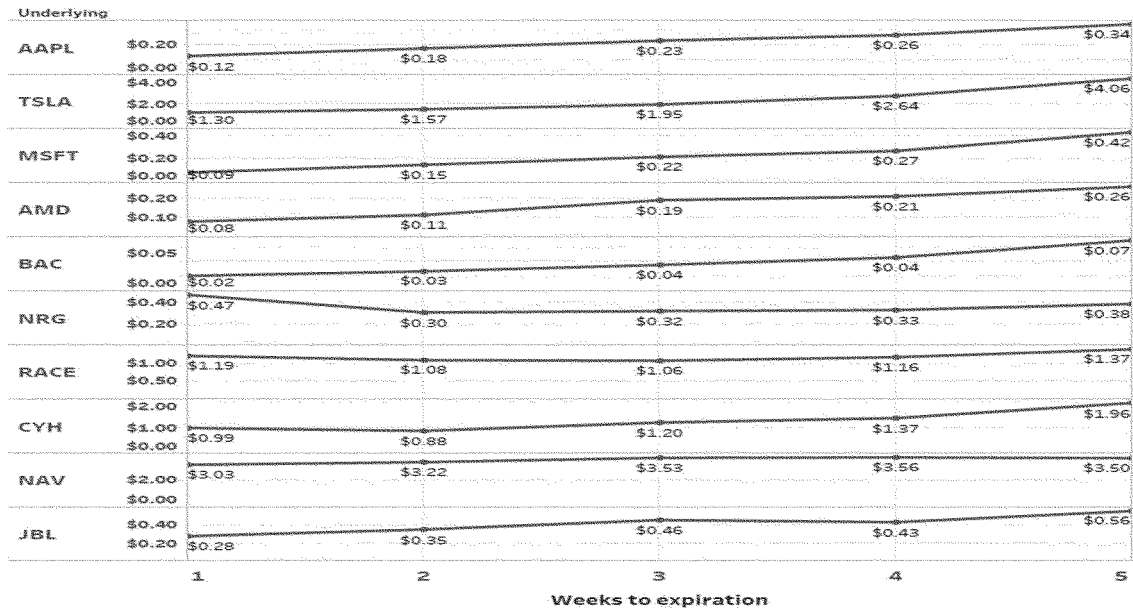
imposed by Supplementary Material .03(e) of Options 4, Section 5.

options are intended to remove repetitive and unnecessary strike listings across the weekly expiries. BX's Strike Interval Proposal seeks to reduce the number of strikes in the furthest

weeklies, where there exist wider markets and therefore lower market quality. Below are two tables which focus on data for 10 of the most and least actively traded symbols<sup>21</sup> and

demonstrate average spreads in weekly options during the month of August 2020.

**August 2020 Average Daily Spread by Expiration (aggregated by series)**



The proposed table within Supplementary Material .07 of Options 4, Section 5 is intended to distribute strike intervals in multiply listed equity options where there is less volume as measured by the Average Daily Volume tiers. Therefore, the lower the Average Daily Volume, the greater the proposed spread between strike intervals. Options

classes with higher volume contain the most liquid symbols and strikes, therefore the finer the proposed spread between strike intervals. Additionally, lower-priced shares have finer strike intervals than higher-priced shares when comparing the proposed spread between strike intervals.<sup>22</sup>

Today, weeklies are available on 16% of underlying products. The Exchange's Strike Interval Proposal curtails the density of strike intervals listed in series of options, without reducing the classes of options available for trading on BX. The Exchange's Strike Interval Proposal would reduce 2% of the total number of strikes that equates to 81,000 strikes.<sup>23</sup>

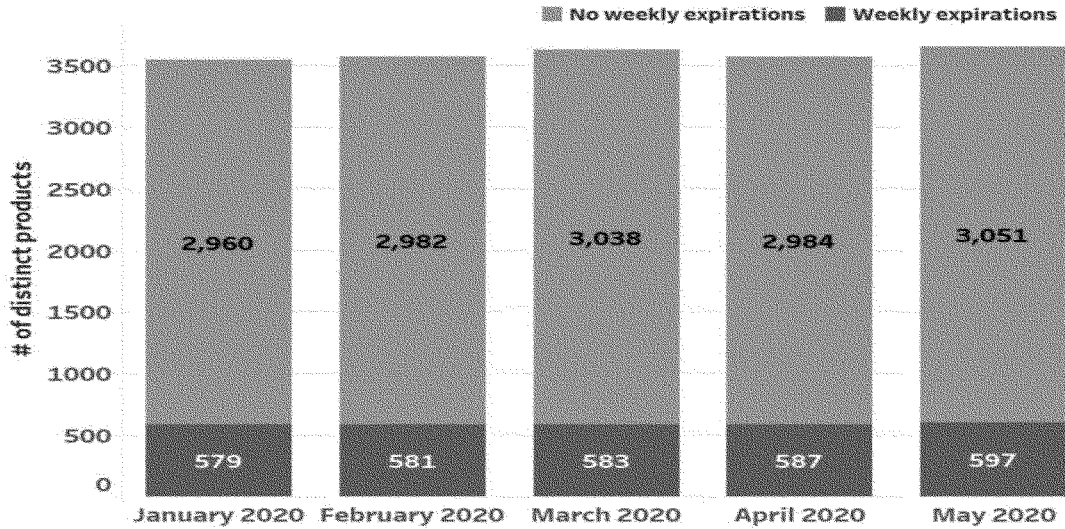
<sup>21</sup> The table represents stock in the following securities: Apple, Tesla, Microsoft Corporation, Advanced Micro Devices, Inc., Bank of America Corp., NRG Energy Inc., Ferrari NV, Community Health Systems Inc., Navistar International Corp, and Jabil Inc.

<sup>22</sup> The Exchange notes that it has discussed the proposed strike intervals with various members. The Exchange has gathered information regarding where trading in weeklies generally occurs to arrive at the proposed strike intervals.

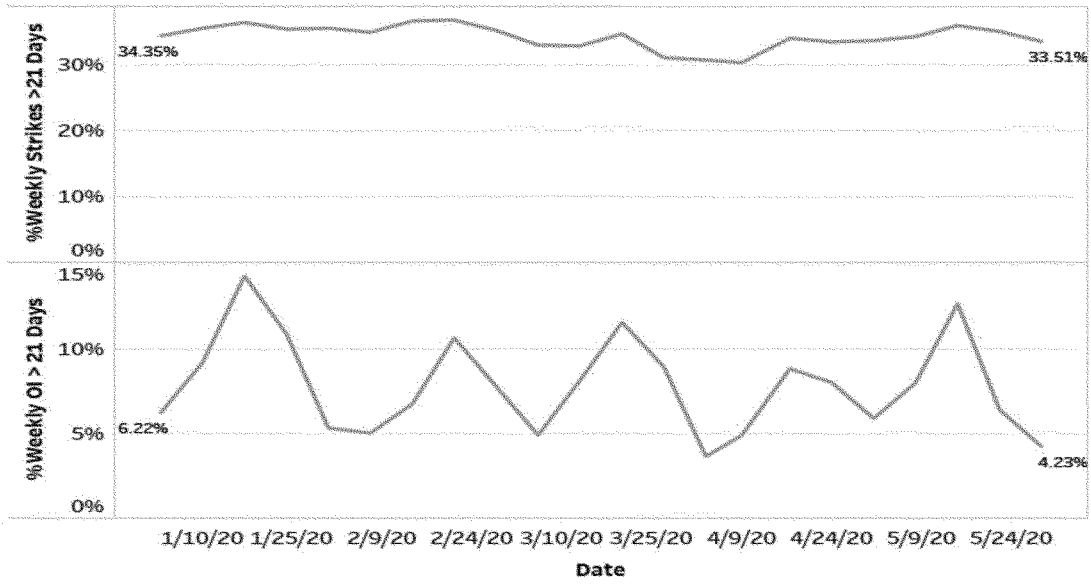
<sup>23</sup> The Exchange notes that this proposal is an initial attempt at reducing strikes and anticipates

filing additional proposals to continue reducing strikes. The above-referenced data, specifically the percentage of underlying products and percentage of and total number of strikes, are approximations and may vary slightly at the time of this filing.

# of distinct products with/without weekly expirations



Weekly Strikes and Open Interests Distribution

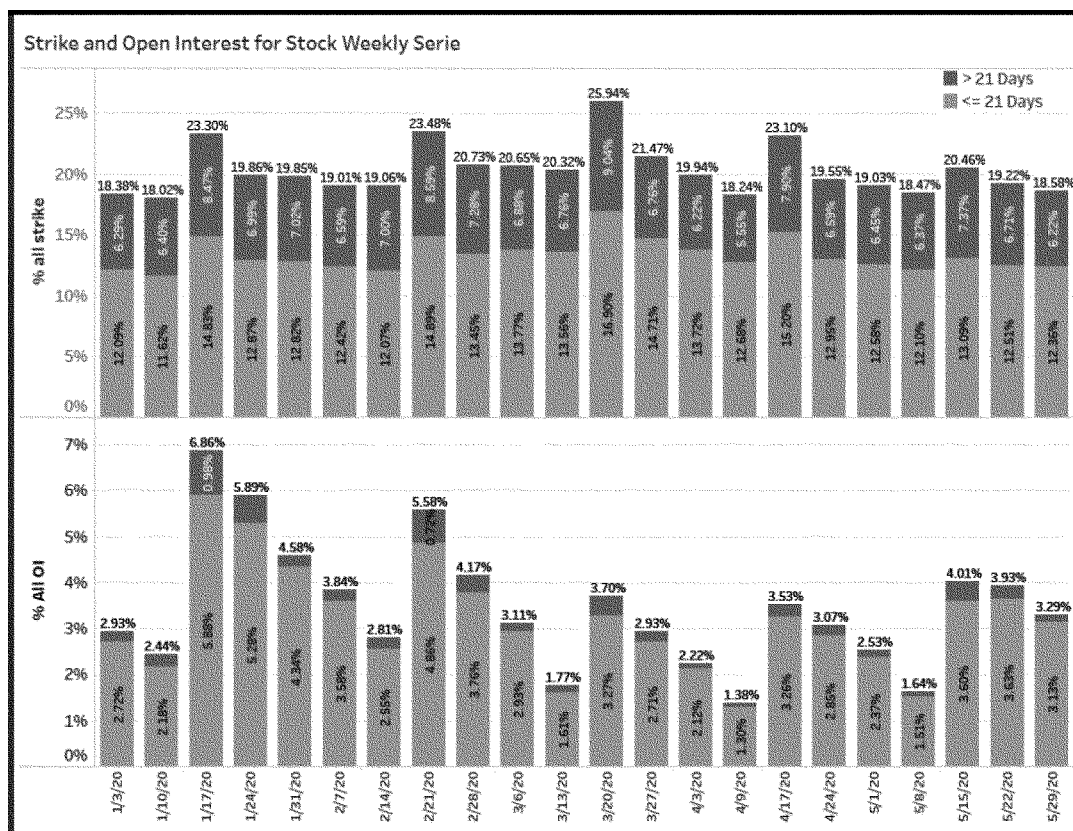


The above table represents the inconsistency of demand for series of

options beyond twenty-one calendar days.

BX's Strike Interval Proposal focuses on strikes in multiply listed equity

options, and excludes Exchange-Traded Fund Shares and ETNs, as the majority of strikes reside within equity options.



While the current listing rules permit BX to list a number of weekly strikes on its market, in an effort to encourage Market Makers to deploy capital more efficiently, as well as improve displayed market quality, BX's Strike Interval Proposal reduces the number of listed weekly options. As BX's Strike Interval Proposal seeks to reduce the number of weekly options that would be listed on its market in later weeks, Market Makers would be required to quote in fewer weekly strikes as a result of the Strike Interval Proposal. Specifically, the Strike Interval Proposal aims to reduce the density of strike intervals that would be listed in later weeks, by creating limitations for intervals between strikes which have an expiration date more than twenty-one days from the listing date. The table takes into account customer demand for certain options classes, by considering both the Share Price and the Average Daily Volume, to arrive at the manner which weekly strike intervals may be listed. The intervals for listing strikes in equity options is intended to remove certain strike intervals where there exist clusters of strikes whose characteristics closely resemble one another and, therefore, do not serve different trading

needs,<sup>24</sup> rendering these strikes less useful.

This Strike Interval Proposal serves to respond to comments received from industry members with respect to the increasing number of strikes that are required to be quoted by market makers in the options industry. BX requires Lead Market Makers and Market Makers to quote a certain amount of time in the trading day in their assigned options series to maintain liquidity in the market.<sup>25</sup> With an increasing number of strikes being listed across options exchanges, Market Makers must expend their capital to ensure that they have the appropriate infrastructure to meet their quoting obligations on all options markets in which they are assigned in options series. The Exchange believes that this Strike Interval Proposal would limit the intervals between strikes, reducing the number of strikes listed on BX, and thereby allow Lead Market Makers and Market Makers to expend their capital in the options market in a more efficient manner. Due to this increased efficiency, the Exchange believes that this Strike Interval Proposal would improve overall market quality on BX by limiting the intervals

<sup>24</sup> For example, two strikes that are densely clustered may have the same risk properties and may also be the same percentage out-of-the-money.

<sup>25</sup> See Options 2, Sections 4(j) and 5.

between strikes in multiply listed equity options that have an expiration date more than twenty-one days, from the listing date.

This Strike Interval Proposal is intended to be the first in a series of proposals to limit the number of listed options series listed on BX and other Nasdaq affiliated markets. The Exchange intends to decrease the overall number of strikes listed on Nasdaq exchanges in a methodical fashion, so that it may monitor progress and feedback from its membership. While limiting the intervals between listed strikes is the goal of this rule change, BX's Strike Interval Proposal is intended to balance that goal with the needs of market participants. BX believes that various strike intervals continue to offer market participants the ability to select the appropriate strike interval to meet that market participant's investment objective.

#### Implementation

The Exchange intends to begin implementation of the proposed rule change prior to March 31, 2021. The Exchange will issue an Options Trader Alert to Participants to provide notification of the implementation date.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

of the Act,<sup>26</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>27</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Strike Proposal seeks to limit the intervals between strikes listed in the Short Term Options Series program that have an expiration date more than twenty-one days. While the current listing rules permit BX to list a number of weekly strikes on its market, the Exchange's Strike Interval Proposal removes impediments to and perfects the mechanism of a free and open market and a national market system by encouraging Market Makers to deploy capital more efficiently and improving market quality overall on BX through limiting the intervals between strikes when applying the strike interval table to multiply listed equity options that have an expiration date more than twenty-one days from the listing date. Also, as BX's Strike Interval Proposal seeks to reduce the number of weekly options that would be listed on its market in later weeks, Market Makers would be required to quote in fewer weekly strikes as a result of the Strike Interval Proposal. Amending BX's listing rules to limit the intervals between strikes for multiply listed equity options that have an expiration date more than twenty-one days causes less disruption in the market as the majority of the volume traded in weekly options exists in options series which have an expiration date of twenty-one days or less. The Exchange's Strike Interval Proposal curtails the number of strike intervals listed in series of options without reducing the number of classes of options available for trading on BX.

The Strike Interval Proposal takes into account customer demand for certain options classes by considering both the Share Price and the Average Daily Volume in the underlying security to arrive at the manner in which weekly strike intervals would be listed in the later weeks for each multiply listed equity options class. The Exchange utilizes OCC Customer-cleared volume, as customer volume is an appropriate proxy for demand. The OCC Customer-cleared volume represents the majority of options volume executed on the Exchange that, in turn, reflects the demands in the marketplace. The options series listed on BX is intended to meet customer demand by offering an

appropriate number of strikes. Non-Customer cleared OCC volume represents the supply side.

The Strike Interval Proposal for listing strikes in certain multiply listed equity options is intended to remove certain strikes where there exist clusters of strikes whose characteristics closely resemble one another and, therefore, do not serve different trading needs that renders the strikes less useful and thereby protects investors and the general public by removing an abundance of unnecessary choices for an options series, while also improving market quality. BX's Strike Interval Proposal seeks to reduce the number of strikes in the furthest weeklies, where there exist wider markets, and, therefore, lower market quality. The implementation of the proposed table is intended to spread strike intervals in multiply listed equity options, where there is less volume that is measured by the average daily volume tiers. Therefore, the lower the average daily volume, the greater the proposed spread between strike intervals. Options classes with higher volume contain the most liquid symbols and strikes, therefore the finer the proposed spread between strike intervals. Additionally, lower-priced shares have finer strike intervals than higher-priced shares when comparing the proposed spread between strike intervals.<sup>28</sup>

Beginning on the second trading day in the first month of each calendar quarter, the Average Daily Volume shall be calculated by utilizing data from the prior calendar quarter based on OCC Customer-cleared volume. Utilizing the second trading day allows the Exchange to accumulate data regarding OCC Customer-cleared volume from the entire prior quarter. Beginning on the second trading day would allow trades executed on the last day of the previous calendar quarter to have settled<sup>29</sup> and be accounted for in the calculation of Average Daily Volume. Utilizing the previous three months is appropriate because this time period would help reduce the impact of unusual trading activity as a result of unique market events, such as a corporate action (*i.e.*, it would result in a more reliable measure of average daily trading volume than would a shorter period).

This Strike Interval Proposal serves to respond to comments received from

<sup>28</sup> The Exchange notes that it has discussed the proposed strike intervals with various members. The Exchange has gathered information regarding where trading in weeklies generally occurs to arrive at the proposed strike intervals.

<sup>29</sup> Options contracts settle one business day after trade date. Strike listing determinations are made the day prior to the start of trading in each series.

industry members with respect to the increasing number of strikes that are required to be quoted by market makers in the options industry. Today, BX requires Lead Market Makers and Market Makers to quote a certain amount of time in the trading day in their assigned due options series to maintain liquidity in the market.<sup>30</sup> With an increasing number of strikes due to tighter intervals being listed across options exchanges, Market Makers must expend their capital to ensure that they have the appropriate infrastructure to meet their quoting obligations on all options markets in which they are assigned in options series. The Exchange believes that this Strike Interval Proposal would limit the intervals between strikes listed on BX and thereby allow Lead Market Makers and Market Makers to expend their capital in the options market in a more efficient manner that removes impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange also believes that this Strike Interval Proposal would improve overall market quality on BX for the protection of investors and the general public by limiting the intervals between strikes when applying the strike interval table to multiply listed equity options which have an expiration date more than twenty-one days from the listing date.

This Strike Interval Proposal is intended to be the first in a series of proposals to limit the number of listed options series listed on BX and other Nasdaq affiliated markets. The Exchange intends to decrease the overall number of strikes listed on Nasdaq exchanges in a methodical fashion in order that it may monitor progress and feedback from its membership. While limiting the intervals between strikes listed is the goal of this rule change, BX's Strike Interval Proposal is intended to balance that goal with the needs of market participants. The Exchange believes that varied strike intervals continue to offer market participants the ability to select the appropriate strike interval to meet that market participant's investment objective.

#### *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 Strike Interval Proposal limits the number of Short Term Options Series strike intervals available for quoting and

<sup>30</sup> See Options 2, Sections 4(f) and 5.

<sup>26</sup> 15 U.S.C. 78f(b).

<sup>27</sup> 15 U.S.C. 78f(b)(5).

trading on BX for all BX Participants. While the current listing rules permit BX to list a number of weekly strikes on its market, in an effort to encourage Market Makers to deploy capital more efficiently, as well as improve displayed market quality, BX's Strike Interval Proposal seeks to reduce the number of weekly options that would be listed on its market in later weeks, without reducing the number of series or classes of options available for trading on BX. As BX's Strike Interval Proposal seeks to reduce the number of weekly options that would be listed on its market in later weeks, Market Makers would be required to quote in fewer weekly strikes as a result of the Strike Interval Proposal.

The Exchange's Strike Interval Proposal, which is intended to decrease the overall number of strikes listed on BX, does not impose an undue burden on intra-market competition as all Participants may only transact options in the strike intervals listed for trading on BX. While limiting the intervals of strikes listed on BX is the goal of this Strike Interval Proposal, the goal continues to balance the needs of market participants by continuing to offer a number of strikes to meet a market participant's investment objective.

The Exchange's Strike Interval Proposal does not impose an undue burden on inter-market competition as this Strike Interval Proposal does not impact the listings available at another self-regulatory organization. In fact, BX is proposing to list a smaller amount of weekly equity options in an effort to curtail the increasing number of strikes that are required to be quoted by market makers in the options industry. Other options markets may choose to replicate the Exchange's Strike Interval Proposal and, thereby, further decrease the overall number of strikes within the options industry.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents,

the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2020-032 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-BX-2020-032. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549-1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BX-2020-032, and should be submitted on or before December 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-25179 Filed 11-13-20; 8:45 am]

BILLING CODE 8011-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-90382; File No. SR-NYSE-2020-90]

### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Amend the Requirement Applicable to Special Purpose Acquisition Companies Upon Consummation of a Business Combination Concerning Compliance With the Round Lot Shareholder Requirement**

November 9, 2020.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 27, 2020, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend certain of the requirements of the NYSE Listed Company Manual ("Manual") that are applicable to special purpose acquisition companies upon consummation of a business combination. The proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change

<sup>31</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

Section 102.06 of the Manual sets forth initial listing requirements applicable to a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time (an "Acquisition Company" or "AC").<sup>4</sup> Section 102.06 requires, in part, that an Acquisition Company: (i) Deposit into and retain in an escrow account at least 90% of the proceeds of its initial public offering, together with the proceeds of any other concurrent sales of the AC's equity securities, through the date of its Business Combination; (ii) complete the Business Combination within 36 months of the effectiveness of the IPO registration statement; and (iii) provide the public shareholders who object to the Business Combination with the right to convert their common stock into a pro rata share of the funds held in escrow.<sup>5</sup>

Section 802.01B of the Manual currently states that: After consummation of its Business Combination, a company that had originally listed as an AC will be subject to Section 801 and Section 802.01 in its entirety and will be required immediately upon consummation of the Business Combination to meet the following requirements:

- (i) A price per share of at least \$4.00;
- (ii) a global market capitalization of at least \$150,000,000;
- (iii) an aggregate market value of publicly-held shares of at least \$40,000,000;<sup>6</sup> and
- (iv) the requirements with respect to shareholders and publicly-held shares

<sup>4</sup> Section 102.06 provides that an Acquisition Company must complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the deposit account (the "Business Combination") within 36 months of the effectiveness of its IPO registration statement.

<sup>5</sup> Section 102.06 also requires that each proposed business combination be approved by a majority of the company's independent directors.

<sup>6</sup> Shares held by directors, officers, or their immediate families and other concentrated holding of 10 percent or more are excluded in calculating the number of publicly-held shares.

set forth in Section 102.01A for companies listing in connection with an initial public offering.<sup>7</sup>

Section 802.01B also provides that an Acquisition Company failing to meet these requirements will be promptly subject to suspension and delisting proceedings. However, while it is clear that an Acquisition Company must satisfy all initial listing requirements immediately upon consummation of its Business Combination, Section 802.01B does not provide a timetable for the company to demonstrate that it satisfies those requirements. Accordingly, the Exchange proposes to modify the rule to specify that if the Acquisition Company demonstrates that it will satisfy all requirements except the applicable round lot shareholder requirement, then the company will receive 15 calendar days following the closing to demonstrate that it satisfied the applicable round lot shareholder requirement immediately following the transaction's closing.

When a listed AC consummates its Business Combination, the Exchange will also consider whether the Business Combination gives rise to a "back door listing" as described in Section 703.08(E). If the resulting company would not qualify for original listing (including by meeting the applicable distribution standards), the Exchange will promptly initiate suspension and delisting of the AC. The Exchange proposes to modify the rule in relation to Business Combinations that give rise to a "back door listing" to specify that if the Acquisition Company demonstrates that it will satisfy all requirements except the applicable round lot shareholder requirement, then the company will receive 15 calendar days following the closing to demonstrate that it satisfied the applicable round lot shareholder requirement immediately following the transaction's closing.

In determining compliance with the round lot shareholder requirement at the time of a Business Combination, the Exchange will review a company's public disclosures and information provided by the company about the transaction. For example, the merger agreement may result in the Acquisition Company issuing a round lot of shares to more than 400 holders of the target of the Business Combination at closing. If public information is not available that enables the Exchange to determine compliance, the Exchange will typically request that the company provide additional information such as

<sup>7</sup> The applicable requirement is 400 holders of round lots (*i.e.*, 100 shares).

registered shareholder lists from the company's transfer agent, data from Cede & Co. about shares held in street name, or data from broker-dealers and from third parties that distribute information such as proxy materials for the broker-dealers. If the company can provide information demonstrating compliance before the Business Combination closes, no further information would be required.<sup>8</sup>

However, the Exchange has observed that in some cases it can be difficult for a company to obtain evidence demonstrating the number of shareholders that it has or will have following a Business Combination. As noted above, shareholders of an Acquisition Company may redeem or tender their shares until just before the time of the Business Combination, and the company may not know how many shareholders will choose to redeem until very close to the consummation of the business combination. In cases where the number of round lot shareholders is close to the applicable requirement, this could affect the ability for the Exchange to determine compliance before the Business Combination closes. Accordingly, for a company that has demonstrated that it will satisfy all initial listing requirements except for the round lot shareholder requirement (including the initial listing standards that are applicable in the event that the Business Combination gives rise to a "back door listing") before consummating the Business Combination, the Exchange will allow the company 15 calendar days after the closing of the Business Combination to demonstrate that it also complied with the round lot requirement at the time of the business combination. To be clear, the company must still demonstrate that it satisfied the round lot shareholder requirement immediately following the Business Combination; the proposal is merely giving the company 15 calendar days to provide evidence that it did.

The Exchange believes that this proposal balances the burden placed on the Acquisition Company to obtain accurate shareholder information for the new entity and the need to ensure that a company that does not satisfy the initial listing requirements following a Business Combination enters the delisting process promptly. If the company does not evidence compliance within the proposed time period, Exchange staff would immediately

<sup>8</sup> Companies must seek this information from third parties because many accounts are held in street name and shareholders may object to being identified to the company.

commence suspension and delisting proceedings with respect to the company.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect the public interest and the interests of investors, by imposing a specific timeline for Acquisition Companies to demonstrate that they will comply with the initial listing requirements following a Business Combination and allowing a reasonable period of time for the company to provide evidence that it complied with the round lot shareholder requirement at the time of the business combination.

The proposed rule would specify the time when an Acquisition Company must demonstrate compliance with the initial listing standards following the completion of a Business Combination, thereby enhancing investor protection. Specifically, it would require an Acquisition Company to provide evidence before completing the Business Combination that it will satisfy all requirements for initial listing, except for the round lot shareholder requirement. While the proposed rule would allow Acquisition Companies 15 calendar days, if needed, to provide evidence that they also complied with the round lot shareholder requirement at the time of the Business Combination, that additional time is a reasonable accommodation given both the difficulty companies face in identifying their shareholders and the ability for the Acquisition Company's shareholders to redeem their shares when the Business Combination is consummated. In that regard, Acquisition Companies are unlike other newly listing companies, which do not face redemptions and are not already listed and trading at the time they must demonstrate compliance. Importantly, the company must still demonstrate that it satisfied the round lot shareholder requirement immediately following the Business Combination. As such, the Exchange

believes that the proposed rule change appropriately balances the protection of prospective investors with the protection of shareholders of the Acquisition Company, the latter of whom would be harmed if the Exchange issued a delisting determination at a time when the company did, in fact, satisfy all initial listing requirements but could not yet provide proof.

The proposed rule change is also consistent with Section 6(b)(7) of the Act in that it provides a fair procedure for the prohibition or limitation by the Exchange of any person with respect to access to services offered. The proposed rule change accounts for the particular difficulties encountered by Acquisition Companies when attempting to determine their total number of shareholders due to the ability of shareholders to redeem their shares. Acquisition Companies will still be required to demonstrate compliance with all initial listing standards immediately following the Business Combination, which is the initial listing of the combined company. This is no different from the requirements imposed on other newly listing companies.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule would clarify that a company listing in connection with a merger with an Acquisition Company must provide evidence before completing the Business Combination that it will satisfy all requirements for initial listing, although a reasonable accommodation would be made to allow the company to demonstrate compliance with the round lot shareholder requirement before the immediate commencement of suspension and delisting procedures if that is the only requirement that the company cannot demonstrate compliance with before completing the Business Combination. This change is not expected to have any impact on competition.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-90 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2020-90. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).



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-2020-90, and should be submitted on or before December 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-25178 Filed 11-13-20; 8:45 am]

**BILLING CODE 8011-01-P**

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## 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 15, 2021.

**ADDRESSES:** Send all comments by email to Lyn Womack, Chief, Funding Administration Branch, Office of Investment and Innovation, Small Business Administration, [lyn.womack@sba.gov](mailto:lyn.womack@sba.gov).

**FOR FURTHER INFORMATION CONTACT:** Lyn Womack, Chief, Funding Administration Branch, Office of Investment and Innovation, [lyn.womack@sba.gov](mailto:lyn.womack@sba.gov), 202-205-2416, or Curtis B. Rich, Management Analyst, 202-205-7030, [curtis.rich@sba.gov](mailto:curtis.rich@sba.gov).

**SUPPLEMENTARY INFORMATION:** Applicants for SBA-guaranteed leverage commitments must complete these forms as part of the application process. SBA uses the information to make informed and proper credit decisions and to establish the SBIC's eligibility for leverage and need for funds.

### 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

#### Collection: 3245-0081

(1) *Title:* Form 25 LLGP Model Limited Liability General Partner Certificate, Form 25 PCGP Model Resolution SBIC organized as Corporate General Partnership, Form 25 PC Model Resolution SBIC organized as Corporation, Form 33 Instructions for the Authorization to Disburse Proceeds, Form 34 Bank Identification, Form 1065 Applicant Licensee's Assurance of Compliance for the Public Interest.

*Description of Respondents:* Eligible SBICs.

*Form Number:* SBA Forms 25 LLGP, 25 PCGP, 25 PC, 33, 34, 1065.

*Total Estimated Annual Responses:* 60.

*Total Estimated Annual Hour Burden:* 50 minutes.

**Curtis Rich,**  
Management Analyst.

[FR Doc. 2020-25196 Filed 11-13-20; 8:45 am]

**BILLING CODE 8026-03-P**

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## DEPARTMENT OF STATE

[Public Notice: 11256]

### Foreign Affairs Policy Board Meeting Notice Closed Meeting

In accordance with the Federal Advisory Committee Act, 5 U.S.C. App., the Department of State announces a meeting of the Foreign Affairs Policy Board to take place on December 7, 2020, at the Department of State, Washington, DC.

The Foreign Affairs Policy Board reviews and assesses: (1) Global threats and opportunities; (2) trends that implicate core national security interests; (3) technology tools needed to advance the State Department's mission; and (4) priorities and strategic frameworks for U.S. foreign policy. Pursuant to section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App § 10(d), and 5 U.S.C. 552b(c)(1), it has been determined that this meeting will be closed to the public as the Board will be reviewing and discussing matters

properly classified in accordance with Executive Order 13526.

For more information, contact Duncan Walker at (202) 647-2236.

**Duncan H. Walker,**  
Designated Federal Officer, Office of Policy Planning, Department of State.

[FR Doc. 2020-25223 Filed 11-13-20; 8:45 am]

**BILLING CODE 4710-10-P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

[Docket No. FAA-2020-1061]

#### Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Advanced Qualification Program (AQP)

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The Advanced Qualification Program uses data driven quality control processes for validating and maintaining the effectiveness of air carrier training program curriculum content.

**DATES:** Written comments should be submitted by January 15, 2021.

**ADDRESSES:** Please send written comments:

*By Electronic Docket:*  
[www.regulations.gov](http://www.regulations.gov) (Enter docket number into search field).

*By mail:* Sandra Ray, Federal Aviation Administration, Policy Integration Branch AFS-270, 1187 Thorn Run Road, Suite 200, Coraopolis, PA 15108.

*By fax:* 412-239-3063

**FOR FURTHER INFORMATION CONTACT:** Ryan Rachfalski by email at: [Ryan.P.Rachfalski@faa.gov](mailto:Ryan.P.Rachfalski@faa.gov); phone: 303-342-1951.

**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

<sup>11</sup> 17 CFR 200.30-3(a)(12).

will summarize and/or include your comments in the request for OMB's clearance of this information collection.

*OMB Control Number:* 2120-0701.

*Title:* Advanced Qualification Program (AQP) Subpart Y to 14 CFR 121.

*Form Numbers:* N/A.

*Type of Review:* Renewal of an information collection.

*Background:* Under Special Federal Aviation Regulation No. 58, Advanced Qualification Program (AQP), the FAA provides certificated air carriers, as well as training centers they employ, with a regulatory alternative for training, checking, qualifying, and certifying aircrew personnel subject to the requirements of 14 CFR parts 121 and 135. Data collection and analysis processes ensure that the certificate holder provides performance information on its crewmembers, flight instructors, and evaluators that will enable them and the FAA to determine whether the form and content of training and evaluation activities are satisfactorily accomplishing the overall objectives of the curriculum.

*Respondents:* 25 Respondents with approved Advanced Qualification Programs.

*Frequency:* Monthly.

*Estimated Average Burden per Response:* 7 hours.

*Estimated Total Annual Burden:* 2,100 hours.

Issued in Washington, DC, on November 9, 2020.

**Sandra L. Ray,**

*Aviation Safety Inspector, FAA, Policy Integration Branch, AFS-270.*

[FR Doc. 2020-25165 Filed 11-13-20; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

[Docket No. FHWA-2125-0026]

#### Agency Information Collection

#### Activities: Request for Comments for Periodic Information Collection

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (USDOT).

**ACTION:** Notice of request for approval of a new information collection and request for comments.

**SUMMARY:** The FHWA has forwarded the information collection request described in this notice to the Office of Management and Budget (OMB) for approval of a new (periodic) information collection. We published a **Federal Register** Notice with a 60-day

public comment period on this information collection on September 8, 2020. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

**DATES:** Please submit comments by December 16, 2020.

**ADDRESSES:** You may submit comments within 30 days identified by DOT Docket ID Number (FHWA-2125-0026) by any of the following methods:

*Website:* For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Fax:* 1-202-493-2251.

*Mail:* Docket Management Facility; U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

*Hand Delivery or Courier:* U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Kenneth Petty, [Kenneth.Petty@dot.gov](mailto:Kenneth.Petty@dot.gov), 202-366-6654, Office of Planning, Environment, and Realty, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Title:* Assessment of Transportation Planning, Performance and Asset Management Agency Needs, Capabilities, and Capacity.

*Background:* FHWA will collect information on the current state of the practice, data, methods, and systems used by state, metropolitan, regional, local, and tribal transportation planning entities to support their required planning, performance and asset management processes in accordance with Title 23 United States Code 134, 135, 150, and 119. This includes, but is not limited to, information to support transportation research, capacity building, data collection, planning, travel modeling, and performance and asset management. This also includes information about how data is shared between planning agencies and how it is processed and used in the planning and programming context.

Questionnaires will be sent to State DOT headquarters and districts, Metropolitan Planning Organizations, Regional Planning Organizations, and

Tribal Governments. FHWA anticipates that one representative from each agency will take approximately 30 minutes to complete up to 4 questionnaires each year. The questionnaires will be administered via the internet and invitations to participate in the questionnaire will be distributed via email.

This information, once compiled, will allow the FHWA to better understand the existing capabilities that agencies across the country have in support of the planning, performance and asset management processes and the readiness they possess to handle new and ongoing challenges. As a result of the collected information, FHWA will focus its efforts and resources on providing targeted and meaningful support for planning, performance and asset management implementation nationwide. Additionally, FHWA will ensure that excellent planning, performance and asset management practices are identified will be shared broadly across the country.

*Respondents:* Respondents are representatives of State DOT headquarters and districts, Metropolitan Planning Organizations, Regional Planning Organizations, and Tribal Governments.

*Respondents:* 950 respondents annually.

*Frequency:* 4 per year for 3 years.

*Estimated Average Burden per Response:* Approximately 30 minutes.

*Estimated Total Annual Burden Hours:* Up to 1,900 hours annually.

#### Public Comments Invited

You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection of information is necessary for the USDOT's performance, including whether the information will have practical utility; (2) the data acquisition methods; (3) the accuracy of the USDOT's estimate of the burden of the proposed information collection; (4) the types of data being acquired; (5) ways to enhance the quality, usefulness, and clarity of the collected information; and (6) 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.

**Authority:** The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued on: November 9, 2020.

**Michael Howell,**

*Information Collection Officer, Federal Highway Administration.*

[FR Doc. 2020-25169 Filed 11-13-20; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

[Docket Number FRA-2020-0086]

#### Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on November 3, 2020, St. Marys Railroad, LLC (SM) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 215. FRA assigned the petition Docket Number FRA-2020-0086.

Specifically, SM requested relief from 49 CFR 215.203, *Restricted cars*, and 49 CFR 215.303, *Stenciling of restricted cars*, concerning 3 flatcars (SM 1001, 1002, and 1003) and 2 cabooses (SM 0616 and SM X395), all over 50 years of age and converted to excursion service.

SM operates over 9 miles of track between St Marys and Kingsland, Georgia, under other-than-main-track rules and not exceeding 25 miles per hour. The cars will not be utilized in interchange service, and SM wishes to maintain the cars' historic appearance for preservation purposes.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at [www.regulations.gov](http://www.regulations.gov). The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website:* <http://www.regulations.gov>.

Follow the online instructions for submitting comments.

- *Fax:* 202-493-2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12-140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by December 31, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacyNotice> for the privacy notice of regulations.gov.

Issued in Washington, DC.

**John Karl Alexy,**

*Associate Administrator for Railroad Safety, Chief Safety Officer.*

[FR Doc. 2020-25217 Filed 11-13-20; 8:45 am]

**BILLING CODE 4910-06-P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

[Docket No. MARAD-2020-0153]

#### Request for Comments of a Previously Approved Information Collection: Cruise Vessel Security and Safety Training Provider Certification

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on August 27, 2020.

**DATES:** Comments must be submitted on or before December 16, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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:

Cameron Naron, 202-366-1883, Office of Maritime Security, Maritime Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC, 20590.

**SUPPLEMENTARY INFORMATION:** *Title:* Cruise Vessel Security and Safety Training Provider Certification.

*OMB Control Number:* 2133-0547.

*Type of Request:* Renewal of a Previously Approved Information Collection.

*Background:* Section 3508 of the Cruise Vessel Security and Safety Act (CVSSA) of 2010, Public Law 111-207 (as codified at 46 U.S.C. 3507-3508) provides the Maritime Administrator with discretionary authority to certify CVSSA training providers that comply with training standards developed by the USCG, FBI and the Maritime Administration (MARAD). The certification process necessarily requires applicants to provide supporting information to evidence their compliance with the CVSSA Model Course training standards.

*Respondents:* Cruise line companies and maritime industry training providers.

*Affected Public:* Passengers and crew onboard cruise lines.

*Total Estimated Number of Responses:* 10.

*Frequency of Collection:* Annually.

*Estimated time per Respondent:* 40 hours.

*Total Estimated Number of Annual Burden Hours:* 400.

*Public Comments Invited:* Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department'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 collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

**Authority:** The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93 \* \* \*.

Dated: November 10, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2020-25211 Filed 11-13-20; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

[Docket No. MARAD-2020-0154]

#### Request for Comments of a Previously Approved Information Collection: Automated Mutual Assistance Vessel Rescue System

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on August 27, 2020.

**DATES:** Comments must be submitted on or before December 16, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://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:**

Mark O'Malley, 202-366-9347, Division of Sealift Operations and Emergency Response, Maritime Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

*Title:* Automated Mutual Assistance Vessel Rescue System.

*OMB Control Number:* 2133-0025.

*Type of Request:* Renewal of a Previously Approved Information Collection.

*Background:* This collection of information will be used to gather information regarding the location of U.S.-flag vessels and certain other U.S. citizen-owned vessels for the purpose of search and rescue in the saving of lives at sea and for the marshalling of ships for national defense and safety purposes. The collection of information

is necessary for maintaining a current plot of U.S.-flag and U.S.-owned vessels.

*Respondents:* U.S.-flag and U.S. citizen-owned vessels.

*Affected Public:* Business or other for profit.

*Estimated Number of Respondents:* 171.

*Estimated Total Number of Responses:* 31,293 (183 per Respondents).

*Frequency of Collection:* Annually.

*Estimated Hours per Respondent:* .07.

*Total Estimated Number of Annual Burden Hours:* 2191.

*Public Comments Invited:* Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department'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 collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

(Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93)

Dated: November 10, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2020-25210 Filed 11-13-20; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

[Docket No. MARAD-2020-0152]

#### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel RAISING CHAMPIONS (Trawler); Invitation for Public Comments

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before December 16, 2020.

**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD-2020-0152 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Search MARAD-2020-0152 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD-2020-0152, 1200 New Jersey Avenue SE, West Building, Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

*Note:* If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

*Instructions:* All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at [www.regulations.gov](http://www.regulations.gov), including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

**FOR FURTHER INFORMATION CONTACT:**

Russell Haynes, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23-461, Washington, DC 20590. Telephone 202-366-3157, Email [Russell.Haynes@dot.gov](mailto:Russell.Haynes@dot.gov).

**SUPPLEMENTARY INFORMATION:** As

described by the applicant the intended service of the vessel RAISING CHAMPIONS is:

—*Intended Commercial Use of Vessel:* "Commercial passenger operations, local tours, day trips, short overnight stays, sunset cruises."

—*Geographic Region including Base of Operations:* "Florida (Gulf Coast)" (Base of Operations: Tierra Verde, FL)

—*Vessel Length and Type:* 46' Trawler  
The complete application is available for review identified in the DOT docket as MARAD-2020-0152 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in

accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

### Public Participation

#### *How do I submit comments?*

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

#### *Where do I go to read public comments, and find supporting information?*

Go to the docket online at <http://www.regulations.gov>, keyword search MARAD-2020-0152 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

#### *Will my comments be made available to the public?*

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

#### *May I submit comments confidentially?*

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR-225, W24-220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

### Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process.

DOT posts these comments, without edit, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice, DOT/ALL-14 FDMS, accessible through [www.dot.gov/privacy](http://www.dot.gov/privacy). To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: November 11, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2020-25199 Filed 11-13-20; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2018-0025 (Notice No. 2020-09)]

### Hazardous Materials: Information Collection Activities

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on an Office of Management and Budget (OMB) control number pertaining to hazardous materials transportation. This notice follows the publication of a PHMSA final rule titled "Hazardous Materials: Liquefied Natural Gas by Rail" [HM-264, 85 FR 44994] authorizing the transportation of liquefied natural gas by rail. Following publication of this notice, PHMSA intends to request a renewal with change of currently approved OMB control number 2137-0612, "Hazardous Materials Security Plans."

**DATES:** Interested persons are invited to submit comments on or before December 16, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to [www.reginfo.gov/public/do/PRAMain](http://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.

We invite comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the Department's estimate of the burden of the proposed information collection; (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 the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Steven Andrews or Shelby Geller, Standards and Rulemaking Division, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

**SUPPLEMENTARY INFORMATION:** On July 24, 2020, PHMSA, in coordination with the Federal Railroad Administration (FRA), published a final rule titled "Hazardous Materials: Liquefied Natural Gas by Rail" [HM-264, 85 FR 44994], to allow for the bulk transport of "Methane, refrigerated liquid," commonly known as liquefied natural gas (LNG), in rail tank cars. In this final rule, PHMSA amended the Hazardous Materials Regulations (HMR; 49 Code of Federal Regulations (CFR) parts 171-180) to require any rail carrier transporting a tank car quantity of UN1972 (Methane, refrigerated liquid (cryogenic liquid) or Natural gas, refrigerated liquid (cryogenic liquid)) to comply with the additional safety and security planning requirements for transportation by rail. PHMSA currently accounts for the burden associated with safety and security planning requirements in Office of Management and Budget (OMB) Control Number 2137-0612, "Hazardous Materials Security Plans."

OMB regulations require PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. 5 CFR 1320.8d. Under the Paperwork Reduction Act of 1995 (Pub. L. 96-511), no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. As the HM-264 final rule contains revisions that

were not proposed in the notice of proposed rulemaking (NPRM) [October 24, 2019; 84 FR 56964], PHMSA published a 60-day notice [85 FR 46220] and is subsequently publishing this 30-day notice to provide an opportunity for public comment on the estimated increase in burden. The estimated

increase in burden hours is reflected in “Section VI.G. Paperwork Reduction Act” of the preamble to the final rule, with a minor adjustment due to a rounding error.

As mentioned, on July 31, 2020, PHMSA published a 60-day notice to request comments on the revision to

OMB Control Number 2137–0612. PHMSA received four sets of comments to the 60-day notice. None of these comments were specifically related to the change in the information collection burden. Therefore, PHMSA is revising OMB Control Number 2137–0612 as follows:

|   | Increase in total number of railroads | Increase in total number of routes | Burden hours per route | Increase in total burden hours | Salary cost per hour | Increase in total salary cost |
|---|---------------------------------------|------------------------------------|------------------------|--------------------------------|----------------------|-------------------------------|
| Class I Railroads .....                               | 0                                     | 2                                  | 80                     | 160                            | \$60.83              | \$9,733                       |
| Class II Railroads .....                              | 0                                     | 1                                  | 80                     | 80                             | 60.83                | 4,866                         |
| Class III Railroads .....                             | 0                                     | 1                                  | 40                     | 40                             | 60.83                | 2,433                         |
| <b>Total Increase in Primary Route Analysis .....</b> |                                       | <b>4</b>                           |                        | <b>280</b>                     |                      | <b>17,032</b>                 |

|   | Increase in total number of railroads | Increase in total number of routes | Burden hours per route | Increase in total burden hours | Salary cost per hour | Increase in total salary cost |
|---|---------------------------------------|------------------------------------|------------------------|--------------------------------|----------------------|-------------------------------|
| Class I Railroads .....                                 | 0                                     | 2                                  | 120                    | 240                            | \$60.83              | \$14,599                      |
| Class II Railroads .....                                | 0                                     | 1                                  | 120                    | 120                            | 60.83                | 7,300                         |
| Class III Railroads .....                               | 0                                     | 1                                  | 40                     | 40                             | 60.83                | 2,433                         |
| <b>Total Increase in Alternate Route Analysis .....</b> |                                       | <b>4</b>                           |                        | <b>400</b>                     |                      | <b>24,332</b>                 |

Annual Increase in Number of Respondents: 0.

Annual Increase in Number of Responses: 8.

Annual Increase in Burden Hours: 680.

Annual Increase in Salary Costs: \$41,364.

Issued in Washington, DC on November 9, 2020, under authority delegated in 49 CFR 1.97.

**William A. Quade,**

Deputy Associate Administrator of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2020–25168 Filed 11–13–20; 8:45 am]

BILLING CODE 4910–60–P

the proposed renewal, without change, of a currently approved information collection found in existing Bank Secrecy Act regulations. Specifically, FinCEN invites comment on a renewal, without change, of existing information collection requirements concerning reports of foreign financial accounts and FinCEN Report 114, Report of Foreign Bank and Financial Accounts (FBAR). This request for comments is made pursuant to the Paperwork Reduction Act of 1995.

**DATES:** Written comments are welcome, and must be received on or before January 15, 2021.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2020–0013 and the specific Office of Management and Budget (OMB) control number 1506–0009.

- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2020–0013 and OMB control number 1506–0009.

Please submit comments by one method only. Comments will also be incorporated into FinCEN’s review of existing regulations, as provided by Treasury’s 2011 Plan for Retrospective Analysis of Existing Rules. All comments submitted in response to this

notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** The FinCEN Regulatory Support Section at 1–800–767–2825 or electronically at [frc@fincen.gov](mailto:frc@fincen.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Statutory and Regulatory Provisions**

The legislative framework generally referred to as the Bank Secrecy Act (BSA) consists of the Currency and Financial Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) (Pub. L. 107–56) and other legislation. The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto, with implementing regulations at 31 CFR Chapter X.

The BSA authorizes the Secretary of the Treasury, *inter alia*, to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement anti-money laundering

**DEPARTMENT OF THE TREASURY**

**Financial Crimes Enforcement Network**

**Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Foreign Financial Accounts Regulations and FinCEN Report 114, Report of Foreign Bank and Financial Accounts**

**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, FinCEN invites comments on

programs and compliance procedures.<sup>1</sup> Regulations implementing the BSA appear at 31 CFR Chapter X. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.<sup>2</sup>

Under 31 U.S.C. 5314, the Secretary is authorized to require any “resident or citizen of the United States or a person in, and doing business in, the United States, to . . . keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.” The term “foreign financial agency” encompasses the activities found in the statutory definition of “financial agency,”<sup>3</sup> notably, “a person acting for a person as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.”<sup>4</sup> The Secretary is also authorized to prescribe exemptions to the reporting requirement and to prescribe other matters the Secretary considers necessary to carry out 31 U.S.C. 5314.

The regulations implementing 31 U.S.C. 5314 appear at 31 CFR 1010.350, 1010.306, and 1010.420. Section 1010.350 generally requires each U.S. person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country to report such relationship to the Commissioner of Internal Revenue for each year such relationship exists, and to provide and report such information specified in a reporting form prescribed under 31 U.S.C. 5314. The FinCEN Report 114, Report of Foreign Bank and Financial Accounts (FBAR), is used to file the information required by this section. The FBAR must be filed electronically with FinCEN.<sup>5</sup> 31 CFR 1010.306(c) requires the FBAR to be filed for foreign financial accounts exceeding \$10,000 maintained during the previous calendar year. No FBAR is required to be filed if the aggregate account value of

foreign financial accounts maintained during the previous calendar year is below \$10,000.

The FBAR must be filed on or before April 15 of each calendar year for accounts maintained during the previous calendar year.<sup>6</sup>

31 CFR 1010.420 outlines the recordkeeping requirements associated with foreign financial accounts required to be reported under section 1010.350. Specifically, filers must retain records of such accounts for a period of five years and make the records available for inspection as authorized by law.<sup>7</sup>

## II. Paperwork Reduction Act of 1995 (PRA)<sup>8</sup>

*Title:* Reports of foreign financial accounts (31 CFR 1010.350), records to be made and retained by persons having financial interests in foreign financial accounts (31 CFR 1010.420), filing of reports (31 CFR 1010.306(c)), and FinCEN Report 114—Report of Foreign Bank and Financial Accounts (FBAR).

*OMB Control Number:* 1506–0009.

*Report Number:* FinCEN Report 114—FBAR.

*Abstract:* FinCEN is issuing this notice to renew the OMB control number for the FBAR regulations and report.

*Affected Public:* Individuals, businesses or other for-profit institutions, and non-profit institutions who qualify as U.S. persons.

*Type of Review:*

- Renewal without change of a currently approved information collection.

*Frequency:* Annual.

*Estimated Number of Respondents:* 1,273,579 FBAR filers.<sup>9</sup>

*Estimated Reporting and Recordkeeping Burden:*

The estimated average burden associated with the FBAR reporting and

recordkeeping requirements will vary depending on the number of reportable foreign financial accounts and the applicability of special rules provided in the regulations which provide some relief from the full scope of the reporting obligations.<sup>10</sup>

The information required to be reported on the FBAR is basic information U.S. persons will have received on account statements from the foreign financial institutions where the accounts are opened and maintained. Those statements will provide a U.S. person with the information needed to complete and file the FBAR. No special accounting or legal skills are necessary to transfer the basic information required to be reported, such as the name of the foreign financial institution, the type of account, and the account number, to the FBAR.

The special rules located at 31 CFR 1010.350(g) provide a variety of relief to FBAR filers by (1) limiting the information reported in the FBAR to the number of accounts and certain other basic identifying information where the filer has financial interest in or signature authority over 25 more reportable accounts; (2) allowing for entities to file consolidated FBARs on their own behalf and on behalf of entities for which they have a direct or indirect ownership interest over 50%; and (3) exempting reporting of foreign financial interest in accounts involving certain trust and retirement plans. However, filers reporting financial interest in, or signature authority over, 25 or more foreign financial accounts, are required to maintain a record of the detailed account information on each of their foreign financial accounts, including the account number, the name of the foreign financial institution that holds the account, the address of the foreign financial institution, the maximum value of the account during the calendar year, and the type of account.<sup>11</sup>

For the reasons noted above, FinCEN estimates that the approximate FBAR reporting burden will vary depending on the number of reportable foreign financial accounts, and will range from approximately 20 minutes to 90 minutes. As a result, FinCEN estimates the average reporting burden per FBAR filer will be 55 minutes.

Past estimates of the FBAR recordkeeping requirement took into

<sup>1</sup> Section 358 of the USA PATRIOT Act added language expanding the scope of the BSA to intelligence or counter-intelligence activities to protect against international terrorism.

<sup>2</sup> Treasury Order 180–01 (re-affirmed Jan. 14, 2020).

<sup>3</sup> 31 U.S.C. 5312(b)(2).

<sup>4</sup> See 31 U.S.C. 5312(a)(1), which exempts from the definition of financial agency a person acting for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member.

<sup>5</sup> Formerly Form TD-F 90–22.1. FinCEN Report 114 can be completed by accessing FinCEN’s BSA E-Filing System website at <http://bsaeiling.fincen.treas.gov/main.html>.

<sup>6</sup> In accordance with section 2006(b)(11) of Public Law 114–41 the filing due date for the report is April 15 effective as of the 2016 reporting year. The statute permits the Secretary to extend the filing due date for up to 6 months. Filers who submit complete and accurate reports to FinCEN no later than October 15 of the year the report is due will be deemed to have timely filed. FinCEN issued a statement on its website in 2016 noting the FBAR date change as a result of the statutory change. FinCEN intends to revise the FBAR regulations at 31 CFR 1010.306(c) to reflect the statutory date change in the near term.

<sup>7</sup> The penalties provided in the BSA apply to both the FBAR reporting and recordkeeping requirements.

<sup>8</sup> Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

<sup>9</sup> The total number of FBARs reported for foreign financial accounts held during calendar year 2018, and reported in 2019 is 1,273,579. Each U.S. individual or entity that maintains foreign financial accounts reportable on the FBAR can report all of their foreign financial accounts on one FBAR report.

<sup>10</sup> 31 CFR 1010.350(g).

<sup>11</sup> Filers availing themselves of special rules under 31 CFR 1010.350(g)(1) and (2) involving 25 or more reportable foreign financial accounts are required to maintain and provide detailed account information for each foreign financial account, if requested by the Secretary or his delegate.

account time to store paper copies of the FBAR form, and estimated that the approximate recordkeeping burden was 30 minutes. Since 2011, FBARs have been filed electronically. Electronically filing the FBAR allows a filer to save an electronic copy of the report, which satisfies the recordkeeping part of the requirement. FinCEN estimates it would take a filer five minutes to save an electronic copy of the FBAR.<sup>12</sup> In addition to maintaining a copy of the form, those filers who take advantage of the special rules provisions involving 25 or more accounts are required to maintain detailed information on those accounts. However, FinCEN believes that in most cases, such information would be maintained by filers in the ordinary course of business in the form of periodic account statements and other business records which would be maintained mostly electronically. In addition, there is no requirement in the FBAR regulations to maintain such information in any particular format.

For these reasons, FinCEN estimates that the approximate FBAR recordkeeping burden will be approximately five minutes.

FinCEN estimates the total annual reporting and recordkeeping burden per FBAR filer will be one hour (55 minutes for FBAR reporting, and five minutes for FBAR recordkeeping).

*Estimated Total Annual Reporting and Recordkeeping Burden:* 1,273,579 hours (1,273,579 FBAR filers multiplied by one hour).

*Estimated Total Annual Reporting and Recordkeeping Cost:* Of the 1,273,579 FBARs filed for foreign financial accounts held during calendar year 2018, 1,209,287 were filed by individuals, and 64,292 were filed by entities. FinCEN cannot quantify the cost to individuals who file FBARs on their own behalf. For entities, FinCEN estimates the following annual burden cost: 64,292 hours × \$48.30<sup>13</sup> per hour = \$3,105,303.60.

<sup>12</sup> Although filings have been electronic since 2011, this is the first renewal notice in which FinCEN has reconsidered the burden of storing reports electronically.

<sup>13</sup> The U.S. Bureau of Labor Statistics, Occupational Employment Statistics-National, May 2019, available at <https://www.bls.gov/oes/tables.htm>. The most recent data from the BLS corresponds to May 2019. For the benefits component of total compensation, see U.S. Bureau of Labor Statistics, Employer's Cost per Employee Compensation as of December 2019, available at <https://www.bls.gov/news.release/ecec.nr0.htm>. The ratio between benefits and wages for financial activities is \$15.95 (hourly benefits)/\$32.05 (hourly wages) = 0.50. The benefit factor is 1 plus the benefit/wages ratio, or 1.50. Multiplying each hourly wage by the benefit factor produces the fully-loaded hourly wage per position. The May 2019 Bureau of Labor Statistics average hourly wage

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Records required to be retained under the BSA must be retained for five years.

*General Request for Comments:*

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (i) 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; (ii) the accuracy of the agency's estimate of the burden of the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information to be collected; (iv) 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 (v) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

**Michael Mosier,**

*Deputy Director, Financial Crimes Enforcement Network.*

[FR Doc. 2020-25216 Filed 11-13-20; 8:45 am]

**BILLING CODE 4810-02-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 these persons 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

for "13-1041 Compliance Officer" is \$32.20. (\$32.20 × 1.50 = \$48.30).

Targeting, tel.: 202-622-2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202-622-2490; Assistant Director for Licensing, tel.: 202-622-2480; or Assistant Director for Regulatory Affairs, tel.: 202-622-4855.

**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 (<https://www.treasury.gov/ofac>).

**Notice of OFAC Actions**

On November 10, 2020, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

*Individuals*

1. BANIHASHEMI, Mohammad (a.k.a. BANIHASHEMI CHAHAROM, Seyed Mohammad), No. 3, Mehr Alley, Kamran Alley, Bastan Alley, Firuzbakhsh Ave., Aghdasieh, Tehran 1957759678, Iran; DOB 26 Mar 1959; POB Mashhad, Iran; nationality Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport B32563329 (Iran) expires 17 Dec 2019; National ID No. 0940486229 (Iran) (individual) [NPWMD] [IFSR] (Linked To: DES INTERNATIONAL CO., LTD.).

Designated pursuant to section 1(a)(iv) of Executive Order 13382 of June 28, 2005, 70 FR 38567, 3 CFR, 2006 Comp., p. 170 (E.O. 13382) for acting or purporting to act for or on behalf of, directly or indirectly, DES INTERNATIONAL CO., LTD., a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. HUANG, Chin-Hua (a.k.a. HUANG, Jinee), Taiwan; DOB 08 Apr 1978; POB Taiwan; citizen Taiwan; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Female; Passport 302114600 (Taiwan) expires 07 Oct 2020; Identification Number H222234242 (Taiwan) (individual) [NPWMD] [IFSR] (Linked To: DES INTERNATIONAL CO., LTD.).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological, or other support for, or goods or services in support of, DES INTERNATIONAL CO., LTD., a person whose property and interests in property are blocked pursuant to E.O. 13382.

3. SOLTANMOHAMMADI, Mohammad (a.k.a. SELTAN MOHAMMEDI, Mohammed; a.k.a. SULTAN MOHMADI, Mohamad; a.k.a. WANG, Chung Lang; a.k.a. WANG, Chung Lung; a.k.a. WANG, Zhong-Lang), Apartment #1504, Fairouz Tower, Dubai Marina, Dubai, United Arab Emirates; 216 Ocean Drive, Sentosa Cove, Singapore 098622, Singapore; DOB 04 Nov 1960; POB Hamedan, Iran; nationality Iran; alt. nationality United Kingdom; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport 518015439



(United Kingdom) expires 07 Apr 2026; alt. Passport T96397867 (Iran); alt. Passport 038016890 (United Kingdom); alt. Passport 093045489 (United Kingdom); alt. Passport 093104973 (United Kingdom); alt. Passport 093234017 (United Kingdom); alt. Passport 099156908 (United Kingdom); alt. Passport U11283369 (Iran); alt. Passport S2760238Z; National ID No. S27602 (United Kingdom) (individual) [NPWMD] [IFSR] (Linked To: SOLTECH INDUSTRY CO., LTD.).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for acting or purporting to act for or on behalf of, directly or indirectly, SOLTECH INDUSTRY CO., LTD., a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. SUN, Shih Mei (a.k.a. SUN, Amber; a.k.a. SUN, Shi Mei; a.k.a. SUN, Shih-Mei; a.k.a. SUN, Shi-Mei), No. 12, Lane 85, Zhongyi Rd., Zhongli, Taoyuan, 325, Taiwan; DOB 23 Mar 1969; POB Taitung, Taiwan; nationality Taiwan; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Female; Passport 211104130 (Taiwan); National ID No. V220335470 (Taiwan) (individual) [NPWMD] [IFSR] (Linked To: DES INTERNATIONAL CO., LTD.).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological, or other support for, or goods or services in support of, DES INTERNATIONAL CO., LTD., a person whose property and interests in property are blocked pursuant to E.O. 13382.

#### Entities

1. ARTIN SANA'AT TABAAN COMPANY (a.k.a. ARTIN SANAT TABAN; a.k.a. ARTIN SANAT TABAN CO; a.k.a. "SOLMATE"), 3rd Floor, No. 158, Keshavarz Str., Tehran, Iran; 1 North Bridge Road, #25–05, High Street Center, 179094, Singapore; #14, Bashardust Ave, Roudbare-Sharghie, Madar Sq., Shariati St., Mirdamad, Tehran, Iran; 404, 4th Floor, Atrium Centre, Bur-Dubai, Dubai, United Arab Emirates; P.O. Box 112724, Dubai, United Arab Emirates; Shariati Street, after MirDamand Blvd., Lushah Street, Rabie Street, Bashar Dost Alley, Plaque 14, Tehran, Iran; TWTC Rm., 6C–21(6F), No. 5, Hsin Yi Rd, Taipei, Taiwan; website <http://solmatepciran.com>; alt. website <http://www.solmateco.com>; Additional Sanctions Information—Subject to Secondary Sanctions; Registration Number 368623 (Iran) [NPWMD] [IFSR] (Linked To: DES INTERNATIONAL CO., LTD.).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological, or other support for, or goods or services in support of, DES INTERNATIONAL CO., LTD., a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. DES INTERNATIONAL CO., LTD. (a.k.a. D.E.S. INTERNATIONAL; a.k.a. D.E.S. INTERNATIONAL CO. LTD.; a.k.a. DES INTERNATIONAL; a.k.a. DES INTERNATIONAL CO.; a.k.a. DES INTERNATIONAL COMPANY; a.k.a. DES INTERNATIONAL COMPANY LIMITED), Taiwan World Trade Centre, Rm. 6c–21 (6F),

No. 5, Sec. 5, Xinyi Road, Taipei 11011, Taiwan; 1 North Bridge Road, #24–05 High Street Centre, Singapore 179094, Singapore; Suite 911, 9TH/F, Chuangjian Building, No.6023 Shennan Main Road, Futian District, Shenzhen, Guangdong, China; Unit 201, 2F Lung Fung Centre, No. 23 Yip Cheong Street, Fanling, N.T., Hong Kong, China; Sultan Belshalat Building, Shop #4, Ground Floor, B/H Admiral Plaza Hotel, Bur Dubai, Dubai, United Arab Emirates; P.O. Box 112724, United Arab Emirates; Sec. 5, Xinyi Rd., Xinyi District No. 5, Taipei City 110, Taiwan; 9FL–3, No. 375, Sec. 4, Sin Yi Rd., Sin Yi Dist., Taipei 110, Taiwan; website [www.des.com.tw](http://www.des.com.tw); alt. website [www.dscmmc.com](http://www.dscmmc.com); Additional Sanctions Information—Subject to Secondary Sanctions; Business Number 89402436 (Taiwan); Registration Number 69402436 (Taiwan) [NPWMD] [IFSR] (Linked To: SOLTANMOHAMMADI, Mohammad).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by, MOHAMMAD SOLTANMOHAMMADI, a person whose property and interests in property are blocked pursuant to E.O. 13382.

3. HODA TRADING (a.k.a. HODA TRADING CO.; a.k.a. HODA TRADING COMPANY; a.k.a. SUSTAINABLE ELECTRONIC DEVELOPMENT; a.k.a. SUSTAINABLE ELECTRONICS DEVELOPMENT; a.k.a. SUSTAINABLE ELECTRONICS DEVELOPMENT COMPANY), No. 34, Shahid Hesari (Southern Razan) St., Mirdamad Avenue, Tehran, Iran; Langari Street, Nobonyad Square, Pasdaran Avenue, Tehran, Iran; No. 225 Teymori St., Langari—Nobonyad Ave., Tehran, Iran; No. 31, Across Nikan Hospital, Araj, Artesh Highway, Tehran, Iran; website [www.sedfirm.com](http://www.sedfirm.com); Additional Sanctions Information—Subject to Secondary Sanctions [NPWMD] [IFSR] (Linked To: IRAN COMMUNICATION INDUSTRIES).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for acting or purporting to act for or on behalf of, directly or indirectly, IRAN COMMUNICATION INDUSTRIES, a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. NAZ TECHNOLOGY CO., LTD. (a.k.a. N.A.Z. TECHNOLOGY; a.k.a. NAZ TECHNOLOGY; a.k.a. NAZ TECHNOLOGY CO.; a.k.a. NAZ TECHNOLOGY CORPORATION LTD; a.k.a. "NAZ"), Taiwan World Trade Center (TWTC) Room 6C–21 (6F) Number 5 Section 5, Xinyi Road, Xinyi District, Taipei City, Taiwan; 605, Floor 6, Building 204, Tairan Technology Park, Tairan 6th Road, Tianan Community, Sha, Tou Sub-District, Futian District, Shenzhen, Guangdong, China; Building 10, Shiguan Industrial Park, Shenzhen 518106, China; C–608, Floor 6, Lan Optical Technology Building, No. 7, Xinxu Road, Hi-and-New Tech Part (North Zone), Nanshan District, Shenzhen, China; Rm. 804, Sino Centre, 582–592 Nathan Rd., KLN, Hong Kong, China; Additional Sanctions Information—Subject to Secondary Sanctions; Registration Number 440301503328703 (China) [NPWMD] [IFSR] (Linked To: SOLTANMOHAMMADI, Mohammad).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by,

MOHAMMAD SOLTANMOHAMMADI, a person whose property and interests in property are blocked pursuant to E.O. 13382.

5. PROMA INDUSTRY CO., LTD. (a.k.a. PROMA INDUSTRY CO.; a.k.a. PROMA INDUSTRY CO., LTD; a.k.a. PROMA INDUSTRY COMPANY; a.k.a. PROMA INDUSTRY COMPANY, LIMITED; a.k.a. PROMA INDUSTRY COMPANY, LTD.; a.k.a. "PROMA"; a.k.a. "PROMA INDUSTRY"), 1A, Fook Ying Building, 379 King's Road, North Point, Hong Kong, China; 3A, Fook Ying Building, 420 Kins Road, Hong Kong, China; Additional Sanctions Information—Subject to Secondary Sanctions; C.R. No. 4116 (Hong Kong) [NPWMD] [IFSR] (Linked To: HODA TRADING).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological, or other support for, or goods or services in support of, HODA TRADING, a person whose property and interests in property are blocked pursuant to E.O. 13382.

6. SOLTECH INDUSTRY CO., LTD. (a.k.a. SOLTECH INDUSTRIES COMPANY LTD.; a.k.a. SOLTECH INDUSTRY COMPANY, LTD; a.k.a. "SOLTECH"; a.k.a. "SOLTECH INDUSTRIES"; a.k.a. "SOLTECH INDUSTRY CO."; a.k.a. "SOLTECH INDUSTRY COMPANY"), 1A, Fook Ying Building, 379 Kings Road, North Point, Hong Kong, China; Rm. 51, 5th Floor, Britannia House, Jalan Cator, Bandar Seri Begawan BS 8811, Brunei; Additional Sanctions Information—Subject to Secondary Sanctions; Company Number NBD/4116 (Brunei) [NPWMD] [IFSR] (Linked To: HODA TRADING).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological, or other support for, or goods or services in support of, HODA TRADING, a person whose property and interests in property are blocked pursuant to E.O. 13382.

Dated: November 10, 2020.

**Andrea M. Gacki,**

*Director, Office of Foreign Assets Control,  
U.S. Department of the Treasury.*

[FR Doc. 2020–25224 Filed 11–13–20; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF THE TREASURY

### Open Meeting of the Federal Advisory Committee on Insurance

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces that the U.S. Department of the Treasury's Federal Advisory Committee on Insurance ("Committee") will meet via video conference on Thursday, December 3, 2020 from 12:30 p.m.–3:30 p.m. Eastern Time. The meeting is open to the public.

**DATES:** The meeting will be held via teleconference on Thursday, December 3, 2020 from 12:30 p.m.–3:30 p.m. Eastern Time.

**ADDRESSES:** The Committee meeting will be held via teleconference and is open to the public. The public can view the meeting via live webcast at <https://www.yorkcast.com/treasury/events/2020/12/03/faci>. The webcast will also be available through the Committee's website at <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/federal-advisory-committee-on-insurance-faci>. Requests for reasonable accommodations under Section 504 of the Rehabilitation Act should be directed to Mariam G. Harvey, Office of Civil Rights and Diversity, Department of the Treasury at (202) 622-0316, or [mariam.harvey@do.treas.gov](mailto:mariam.harvey@do.treas.gov).

**FOR FURTHER INFORMATION CONTACT:** Lindsey Baldwin, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220, at (202) 622-3220 (this is not a toll-free number) or [faci@treasury.gov](mailto:faci@treasury.gov). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is provided in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 10(a)(2), through implementing regulations at 41 CFR 102-3.150.

*Public Comment:* Members of the public wishing to comment on the business of the Committee are invited to submit written statements by any of the following methods:

#### *Electronic Statements*

- Send electronic comments to [faci@treasury.gov](mailto:faci@treasury.gov).

#### *Paper Statements*

- Send paper statements in triplicate to the Federal Advisory Committee on Insurance, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220. In general, the Department of the Treasury will post all statements on its website <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/federal-advisory-committee-on-insurance-faci> without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. The Department of the Treasury will also make such statements available for public inspection and copying in the Department of the Treasury's Library,

720 Madison Place NW, Room 1020, Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect statements by calling (202) 622-2000. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

*Tentative Agenda/Topics for Discussion:* In the meeting, the Committee's four subcommittees will provide the Committee with updates concerning their work. The "International Work" subcommittee will discuss its ongoing work related to market access issues in the insurance sector. The "COVID-19" subcommittee will discuss its work relating to the insurance sector's preparation for future pandemics and other emergencies. Additionally, the "Availability of Insurance Products" subcommittee and the "Addressing the Protection Gap Through Public-Private Partnerships and Other Mechanisms" subcommittee will provide brief updates on their anticipated workplans for 2021. FIO staff will also provide the Committee with an update on FIO's recent work and activities.

Dated: November 10, 2020.

**Steven Seitz,**

*Director, Federal Insurance Office.*

[FR Doc. 2020-25201 Filed 11-13-20; 8:45 am]

**BILLING CODE 4810-25-P**

## **UNIFIED CARRIER REGISTRATION PLAN**

### **Sunshine Act Meeting**

**TIME AND DATE:** November 19, 2020, from Noon to 2:00 p.m., Eastern Time.

**PLACE:** This meeting will be accessible via conference call and via Zoom Meeting and Screenshare. Any interested person may call (i) 1-929-205-6099 (US Toll) or 1-669-900-6833 (US Toll) or (ii) 1-877-853-5247 (US Toll Free) or 1-888-788-0099 (US Toll Free), Meeting ID: 992 1847 3466, to listen and participate in this meeting. The website to participate via Zoom Meeting and Screenshare is <https://kellen.zoom.us/j/99218473466>.

**STATUS:** This meeting will be open to the public.

**MATTERS TO BE CONSIDERED:** The Unified Carrier Registration Plan Education and Training Subcommittee (the "Subcommittee") will continue its work in developing and implementing the Unified Carrier Registration Plan and

Agreement. The subject matter of this meeting will include:

### **Proposed Agenda**

#### *I. Call to Order—Subcommittee Chair*

The Subcommittee Chair will welcome attendees, call the meeting to order, call roll for the Subcommittee, confirm whether a quorum is present, and facilitate self-introductions.

#### *II. Verification of Publication of Meeting Notice—UCR Executive Director*

The UCR Executive Director will verify the publication of the meeting notice on the UCR website and distribution to the UCR contact list via email followed by the subsequent publication of the notice in the **Federal Register**.

#### *III. Review and Approval of Subcommittee Agenda and Setting of Ground Rules—Subcommittee Chair*

For Discussion and Possible Subcommittee Action

The Subcommittee Agenda will be reviewed, and the Subcommittee will consider adoption.

#### Ground Rules

- Subcommittee action only to be taken in designated areas on agenda

#### *IV. Review and Approval of Minutes From the October 15, 2020 Meeting—Subcommittee Chair*

For Discussion and Possible Subcommittee Action

Draft minutes from the October 15, 2020 Subcommittee meeting via teleconference will be reviewed. The Subcommittee will consider action to approve.

#### *V. Audit Module Development Discussion With the Education and Training Subcommittee—UCR Operations Director*

The Subcommittee will discuss and provide updates on development of the Audit Module.

#### *VI. Decision Tree Development Discussion With the Education and Training Subcommittee—UCR Operations Director*

The Subcommittee will discuss and provide input and comments on the development of the Decision Tree Widget.

#### *VII. Other Items—Subcommittee Chair*

The Subcommittee Chair will call for any other items the committee members would like to discuss.

### VIII. Adjournment—Subcommittee Chair

The Subcommittee Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, November 11, 2020 at: <https://plan.ucr.gov>.

**CONTACT PERSON FOR MORE INFORMATION:** Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305-3783, [eleaman@board.ucr.gov](mailto:eleaman@board.ucr.gov).

**Alex B. Leath,**

*Chief Legal Officer, Unified Carrier Registration Plan.*

[FR Doc. 2020-25325 Filed 11-12-20; 4:15 pm]

**BILLING CODE 4910-YL-P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0074]

### Agency Information Collection Activity: Request for Change of Program or Place of Training

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before January 15, 2021.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov) or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to [nancy.kessinger@va.gov](mailto:nancy.kessinger@va.gov). Please refer to "OMB Control No. 2900-0074" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

**FOR FURTHER INFORMATION CONTACT:** Danny S. Green at (202) 421-1354.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must

obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

**Authority:** 38 U.S.C. 3034, 3241, 3323, 3471, 3691, and 10 U.S.C. 16136(b). 38 CFR 21.4234, 21.7114, 21.7614, 21.1030, 21.5030(c)(2), 21.5292(e)(2), 21.7030, 21.7530 and 21.9510, and PL 115-48.

**Title:** Request for Change of Program or Place of Training, VAF 22-1995.

**OMB Control Number:** 2900-0074.

**Type of Review:** Revision of a currently approved collection.

**Abstract:** VA uses the information requested on this form to determine the applicant's continued eligibility to educational assistance administered by VA when a change of program or place of training occur.

**Affected Public:** Institutions of Higher Learning.

**Estimated Annual Burden:** 57,009 hours.

**Estimated Average Burden per Respondent:** 20 minutes paper and 14 minutes electronic.

**Frequency of Response:** Once.

**Estimated Number of Respondents:** 184,895.

By direction of the Secretary.

**Danny S. Green,**

*VA PRA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.*

[FR Doc. 2020-25218 Filed 11-13-20; 8:45 am]

**BILLING CODE 8320-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Minority Veterans, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2., that the Advisory Committee on

Minority Veterans will virtually meet on December 8–December 10, 2020 via Adobe Connect. The meeting sessions will begin and end as follows:

| Dates                 | Times   |
|-----------------------|---|
| December 8, 2020 .... | 11:00 a.m.–3:00 p.m.—Eastern Standard Time (EST). |
| December 9, 2020 .... | 11:00 a.m.–3:00 p.m. EST.                         |
| December 10, 2020 ..  | 11:00 a.m.–3:00 p.m. EST.                         |

This meeting sessions are open to the public. To access the meeting, please use the Adobe Connect link: <http://va-eerc-ees.adobeconnect.com/acmv/> or via phone VANTS: 1-800-767-1750, Participant Code: 09533#.

The purpose of the Committee is to advise the Secretary on the administration of VA benefits and services to minority Veterans; assess the needs of minority Veterans; and evaluate whether VA compensation, medical and rehabilitation services, outreach, and other programs are meeting those needs. The Committee makes recommendations to the Secretary regarding such activities.

On December 8, the Committee will receive briefings and updates from the Center for Minority Veterans, National Cemetery Administration, Veterans Experience Office, National Center for Veterans Analysis, Office of Tribal Government Relations, and Veterans Benefits Administration. On December 9, the Committee will receive briefings and updates from the Board of Veterans Appeals, Veterans Health Administration, Center for Women Veterans, Mental Health, Office of Telehealth, Office of Rural Health and Office of Health Equity. On December 10, the Committee will receive a briefing and update on Office of Diversity & Inclusion, Women's Health Services, Million Veteran Program, Ex-Officio(s) Update and hold an exit briefing with VBA, VHA and NCA. The Committee will receive public comments from 1:10 p.m. to 1:25 p.m. After the Leadership Exit Briefing, the Committee will conduct an after-action review.

Individuals who speak are invited to submit a 1–2-page summary of their comments no later than November 30, 2020 for inclusion in the official meeting record. Members of the public may also submit written statements for the Committee's review to Ms. Juanita Mullen, at [Juanita.Mullen@va.gov](mailto:Juanita.Mullen@va.gov). Any member of the public seeking additional information should contact Ms. Mullen or Mr. Dwayne Campbell 202-461-6191.

Dated: November 10, 2020.

**Jelessa M. Burney,**

*Federal Advisory Committee Management  
Officer.*

[FR Doc. 2020-25245 Filed 11-13-20; 8:45 am]

**BILLING CODE P**



# FEDERAL REGISTER

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Part II

## Social Security Administration

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20 CFR Parts 404, 408, 411, et al.

Hearings Held by Administrative Appeals Judges of the Appeals Council;  
Final Rule

**SOCIAL SECURITY ADMINISTRATION****20 CFR Parts 404, 408, 411, 416, and 422**

[Docket No. SSA–2017–0073]

RIN 0960–AI25

**Hearings Held by Administrative Appeals Judges of the Appeals Council****AGENCY:** Social Security Administration.  
**ACTION:** Final rule.

**SUMMARY:** We are revising our rules to clarify when and how administrative appeals judges (AAJ) on our Appeals Council may hold hearings and issue decisions. The Appeals Council already has the authority to hold hearings and issue decisions under our existing regulations, but we have not exercised this authority or explained the circumstances under which it would be appropriate for the Appeals Council to assume responsibility for holding a hearing and issuing a decision. This final rule will ensure the Appeals Council is not limited in the type of claims for which it may hold hearings. We expect that this rule will increase our adjudicative capacity when needed, and allow us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level. Our ability to use our limited resources more effectively will help us quickly optimize our hearings capacity, which in turn will allow us to issue accurate, timely, high-quality decisions.

**DATES:** This final rule will be effective December 16, 2020.

**FOR FURTHER INFORMATION CONTACT:** Debra Sundberg, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–7100. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at <http://www.socialsecurity.gov>.

**SUPPLEMENTARY INFORMATION:** On December 20, 2019, we published a Notice of Proposed Rulemaking (NPRM), “Hearings Held by Administrative Appeals Judges of the Appeals Council.”<sup>1</sup> In our NPRM, we proposed to clarify that an AAJ from our Appeals Council may hold a hearing and issue a decision on any case pending at the hearings level under titles II, VIII, or XVI of the Social

Security Act (Act). With this final rule, we adopt the proposed changes, with some exceptions.

The final rule differs from our proposed rule in the following ways:

- We are not making the proposed changes to § 402.60 because we are considering the possibility of reorganizing sections within 20 CFR part 402. We will consider revisions to § 402.60 as part of that reorganization.
- We revised §§ 404.929, 416.1429, 404.976, and 416.1476 to conform to the current CFR text, which we recently revised as part of our final rule, “Setting the Manner for the Appearance of Parties and Witnesses at a Hearing,” published on December 18, 2019.<sup>2</sup>
- We removed proposed paragraph (d) from §§ 404.970 and 416.1470 in response to the public comments we received, which we discuss in more detail below. We also removed the corresponding language in proposed paragraph (a) of the same sections.
- We revised §§ 404.973 and 416.1473 in response to the public comments we received, to clarify that prior notice is not needed where the Appeals Council issues a decision that is favorable in part, and remands the remaining issues for further proceedings. We discuss this in more detail in the response to the public comments below.
- We revised §§ 404.976(b) and 416.1476(b) to clarify that if we file a certified administrative record in Federal court, we will include all additional evidence the Appeals Council received during the administrative review process, including additional evidence that the Appeals Council received but did not exhibit or make part of the official record.
- We revised §§ 404.983 and 416.1483 in response to public comments to clarify when the Appeals Council will hold a hearing after court remand. In these sections, we revised paragraph (b) to pertain only to circumstances when the Appeals Council will issue a decision without holding a hearing after a court remand, and we inserted a new paragraph (c) to clarify when the Appeals Council will hold a hearing after court remand. As such, we redesignated the prior paragraphs (c) and (d) as paragraphs (d) and (e), respectively.
- We revised §§ 404.984 and 416.1484 to clarify that the Appeals Council may assume jurisdiction of a case after an administrative law judge (ALJ) or administrative appeals judge (AAJ) issues a hearing decision in a case

remanded by Federal court. We also revised §§ 404.984 and 416.1484 to clarify that the Appeals Council will not dismiss the request for a hearing in a claim where we are otherwise required by law or a judicial order to file the Commissioner’s additional and modified findings of fact and decision with a court.

- We revised § 422.205(a) to clarify that AAJs issue hearing level decisions and dismissals.

We received 275 comments on the NPRM, 204 of which related to the proposed rule and are available for public viewing at <http://www.regulations.gov>.<sup>3</sup> These comments were from:

- Individual citizens and claimant representatives;
- Members of Congress;
- National groups representing claimant representatives, such as the National Organization of Social Security Claimants’ Representatives;
- Groups representing administrative law judges (ALJ), such as the Forum of United States Administrative Law Judges and the Association of Administrative Law Judges; and
- Advocacy groups, such as the Consortium for Citizens with Disabilities and the Disability Law Center.

We carefully considered these comments. We discuss and respond to the significant issues raised by the commenters that were within the scope of the NPRM below.

**Comments and Responses***Change Is Overdue and the Proposed Rule Would Allow Us To Use Our Resources Better*

*Comment:* One commenter, who supported the proposal, said this change is overdue, and will ensure shorter wait times and due process for claimants. Another commenter said the proposed rule would allow us to use resources better.

*Response:* We acknowledge the commenters’ support for our rule. The goal of this final rule is to use our available resources in the best possible way.

*The Administrative Procedure Act (APA) and the Use of ALJs To Hear and Decide Cases*

*Comment:* Several commenters said that Congress passed the APA in part to ensure that the public had a right to a

<sup>3</sup> We excluded two comments from employees of the Social Security Administration who submitted the comments in their capacity as agency employees. The other comments we excluded were out of scope or nonresponsive to the proposal.

<sup>1</sup> 84 FR 70080 (Dec. 20, 2019).

<sup>2</sup> 84 FR 69298 (Dec. 18, 2019).

neutral and impartial arbiter of facts to adjudicate appeals of agency decisions. One commenter said that our proposed rule would upend our longstanding consistency with the APA's requirements, and would deviate from our past practices and Congressional intent. One commenter referred to sections of the APA that state that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,"<sup>4</sup> the agency, one or more members of the body that comprises the agency, or an ALJ, must "preside at the taking of evidence."<sup>5</sup> The commenter opined that SSA disability cases are adjudications required by the Act to be determined on the record and that the statute mandates that "if a hearing is held, [the Commissioner] shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision."<sup>6</sup> According to the commenter, the statute's mandate triggers application of the APA and this is consistent with the APA's definition of "adjudication," which, according to the commenter, was intended to include proceedings such as "claims under Title II (Old Age and Survivors' Insurance) of the Act."<sup>7</sup>

Some commenters acknowledged that Congress has never explicitly included the requirement to use ALJs in the Act, but said that it has made clear in legislative history that our hearing process is covered by the provisions of the APA.<sup>8</sup> One commenter cited a statement from Congress when it enacted the statute that converted SSA hearing examiners into ALJs under the APA pursuant to 5 U.S.C. 3105 as evidence that Congress intended that we use ALJs.<sup>9</sup> Similarly, a commenter asserted that because our procedures are nearly identical to those specified by the APA, it is clear that we observe the

APA's procedural and due process protections, which includes requiring ALJs to preside over hearings. According to a commenter, the APA and Act are so similar that the Supreme Court noted that it did not have to distinguish between the two laws because "social security administrative procedure does not vary from that prescribed by the APA."<sup>10</sup> Additionally, commenters stated that Congress has "understood that hearings under the Social Security Act would [continue to] be presided over by APA-qualified hearing examiners."<sup>11</sup>

According to one commenter, the APA requires the use of ALJs as presiding officers in administrative appeals in virtually all circumstances, the exceptions to which do not apply in the Social Security context.

One commenter referred us to a publication that the commenter said discussed applicable law that invalidates our NPRM.<sup>12</sup>

*Response:* We disagree with these comments. Congress established our administrative hearings process through the Social Security Act Amendments of 1939.<sup>13</sup> The original version of section 205(b)(1) of the Act stated:

The [Social Security] Board is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title. Whenever requested by such individual . . . who makes a showing in writing that his or her rights may be prejudiced by any decision the Board has rendered, it shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision. . . .

These broad provisions, though slightly modified over the years, generally have remained substantively unchanged since their enactment.<sup>14</sup> Therefore, it has been clear that the head of our agency, initially, the Social Security Board, and currently, the Commissioner, has had the discretion to decide how our hearings process is structured and who may preside over a hearing.<sup>15</sup> From the beginning of our hearings process, the head of our agency has delegated to the Appeals Council

the authority to conduct hearings and issue decisions.<sup>16</sup> Indeed, giving the Appeals Council the authority to hold hearings was part of our original vision for our hearings process, predating and forming the basis for the 1940 regulations that authorized the Appeals Council to hold hearings.<sup>17</sup>

Six years after the commencement of our administrative hearings process, and the commencement of the Appeals Council's delegated authority to conduct hearings and issue decisions, Congress enacted the APA.<sup>18</sup> The APA's formal adjudication procedures apply, with limited exceptions, "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."<sup>19</sup> Significantly, neither the text nor the legislative history of the Act explicitly defines what constitutes a "hearing" under the Act, and nothing in the statute or its legislative history requires us to hold hearings "on the record." While it is true that Congress modeled many of the hearing procedures in the APA on the Act,<sup>20</sup> there are significant differences between an informal, non-adversarial Social Security hearing and the type of formal, adversarial adjudication to which the APA applies.

This view of our hearings process as distinct from the type of hearings process to which the APA applies is consistent with the legislative history of the APA, as well as the legislative history of the Act. The legislative history of both statutes highlights the differences between formal, adversarial adjudications by regulatory agencies and informal, non-adversarial proceedings by agencies that administer

<sup>16</sup> 5 FR 4169, 4172 (Oct. 22, 1940) (codified at 20 CFR 403.709(d) (1940 Supp.)). The original regulation governing this issue stated that, "The hearing provided for in this section shall be, except as herein provided, conducted by a referee designated by the Chairman of the Appeals Council. The Chairman may designate a member of the Appeals Council to conduct a hearing. The Territorial Director of the Social Security Board may conduct hearings in the Territories of Alaska and Hawaii. The provisions of this section governing the referee shall be applicable to a member of the Appeals Council or a Territorial Director in conducting a hearing."

<sup>17</sup> *Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims* 39 (Jan. 1940) (*Basic Provisions*). The *Basic Provisions* are reprinted in *Administrative Procedure in Government Agencies: Monograph of the Attorney General's Committee on Administrative Procedure, Part 3 (Social Security Board)*, S. Doc. No. 77-10, 33-59 (1940).

<sup>18</sup> By its own terms, the APA does not repeal delegations of authority as provided by law. Public Law 79-404, section 2, 60 Stat. 237 (1946).

<sup>19</sup> 5 U.S.C. 554(a).

<sup>20</sup> *Richardson v. Perales*, 402 U.S. at 409.

<sup>4</sup> 5 U.S.C. 554(a).

<sup>5</sup> 5 U.S.C. 556(b)(1)-(3).

<sup>6</sup> Sections 205(b) and § 1631(c)(1)(A) of the Act (42 U.S.C. 405(b)(1) and 42 U.S.C. 1383(c)(1)(A)).

<sup>7</sup> The commenter cited the "Attorney General's Manual on the Administrative Procedure Act" 15 (1947), a law review article, Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 612, 636 (1948), and our statement when responding to public comment on hearing procedures under title XVI, 39 FR 37976 (Oct. 25, 1974).

<sup>8</sup> The commenter quoted material from Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. Nat'l Ass'n Admin. L. Judges (2002), available at: <http://digitalcommons.pepperdine.edu/naalj/vol22/iss2/1>.

<sup>9</sup> See Social Security Amendments of 1977, Pub. L. 95-216, 91 Stat. 1509 (1977); 5 U.S.C. 3105 (2000); and H.R. Rep. No. 95-617, pt. 2, at 2 (1977).

<sup>10</sup> See *Richardson v. Perales*, 402 U.S. 389, 409 (1971).

<sup>11</sup> Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr., and Jeffrey S. Lubbers, *Report for Recommendation 92-7: The Federal Administrative Judiciary*, 1992 Administrative Conference of the United States (ACUS) 769, 820 (1992) (1992 ACUS Report).

<sup>12</sup> Arzt, *supra*, n.8.

<sup>13</sup> Social Security Act Amendments of 1939, ch. 666, section 201, 53 Stat. 1360, 1362-1369 (1939).

<sup>14</sup> See *Heckler v. Day*, 467 U.S. 104, 125 (1984) (Marshall, J., dissenting). Title XVI of the Act contains substantially the same language as section 205(b)(1). See section 1631(c)(1)(A) of the Act.

<sup>15</sup> See also section 702(a)(4)-(a)(7) of the Act.

certain Federal benefit programs.<sup>21</sup> Most notably, under our “inquisitorial” hearings process, an ALJ fulfills a role that requires him or her to act as a neutral decisionmaker and to develop facts for and against a benefit claim. The ALJ’s multiple roles involve, in essence, wearing “three hats”: helping the claimant develop facts and evidence; helping the government investigate the claim; and issuing an independent decision. The APA, on the other hand, specifies that “An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision . . . .”<sup>22</sup> The APA, therefore, embodies an internal “separation-of-functions” in agency adjudications that are subject to that statute. Indeed, ensuring such an internal separation-of-functions was one of the APA’s fundamental purposes.<sup>23</sup> The internal separation-of-functions required in formal adjudications under the APA is inconsistent with the concept of the “three-hat” role of an adjudicator in a Social Security hearing,

<sup>21</sup> The legislative history of the Social Security Act Amendments of 1939 states that, “Administrative and judicial review provisions not now provided in the Social Security Act are included, and administrative provisions are included which are similar to those under which the Veterans’ Administration operates. . . . Section 205(b) outlines the general functions of the Board in determining rights to benefits. It requires the Board to offer opportunity for a hearing, upon request, to an individual whose rights are prejudiced by any decision of the Board.” H.R. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939). The legislative history of section 205(b) of the Act therefore links the provisions that Congress contemplated for our administrative review process with the process used by the Veterans’ Administration (now the Department of Veterans Affairs), another benefit-granting agency. This linkage to the Department of Veterans Affairs procedures is significant, because “[t]he prevailing pre-World War II view was that benefits decisionmaking was significantly different from regulatory decisionmaking.” *1992 ACUS Report*, at 815. The Final Report of Attorney General’s Committee on Administrative Procedure, on which Congress relied when it enacted the APA, also highlights the distinction between the regulatory agencies and the benefit granting agencies. S. Doc. No. 77–8, at 55, 69, 263 (1941). “When the Attorney General’s Committee recommended the creation of the office of independent hearing examiner, it was focusing on the operation of regulatory agencies. Benefit adjudication was not a matter of primary concern to the Committee, and there is ground for the belief that the Committee viewed benefit adjudication very differently from regulatory adjudication.” *1992 ACUS Report*, at 825.

<sup>22</sup> 5 U.S.C. 554(d). The APA, 5 U.S.C. 554(d)(2), also provides that the “employee who presides at the reception of evidence” may not “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”

<sup>23</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

which by its very nature, is an investigatory function.<sup>24</sup> Thus, contrary to the restrictions noted in the APA, the SSA adjudicator both performs an investigative function for SSA and participates in the decision.

The ALJ’s three-hat role is consistent with the prevailing view of benefit decision making at the time Congress enacted the APA in 1946. When Congress was considering whether and how to reform the Federal administrative process between the mid-1930s and 1946, it had the benefit of a number of studies on the issue, including the Final Report of Attorney General’s Committee on Administrative Procedure and a series of monographs that the Attorney General’s Committee prepared on numerous Federal agencies, including the Veterans Administration and the Social Security Board. The Final Report of the Attorney General’s Committee recognized a dichotomy between “regulatory” decision making and “benefits” decision making.<sup>25</sup> “It did so on the ground that hearings conducted by these agencies merely augmented ex parte investigations which the agencies conducted on the claims before them. This subordinate role played by hearings in the benefit-granting agencies made the Committee’s

<sup>24</sup> See, e.g., *1992 ACUS Report*, at 792 n.53 (“Obviously, had the formal hearing requirements of the APA been mandatory, the separation-of-functions requirements would have forbidden the ALJ to assume total control of the process.”); Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*, 55 Admin. L. Rev. 787, 809–10 (2003) (“[D]isability cases under the Social Security Act—the largest adjudicatory regime to use ALJs as presiding officers—are arguably not even governed by the APA. . . . Historically, the Social Security Administration decided to use administrative law judges even though it was not required to do so by any ‘on-the-record’ hearing requirement. . . . Moreover, Social Security cases are non-adversarial, the government is not typically represented and, more like the inquisitorial model, the presiding administrative law judge has an affirmative obligation to develop the record even if counsel represents the claimant. Social Security cases have been described as ‘the best example’ of agency adjudication not based on a judicial model. Although Social Security cases are, in numbers at least, the predominant form of ALJ hearing today, they are plainly not the prototypical regulatory hearing of the mid-1940s or the accusatory-style proceeding likely to lead to a finding of culpability or imposition of severe economic sanction whose procedural uniformity appears to be the predicate for an APA-default provision.”); Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 Tulsa L. J. 203, 209 (1996) (“At first glance, this three-hat system may appear to contravene the APA separation-of-functions requirements because the Social Security ALJ is not limited to hearing and deciding. The ALJ also has the task of developing both the claimant’s and the government’s case.”).

<sup>25</sup> “Final Report of Attorney General’s Committee on Administrative Procedure,” S. Doc. No. 77–8, at 55, 69, 263 (1941); see *1992 ACUS Report*, at 815–17.

general analysis of agency adjudication—including its careful review of separations-of-functions issues—inapplicable to the benefit agencies.”<sup>26</sup>

The Supreme Court approved the “three-hat” role of our adjudicators in *Richardson v. Perales*, without addressing the APA’s separation-of-functions requirements.<sup>27</sup> In *Perales*, the Court was less concerned with the position title of our adjudicators than with ensuring that the hearings process worked fairly and efficiently. The Court declined to consider whether a Social Security hearing was a formal adjudication under the APA because, in the Court’s view, our hearings process, including the “three-hat role” for the adjudicator at the hearing, was fair and worked efficiently to process our tremendous volume of cases.<sup>28</sup> The fairness and efficiency of the process, however, did not depend on the fact that an ALJ, as opposed to another type of adjudicator, presided over the hearing.

Consequently, in light of the significant differences between our informal, inquisitorial hearings process and the type of hearings process to which the APA applies, our hearings process is properly viewed as comparable to the APA’s process, but governed only by the requirements of the Act and procedural due process.<sup>29</sup>

<sup>26</sup> Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 Notre Dame L. Rev. 965, 987 (1991); see also Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 Admin. L. Rev. 1, 20–21 (1997) (Gifford, *Past Choices*).

<sup>27</sup> 402 U.S. 389, 410 (1971).

<sup>28</sup> The *Perales* court relied on statistics showing that the agency received “over 20,000 disability claim hearings annually,” 402 U.S. at 406; see also *id.* at 403 n.7 (citing agency statistics showing that “in fiscal 1968, 515,938 disability claims were processed.”) Those numbers pale in comparison to our more recent workload numbers. In 2019, we received and completed approximately 2.3 million initial disability claims, received more than 510,000 hearing requests, and completed more than 793,000 hearings. “Annual Performance Report, Fiscal Years 2019–2021” at 44, 46 (2020).

<sup>29</sup> See, e.g., *1992 ACUS Report*, at 791–92 (“The Social Security Administration had long utilized ALJs even though the APA on-the-record hearing requirements may not have required it to do so. . . . By the 1970s the number of disability determinations skyrocketed with the advent of expanded coverage. It became quickly apparent that the number of ALJs making disability determinations would far outstrip those making all formal decisions in government. The remarkable thing about this expanded use of ALJs was that it emerged without APA compulsion because no on-the-record hearing was mandated in the disability context.”); Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1664–65 (2016) (Barnett, *Against Administrative Judges*) (“SSA has chosen to use ALJs in the absence of any ‘on the record’ language.”); Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. Rev. 1341, 1348–49 (1992); Phyllis E.



We recognize, as some commenters noted, that on two prior occasions, Congress explicitly authorized us, on a temporary basis, to use non-ALJ adjudicators in our hearings process: first, after Congress created the disability program in the 1950s, and again when Congress created the Supplemental Security Income (SSI) program in the 1970s.<sup>30</sup> One possible explanation for these temporary authorizations is that they reflect a congressional belief that, without such authorization, the APA would have compelled us to use ALJs in our hearings process. The commenters seemed to proceed from that assumption. However, an equally plausible explanation for Congress's action is a need for expediency: Congress preferred to address the service delivery problems that arose after enactment of the disability and SSI programs through means that were the least disruptive to our existing processes. In this context, "Congress's temporary authorization for non-ALJ

Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administration Justice in an Ever-Expanding Bureaucracy*, 3 Health Matrix 339, 353 n.18 (1993) ("SSA decides large numbers of disability cases informally—that is outside the formal adjudication requirements of the APA—yet it uses ALJs to do so."); cf., ACUS, *Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program*, at 11–12 (2014). (<https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf>) (discussing SSA's use of ALJs and noting that, "The relevant provision of the Social Security Act, however, required only an 'opportunity for hearing,' not a 'hearing on the record.' This language would not ordinarily be read to require observance of formal APA adjudication procedures.").

<sup>30</sup> Public Law 85–766, 72 Stat. 864, 878 (1958); Public Law 86–158, 73 Stat. 339, 352 (1959); Public Law 92–603, 86 Stat. 1329, 1475 (1972). Notably, the legislation that authorized us to use non-ALJ adjudicators at the outset of the SSI program may have had an unintended effect. At the outset of the SSI program in 1974, as now, many claimants who applied for SSI payments under title XVI of the Act also applied for benefits under title II of the Act. We needed a feasible way to decide these concurrent claims, and using a different adjudicator to decide each claim would not have been supportable because concurrent claims usually involve common issues. Congress subsequently enacted legislation to address the issue. See Public Law 94–202, 89 Stat. 1135 (1976); H.R. Rep. No. 679, 94th Cong., 1st Sess. 3 (1975); S. Rep. No. 550, 94th Cong., 1st Sess. 3–4 (1975), reprinted in 1975 U.S.C.C.A.N. 2347, 2349–2350 (1975); Public Law 95–216, 371, 91 Stat. 1509, 1559 (1977); H.R. Conf. Rep. No. 837, 95th Cong., 1st Sess. 74 (1977), reprinted in 1977 U.S.C.C.A.N. 4308, 4320. The first law, Public Law 94–202, made the requirements for hearings held under title XVI of the Act consistent with those held under title II, and provided that the hearing examiners who had been hired under the original version of the SSI statute would be considered ALJs on a temporary basis. The second law, Public Law 95–216, made these adjudicators ALJs on a permanent basis.

adjudication [after enactment of the disability program] was merely intended to provide relief to the SSA without revising the SSA's decisional format. Under such a view, Congress did not consider the larger question of whether Title II proceedings were or were not governed by the APA or whether they required APA-qualified ALJs as presiding officers."<sup>31</sup>

We also disagree with those commenters who expressed possible due process concerns. It is important to note that there is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs. Indeed, adjudicators other than ALJs significantly outnumber ALJs, and they preside over hundreds of thousands of adjudications in the Federal government each year, including many, such as those conducted by the Department of Veterans Affairs, that involve issues similar to the ones that our adjudicators are required to decide.<sup>32</sup> With respect to the issue of who may be a decisionmaker in an adjudicatory proceeding, the fundamental requirement of due process is that the decisionmaker be fair and impartial.<sup>33</sup>

As we explained in the preamble of the NPRM, we will not implement these changes in a way that will undermine the independence and integrity of our existing administrative review process. We take seriously our responsibility to ensure that claimants receive accurate decisions from impartial decisionmakers, arrived at through a fair process that provides each claimant with the full measure of due process protections. Since the beginning of our administrative review process in 1940, we have held an unwavering commitment to a full and fair hearings process. This final rule will not alter the fundamental fairness of our longstanding hearings process. Under our current rules, and under sections 404.956(c) and 416.1456(c) of this final

<sup>31</sup> 1992 ACUS Report, at 820–21; see also Gifford, *Past Choices*, at 26, n.139.

<sup>32</sup> See Kent H. Barnett, *Some Kind of Hearing Officer*, 94 Wash. L. Rev. 515, 541–43 (2019) (recognizing that non-ALJs significantly outnumber ALJs in the Federal government, and noting that, as of approximately June 2019, there were 1,931 ALJs versus at least 10,831 non-ALJs in the Federal government); John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government* 59–79 (August 1991) (available at: <https://www.acus.gov/sites/default/files/documents/00000001.pdf>).

<sup>33</sup> See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (noting that, "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities" and rejecting a due process challenge to the use of non-ALJ hearing officers who "serve[d] in a quasi-judicial capacity, similar in many respects to that of administrative law judges" in certain Medicare hearings).

rule, our AAJs will apply the same rules that our ALJs apply when they hold hearings. As they do currently, under the authority prescribed by sections 404.979 and 416.1479, AAJs will independently decide cases based on the facts in each case and in accordance with agency policy set out in regulations, rulings, and other policy statements. They will continue to maintain the same responsibility and independence as ALJs to make fair and accurate decisions, free from agency interference. Because AAJs and ALJs have similar levels of training, will follow the same set of policies, and have equivalent decisional independence, we anticipate that when AAJs are used at the hearing level, they will provide the same level of service and fairness as ALJs do.

*Comment:* A commenter said that the regulations and policies currently in place, which we cited as support for our NPRM, have only stood because they have not been previously implemented, and thus were never challenged. The commenter opined that the two regulations that give AAJs the authority to hear cases are in conflict with the APA, which requires adjudications on the record to be conducted only by the agency, one of the members of the body that comprise the agency, or an ALJ appointed under 5 U.S.C. 3105.

*Response:* We disagree. As explained above, in light of the significant differences between our hearings process and the type of hearings process to which the APA applies, we believe our hearings process is properly viewed as comparable to the APA's process, but governed only by the requirements of the Act and procedural due process. For the reasons discussed above, this final rule is consistent with the Act and safeguards the individual's right to procedural due process.

*Comment:* A commenter stated that it is only by regulations, not statute, that we use the Appeals Council to hear appeals at our agency. The commenter opined that if agencies could promulgate regulations and make anyone a member of the body that comprises the agency, then agencies would never need to use ALJs. The commenter cited the Supreme Court's decision in *Wong Yang Sung v. McGrath*<sup>34</sup> as demonstrating that adjudicators authorized to conduct hearings only by regulation must give way to ALJs.

*Response:* We disagree with this comment. Contrary to the commenter's assumption, we are not providing our

<sup>34</sup> See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

AAJs with the authority to hold hearings because we consider them members of the body that comprise the agency under the APA. As we explained above, from the beginning of our hearings process, the head of our agency—initially, the Social Security Board, and currently, the Commissioner—has had statutory authority to decide, through rulemaking, how to structure our hearings process and who may preside over a hearing.<sup>35</sup> Moreover, from the beginning of our hearings process, the head of our agency has delegated to the Appeals Council the authority to conduct hearings and issue decisions.

We also disagree with the commenter's characterization of the Court's decision in *Wong Yang Sung*. In that case, the Court found that the APA's formal adjudication requirements, which apply in every case of adjudication "required by statute" to be determined on the record after opportunity for a hearing, applied to immigration deportation hearings that were not required by statute, but by the Constitution and procedural due process. The court also held that immigrant inspectors, who held deportation hearings pursuant to regulations, did not fall within the APA's exception for proceedings conducted by "officers specially provided for by or designated pursuant to statute."<sup>36</sup> As previously discussed, our hearings process is required under sections 205(b)(1) and 1631(c)(1)(A) of the Act. In light of the significant differences between our hearings process and the type of hearings process to which the APA applies, the proper view of our hearings process is that it is comparable to the APA's process, but governed by the requirements of the Act and procedural due process. Because our hearing process does not fall under the APA's requirements for a formal adjudication, there is no basis to consider whether our AAJs would qualify as "officers specially provided for by or designated pursuant to statute." Consequently, the commenter's reliance on *Wong Yang Sung* is inapposite.

*Comment:* Several commenters said that our agency has previously made statements indicating that we operate under the APA. For example, in responding to public comments on hearing procedures under title XVI, we said, "The regulations herewith governing full administrative hearing and review are in accordance with the Social Security Act, as amended, and

Administrative Procedure Act (5 U.S.C. 554, 556, and 557) and comply with requirements for administrative due process."<sup>37</sup>

*Response:* We disagree with these comments. We recognize that the Department of Health, Education, and Welfare (HEW), our parent agency in the 1970s, and what was then called the Civil Service Commission (CSC) had a dispute over the appointment of ALJs to hear and decide claims under the SSI program after Congress enacted the program in 1972. In that intragovernmental dispute, HEW took the position that an SSI hearing was one to which the APA applied; the CSC took the opposite position, and contended that it had no authority to appoint ALJs for SSI hearings because an SSI hearing was not one to which the APA applied.<sup>38</sup> The Department of Justice agreed with CSC's position, and Congress ultimately resolved the dispute.<sup>39</sup> Regardless of the position that HEW took on the issue in the 1970s, however, we have long held the view that our hearings process is governed by the requirements of the Act and due process, and is not subject to the formal adjudication requirements of the APA. As explained above, in light of the significant differences between our hearings process and the type of hearings process to which the APA applies, we believe our hearings process is properly viewed as comparable to the APA's process, but governed by the requirements of the Act and procedural due process. For the reasons discussed above, this final rule is consistent with the Act and safeguards the individual's right to procedural due process.

*Comment:* According to a commenter, the recent U.S. Supreme Court decision *Smith v. Berryhill*<sup>40</sup> confirms that ALJs must conduct our hearings. The commenter said that the language of this decision indicates that it is not within the agency's discretion to define a "hearing" or appropriate "due process." The commenter said both are reserved for the judicial branch to interpret as a means of further protecting the public from agency over-reaching and ensuring the public receives the protections of the APA as intended by Congress. Another commenter said *Smith v. Berryhill* held that 42 U.S.C. 405(g) provides for judicial review of any final decision made after a hearing before an ALJ, not another group of people. Another commenter said SSA is ignoring the negative impact this rule

change will have on due process and increasing the likelihood that claimants will need to appeal decisions directly to the Federal district courts based on the recent decision of *Smith v. Berryhill*.

*Response:* We disagree with these comments. The Supreme Court did not decide in *Smith* the type of adjudicator who may preside over our administrative hearings. Rather, *Smith* concerned the narrow issue of "whether a dismissal by the Appeals Council on timeliness grounds after a claimant has received an ALJ hearing on the merits qualifies as a 'final decision . . . made after a hearing' for purposes of allowing judicial review under [section 205(g) of the Act]." <sup>41</sup>

The Court held that "[w]here, . . . a claimant has received a claim-ending timeliness determination from the agency's last-in-line decisionmaker after bringing his claim past the key procedural post (a hearing) mentioned in [section 205(g) of the Act], there has been a 'final decision . . . made after a hearing under [section 205(g)].'" <sup>42</sup>

We recognize that the Court noted, in *dicta*, that "the 'hearing' referred to in [section 205(g)] cannot be a hearing before the Appeals Council."<sup>43</sup> However, we do not interpret this statement to have any effect on this final rule clarification. The Court made this statement in support of its conclusion that "the fact that there was no Appeals Council hearing . . . does not bar review."<sup>44</sup> In other words, the Court ruled that the claimant in *Smith* could obtain judicial review of the Appeals Council's dismissal of his request for review even though the Appeals Council did not hold a hearing. The Supreme Court in *Smith* did not decide the type of adjudicator who may preside over our administrative hearings. The Court noted, moreover, that it need not conclusively define "hearing" as used in section 205(g), because the claimant in *Smith* had clearly obtained the type of hearing on the merits contemplated by the statute.<sup>45</sup>

When an AAJ removes a request for a hearing under this final rule, the claimant will still receive the type of merits hearing contemplated by the statute. The AAJ will conduct all proceedings in accordance with the rules that apply to ALJs, and if the claimant is dissatisfied with the hearing decision or dismissal, he or she may ask the Appeals Council to review that action. The AAJ who conducted the

<sup>41</sup> *Id.* at 1771.

<sup>42</sup> *Id.* at 1777.

<sup>43</sup> *Id.* at 1775 n.10.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1775.

<sup>35</sup> See sections 205(b)(1), 702(a)(4)–(7), 1631(c)(1)(A) of the Act.

<sup>36</sup> 339 U.S. at 51–52.

<sup>37</sup> 39 FR 37976 (Oct. 25, 1974).

<sup>38</sup> See Gifford, *Past Choices*, at 16–17.

<sup>39</sup> See *supra* note 30.

<sup>40</sup> 139 S. Ct. 1765 (May 28, 2019).

hearing or issued the decision or dismissal will not participate in any action associated with the request for review. In effect, hearings and appeals will remain separate and distinct. The claimant will also retain the right to request judicial review of the agency's final decision.

Because this final rule does not affect a claimant's right to a hearing on the merits as contemplated by the Act, we do not believe the Supreme Court's decision in *Smith* precludes the rule.

#### *Comments About the Congressional Intent Underlying the Act*

*Comment:* According to one commenter, Congressional action makes clear that Congress has long understood that we were required to use ALJs to decide cases. One commenter asserted that, historically, it has only been at the explicit direction of Congress, through the enactment of new law, that we have been empowered to use non-ALJs to decide cases. The commenter said that twice in the 1950s, Congress enacted emergency legislation to permit non-ALJ adjudication, but both times the legislation included a time limit. According to the commenter, the most recent time Congress legislated on our use of ALJs was in 1977, to repeal a provision that permitted us to use non-ALJs to preside over appeals for the recently created SSI program. The commenter opined that these examples demonstrate that Congress understood that we were required to use ALJs and legislation is necessary to permit us to use non-ALJs.

*Response:* We disagree with these comments. As previously discussed, we recognize that on two prior occasions, Congress explicitly authorized us, on a temporary basis, to use non-ALJ adjudicators in our hearings process: First, after Congress created the disability program in the 1950s and again when Congress created the SSI program in the 1970s.<sup>46</sup> We have previously explained above that, as the Administrative Conference of the United States has recognized, these congressional actions do not unambiguously indicate that Congress intended us to use ALJs to hear and decide all claims. Moreover, Congress has, in fact, made conflicting statements on this issue. For example, in the Conference Report on H.R. 4277, which became the Social Security Independence and Program Improvements Act of 1994, the conference committee expressed its

understanding of present law as being that our hearings process was not subject to the APA.<sup>47</sup>

Notably, we have previously used non-ALJs to issue decisions without an enactment of new law. Under our current rules, attorney advisors have authority to conduct prehearing proceedings in some cases, and issue fully favorable decisions, as a result of those proceedings.<sup>48</sup> We adopted our attorney advisor program during the 1990s when we were again confronted with an unprecedented volume of hearing requests. In an effort to process those requests more timely, we published final rules in June 1995 establishing the attorney advisor program for a limited period of two years.<sup>49</sup> The program's success prompted us to renew it several times until it expired in April 2001.<sup>50</sup> In August 2007, we published an interim final rule that reinstated the attorney advisor program,<sup>51</sup> and in March 2008, we issued a final rule without change.<sup>52</sup> As before, we intended the program to be a temporary modification to our procedures, but with the potential to become a permanent program. Since that time, we periodically extended the sunset date of the program,<sup>53</sup> until we decided to make it permanent in August 2018 because it had become an integral tool in providing timely decisions to the

public while maximizing the use of our ALJs.<sup>54</sup>

#### *Comments About the Clarity of Our NPRM*

*Comment:* Several commenters said there are a number of questions that we did not address in our NPRM, which makes it difficult for the public to evaluate the proposal. Some commenters said the proposal was so vague that it is impossible for the public to provide meaningful comment on it and, as a result, the proposal does not meet the basic requirements of rulemaking under the APA.

Among the questions raised, commenters asked when an AAJ would be assigned a claim, hold a hearing, and issue a decision. Others asked when and how often we expect AAJs to exercise the authority to hold hearings (e.g., if there will be a threshold for the number of pending hearing requests above which we would exercise this authority). Some commenters wanted to know if we would give AAJs the same goals as ALJs in terms of case processing. Others asked if we envision hiring more AAJs, if AAJs will hold hearings by video teleconference, and if we would place AAJs in local offices. One commenter asked if a claimant could object to a hearing by an AAJ and ask for an ALJ instead. Some commenters wanted to know if AAJ decisions would be subject to quality reviews and if AAJs who hear cases would continue to hear appeals at the same time.

*Response:* We continually evaluate our available authority to best handle our work. As discussed above and in the preamble of our NPRM, AAJs have had authority to remove hearing requests, hold hearings, and issue decisions since the beginning of our hearings process in 1940. This final rule merely seeks to clarify the rules that would govern when and how AAJs hold hearings and issue decisions. Furthermore, this rule provides that AAJs will be subject to the same policies and procedures as ALJs, if they remove a request for a hearing. We expect that these revisions will provide us with much-needed flexibility to respond to, and mitigate, the impact of surges in hearing requests and to meet the needs of the public we serve. There may be nationwide caseload surges, regionalized caseload surges, or other circumstances that warrant staffing hearings with new or reallocated AAJ staff. For example, the caseload surge in the wake of the 2008 recession serves as a clear example of a system-wide backlog where, under this rule, new or

<sup>47</sup> H.R. Conf. Rep. No. 103-670, at 98 (1994), reprinted in 1994 U.S.C.C.A.N. 1553, 1564 (noting that, "Although not required by law, the agency follows the procedures of the Administrative Procedures [sic] Act (APA) with respect to the appointment of ALJs and the conduct of hearings."). See, e.g., Barnett, *Against Administrative Judges*, at 1664-65 ("[I]t is far from clear that the SSA is required to use ALJs or formal adjudication under the APA. After all, legislative history to statutory amendments in 1994 states that although the SSA uses ALJs, the use of ALJs and formal APA proceedings are 'not required by law.'"); *ACUS Final Report on EEOC Adjudication*, at 11-12, n.73 ("There nonetheless remains some dispute over whether Congress intended to require DI and SSI hearings be conducted under the APA.").

<sup>48</sup> 20 CFR 404.942 and 416.1442.

<sup>49</sup> 60 FR 34126 (June 30, 1995).

<sup>50</sup> 62 FR 35073 (June 30, 1997) (extending expiration date to June 30, 1998); 63 FR 35515 (June 30, 1998) (extending expiration date to April 1, 1999); 64 FR 13677 (Mar. 22, 1999) (extending expiration date to April 1, 2000); 64 FR 51892 (Sept. 27, 1999) (extending expiration date to April 2, 2001).

<sup>51</sup> 72 FR 44763 (Aug. 9, 2007).

<sup>52</sup> 73 FR 11349 (Mar. 3, 2008).

<sup>53</sup> 74 FR 33327 (July 13, 2009) (extending expiration date to August 10, 2011); 76 FR 18383 (May 4, 2011) (extending expiration date to August 9, 2013); 78 FR 45459 (July 29, 2013) (extending expiration date to August 7, 2015); 80 FR 31990 (June 5, 2015) (extending expiration date to August 4, 2017); 82 FR 34400 (July 25, 2017) (extending expiration date to February 5, 2018); and 83 FR 711 (Jan. 8, 2018) (extending expiration date to August 3, 2018).

<sup>54</sup> 83 FR 40451 (Aug. 15, 2018).

<sup>46</sup> Public Law 85-766, 72 Stat. 864, 878 (1958); Public Law 86-158, 73 Stat. 339, 352 (1959); Public Law 92-603, 86 Stat. 1329, 1475 (1972).

reallocated AAJs could augment the current number of ALJs conducting hearings. Using AAJs can allow the agency to conduct more hearings with less wait time for claimants. This rule is intended to provide flexibility when there is a need for additional support at the hearings level. As another example, in a situation where a regional office unexpectedly needs to re-hear a substantial number of cases, this rule will allow SSA to add additional AAJs to the hearing level review.

We did not specify when we would exercise this authority so that we are able to address unforeseen circumstances. For example, since March 2020, we have had to modify substantially our normal hearings process in light of the national public health emergency resulting from the COVID-19 global pandemic. We closed our hearing offices to the public and began offering claimants the opportunity for a hearing by telephone. Such unforeseen scenarios have the potential to disrupt substantially our normal operations and the availability of all of our adjudicators. We therefore should prepare for this type of unforeseeable circumstance by ensuring that our rules allow us the maximum flexibility to hear and decide claims, in order to provide an appropriate level of public service. This final rule will help us do that. In terms of the other specific questions, we will apply the same rules that apply to ALJs when AAJs hold hearings and issue decisions.

In addition to this rule, we will continue to utilize other flexibilities during surges in hearing requests and during case backlogs, such as shifting cases from hearing offices that are overburdened to hearing offices that have less of a demand or reassigning cases to ALJs or AAJs that have the capacity to take on additional cases, to help reduce the number of pending hearing requests and use all of our adjudicative resources in the most effective manner.

#### *Comments About the Data and Evidence That Justifies the Rule*

*Comment:* Some commenters said that we did not comply with the rulemaking provisions of the APA because we did not provide technical studies or data to explain or support the necessity of this change. One commenter said our NPRM makes conclusory statements that having AAJs conduct hearings will help us process claims faster, with no data or information on how we reached this conclusion. Further, the commenter stated the NPRM does not provide information on how we will track or

monitor the data to see if the rule leads to faster claims processing.

One commenter said that we did not substantiate our assertions related to our need for flexibility and increased capacity to address short-term workloads. According to the commenter, our only rationale for needing additional adjudicative flexibility is the difference in hearing wait times across the country. In the commenter's opinion, we already have enough flexibility to address such disparities. The commenter said that we should use our existing flexibility (e.g., our national first in, first out case assignment policy; our ability to transfer workloads between hearing offices; and our ability to schedule appearances by video teleconferencing) to balance the hearing level workload and address any future surge in hearing requests rather than making the proposed changes final.

*Response:* We disagree that our NPRM required technical studies or data to support this change. As we explained above, this final rule merely clarifies the existing authority of AAJs to hold hearings and issue decisions, in response to questions raised about our existing authority for AAJs to assume ALJ hearings.

Additionally, the commenter mischaracterized our rationale for using AAJs to hold hearings and issue decisions. We have not asserted that having AAJs hold hearings and issue decisions will result in faster claim processing times. Instead, we believe this final rule will allow us flexibility to prevent an increase in waiting times that would naturally occur, if there were no increase in adjudicatory capacity to respond to a surge in hearing requests. In our experience, expanding our adjudicative capacity allows us to hear and decide more cases. By expanding our adjudicative capacity, we anticipate that if there is a surge in hearing requests, as we have regularly seen over the history of our programs, we can use AAJs to hear and decide cases pending at the hearing level. As such, we anticipate this change will assist in reducing the amount of time a claimant must wait before we hold a hearing on his or her claim for benefits, if there were no increase in adjudicatory capacity.

Currently we have 71 AAJs, which is in alignment with staffing needs relative to the current workload at the Appeals Council. In certain circumstances, we may be able to use existing AAJ staff at the hearing level to supplement hearing level caseload surges, and we may have to use AAJs even when Appeals Council pending cases are average or above average, if there is a relative critical

need at the hearings level. However, to avoid creating a subsequent backlog at the Appeals Council or to provide greater support, we may need to hire additional AAJs to conduct hearings or to assist with pending cases at the Appeals Council. When additional flexibility is needed, the additional AAJs may help to reduce processing wait times and may avoid the development of a backlog at the Appeals Council.

#### *Comments About the Timing and Necessity of the Rule*

*Comment:* One commenter said that we did not give a compelling explanation for (1) why we have not exercised this authority in the past; (2) why we have decided to exercise the authority now; and (3) why the regulation is necessary if the authority already exists.

*Response:* We acknowledge that although AAJs already have authority under our current regulations to remove a request for a hearing that is pending before an ALJ, hold a hearing, and issue a decision,<sup>55</sup> we have not exercised this authority in the past. A major reason we had not previously exercised this authority was a lack of regulatory guidance on *how* we would exercise the authority. For this reason, this final rule clarifies that if the Appeals Council assumes responsibility for a hearing request, it must conduct all proceedings in accordance with the rules set forth in sections 404.929 through 404.961 or 416.1429 through 416.1461, as applicable. This final rule also clarifies in section 422.205(a) that Appeals Council decisions and dismissals issued on hearing requests removed under sections 404.956 or 416.1456 require only one AAJ's signature. Additionally, this final rule clarifies that if a claimant is dissatisfied with a hearing level decision issued by an AAJ, he or she may request Appeals Council review. Further, as stated above, we are providing guidance now in preparation of exercising this authority, should the need arise.

*Comment:* One commenter said that it is now as easy to hire ALJs as it is to hire AAJs, because we (not the Office of Personnel Management (OPM)) now predominantly administer the process. The commenter questioned why we would choose now to assert this regulatory authority, when presumably there is no practical need for us to do so.

*Response:* We acknowledge that our agency is now predominately responsible for hiring ALJs. However,

<sup>55</sup> See 20 CFR 404.956 and 416.1456.

we are not pursuing this regulation because of previous hiring practices. The change in the hiring process is not directly relevant to this final rule and our reasons for pursuing this final rule, which we previously explained, still exist.

*Comment:* Several commenters asserted there are more than sufficient numbers of ALJs to handle the current workload and, therefore, there is no need to revise our rules. A commenter said that our ALJs reduced the pending number of cases to its lowest point in 15 years at the end of Fiscal Year 2019 and virtually eliminated the backlog. According to the commenter, ALJs have met expectations and are keeping pace with the number of cases filed.

*Response:* Currently there are 1,389 ALJs and 71 AAJs. At the end of May 2020, we had approximately 450,048 applicants for benefits who were waiting for a hearing before an ALJ.<sup>56</sup> Though our number of current pending cases is not as high as it has been at peak levels, we expect that these revisions will provide us with much-needed flexibility to respond to, and mitigate, the impact of surges in hearing requests as necessary in the future.

Furthermore, we wanted to allow the public the opportunity for public comment, as we prefer not to implement changes on a temporary basis in times of immediate need. Given the length of time that it takes to engage in the notice and comment process required in rulemaking, we are engaging in the rulemaking process now before any potential future surge in hearing receipts. If we delay the start of the rulemaking process, a sudden increase in hearing receipts could potentially overwhelm our limited administrative resources by the time the rulemaking process is complete. We have seen this happen in the past, such as when the sudden rise in claims and hearing requests after the 2008 recession resulted in more than 1.1 million pending hearing requests. In order to be appropriate stewards of the Social Security programs, we need to plan for such inevitable surges, and not merely be reactive to them.

#### *Comments About Our Motives for the Rule*

*Comment:* Multiple commenters opined that we were pursuing this

regulation for reasons other than those we stated. One commenter stated this rule was an attempt to circumvent fair labor laws and intimidate the Association of Administrative Law Judges (AALJ) union into backing off its position during the current labor negotiations. Another commenter opined that AAJs do not have enough work to do and this proposal is an attempt to save AAJ jobs. Multiple commenters said that this proposal was a step toward discontinuing our use of ALJs. Several commenters opined that we want to get rid of ALJs so we may have more control over disability determinations. Another commenter asked if this rule is the first step toward combining the hearing and Appeals Council levels of review.

*Response:* The commenters' characterizations of and speculations about the purposes behind our rule are incorrect. As we stated in the NPRM, we are pursuing this final rule to increase our adjudicative capacity when needed, allowing us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level. Our ability to use our limited resources more effectively will help us quickly optimize our hearings capacity, which in turn will allow us to issue accurate, timely, and high-quality decisions. We are not pursuing this regulation to affect labor negotiations, save jobs, discontinue the use of ALJs, or combine the ALJ and Appeals Council levels of review.

#### *Comments About the Decisional Independence of ALJs Versus AAJs*

*Comment:* Commenters said that ALJs are appointed with the specific purpose of ensuring a neutral and impartial fact-finder, free from pressure from their hiring agency and political influence, to adjudicate appeals of agency decisions. Measures such as independent proceedings for termination protect ALJs, as they are not subject to performance evaluations and are ineligible for bonuses. The commenter said that ALJs have these protections so they can make decisions objectively, independently, and fairly, without fear of interference or influence from an agency.

Commenters asserted that, in contrast, AAJs receive performance evaluations and potential bonuses, and the Commissioner can more easily remove them from their positions. Commenters said that the ALJ and AAJ positions could never be equivalent, if one is subject to agency-imposed performance standards, while the other is not. Commenters concluded that allowing AAJs to hold hearings would effectively

subject the entire administrative adjudication process to performance appraisal control by our agency.

*Response:* We disagree with these comments. We take seriously, and always have taken seriously, our responsibility to ensure that claimants receive accurate decisions from an impartial decisionmaker, arrived at through a fair process that provides each claimant with the full measure of due process protections. We have held an unwavering commitment to a full and fair hearings process since the beginning of the Social Security administrative review process in 1940, and we do not intend to alter the fundamental fairness of our longstanding process in this final rule. Under this final rule, our AAJs, like our ALJs, will have the same responsibility that they always have had to make fair and accurate decisions, free from agency interference. As explained in the preamble, any AAJ who holds hearings and issues decisions on any case pending at the hearing level under titles II, VIII, or XVI of the Act, would be required to follow the same rules as ALJs including exercising independent judgment and discretion in individual cases.

*Comment:* Commenters opined that it is not enough for us to say that non-ALJs presiding over hearings would have qualified decisional independence under agency policy. They said that statement is insufficient because we can easily change this "internal agency policy."

*Response:* We disagree with this comment. As noted in the response above, when AAJs hold hearings and issue hearing level decisions, they are required to exercise independent judgment and discretion. Furthermore, AAJs currently issue decisions independently under the authority prescribed by sections 404.979 and 416.1479. We do not intend to change this requirement of their position, and disagree that this is just an "internal agency policy" that is easily changed. We would not compromise the integrity and fairness of our programs by infringing upon an AAJ's ability to exercise independent judgment and discretion in individual cases.

*Comment:* One commenter said using AAJs would create the appearance of partiality that violates the due process clause of the U.S. Constitution. According to the commenter, due process concerns itself with the *appearance* of partiality and not an actual showing of partiality. Another commenter said recent decisions from the Supreme Court support the assertion that there are legitimate due process concerns about the impartiality of AAJs,

<sup>56</sup> We are making the national Hearing Office Workload from June 2020 available as supporting documentation, at <https://www.regulations.gov>, under "supporting and related material" for this docket, SSA-2017-0073. The national Hearing Office Workload information is also available at [https://www.ssa.gov/appeals/DataSets/02\\_HO\\_Workload\\_Data.html](https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html).

because we retain the ability to control the decision making and, therefore, there remains the appearance of partiality.<sup>57</sup> The commenter also said decisions issued by AAJs who are not impartial will be held invalid, and these cases could usher in class action lawsuits in light of *Lucia v. SEC*.<sup>58</sup> The commenter said that ALJs increase the likelihood of deferential judicial review and absolute official immunity for our adjudicators.<sup>59</sup> According to another commenter, this proposal could make our system unfair or perceived to be unfair, and for that reason, the courts could overturn more decisions.

*Response:* We disagree with this comment. As stated previously, there is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs.<sup>60</sup> We will not implement this final rule in a way that could undermine the independence and integrity of our existing administrative review process. We take seriously our responsibility to ensure that claimants receive accurate decisions from impartial decisionmakers, arrived at through a fair process that provides each claimant with the full measure of due process protections. This revised rule would not alter the fundamental fairness of our longstanding hearings process because it requires AAJs to follow the same rules that apply to ALJs in a process that the Supreme Court has long held is consistent with due process. Additionally, if the Appeals Council denies a request for review of an AAJ decision, parties would have the ability to seek judicial review in Federal district court pursuant to section 205(g) of the Act.

*Comment:* One commenter said it is best to have a local hearing with an ALJ. The commenter said that in his or her experience, AAJs “rubber stamp” denials or find reasons to remand cases, which prolongs cases unnecessarily and does not ultimately help claimants win. The commenter asserted that AAJs work together in the Washington, DC, area and seem to be “company men and women,” while ALJs are in local communities across the country. The commenter opined that a local ALJ is better than an AAJ because the AAJs do

not know local areas and are concerned more about keeping their employer happy than helping people.

*Response:* Under this final rule, AAJs would apply the same rules as ALJs when holding hearings. While our AAJs work from several locations near Baltimore, Maryland, and Washington, DC, the physical location of our hearing level adjudicators is not relevant because we administer national programs and apply uniform policies and procedures nationwide to the extent feasible. Additionally, our AAJs will continue to possess the same responsibility and independence they have always had to make fair and accurate decisions, free from agency interference.<sup>61</sup> We also note that the ALJs in the National Hearing Centers adjudicate cases outside of their locality.

*Comment:* A commenter asserted it would appear unfair for the Appeals Council to act on a request for review of a hearing level decision or dismissal issued by an AAJ. A different AAJ would have to consider the request, but that AAJ would be a colleague of the AAJ who issued the decision or dismissal.

*Response:* To ensure impartiality, this final rule precludes an AAJ who conducted a hearing, issued the decision in a case, or dismissed a hearing request, from participating in any action associated with a request for Appeals Council review in that case. Similarly, AAJs will also be precluded from participating in quality reviews or own motion reviews of any decisions they issued at the hearing level. An AAJ reviewing a hearings level decision will consider the circumstances of the case in accordance with agency policy set forth in the regulations, rulings, and other policy statements, and will exercise independent judgement, free from agency pressure. We also intend to provide subregulatory guidance on AAJ recusals in requests for hearings, as we do for ALJs in the Hearings, Appeals, and Litigation Law (HALLEX) manual I-2-1-60A.<sup>62</sup>

In addition, we note that under our current business processes, AAJs

already review the work of other AAJs. The Appeals Council conducts a random sampling of AAJ work product in its in-line quality review process, where an AAJ reviews the work product of another AAJ.

#### *Comments About the Experience and Skills Levels of AAJs and ALJs*

*Comment:* According to one group of commenters, the title, “Administrative Appeals Judge,” in many ways confuses this issue as it does not accurately describe the position and is a misnomer. The commenters said, before the mid-1990s, the Appeals Council was composed of members, not judges. According to the commenter, the title, “member,” aptly described the position: A member of a group that ensures the consistency and uniformity of agency decisions. The commenters also said that the mission of the Appeals Council is to adjudicate cases similarly to ensure that we treat claimants fairly and consistently throughout the nation. The commenters, who formerly served on the Appeals Council, said when they were part of the Appeals Council, they regularly met as a group to debate and decide questions of policy and procedure. They bound themselves according to the policy interpretations to ensure they reviewed cases consistently and uniformly. Conversely, ALJs hear and decide benefit cases *de novo*. Using the Commissioner’s rules and regulations, ALJs render individualized decisions, tailored to the evidence presented on the record. According to the commenter, while both positions require a thorough knowledge of our agency’s rules and regulations, the skill sets for each job are radically different. Further, another commenter questioned why we have two different positions if we believe that there is no difference between the skills and experience of ALJs and AAJs.

*Response:* We disagree with the commenter’s assertion regarding the description of the duties of AAJs. While part of the position description of an AAJ requires “formulating, determining, or influencing the policies of an agency,” that role is distinct from an AAJ’s other responsibilities of exercising independent judgment and discretion when reviewing decisions of ALJs. Like an ALJ, an AAJ’s responsibilities include that they “may hold hearings or supplemental hearings.”<sup>63</sup> In addition, an AAJ may hold an oral argument with a claimant

<sup>57</sup> One commenter cited *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). According to the commenter, it did not matter if Justice Benjamin said that he was not biased, the appearance of partiality was so strong, he should have recused himself from deciding the case.

<sup>58</sup> 138 S.Ct. 2044 (2018).

<sup>59</sup> The commenter cited *Butz v. Economou*, 438 U.S. 478, 513, 98 S. Ct. 2894, 57 L.Ed. 2d 895 (1978).

<sup>60</sup> See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

<sup>61</sup> Our ALJs have protections that provide them with qualified decisional independence, which ensures that they conduct impartial hearings. They must decide cases based on the facts in each case and in accordance with agency policy set out in regulations, rulings, and other policy statements. Further, because of their qualified decisional independence, ALJs make their decisions free from agency pressure or pressure by a party to decide a particular case, or a particular percentage of cases, in a particular way. Consistent with our longstanding policy and practice, our AAJs will continue to follow these same principles.

<sup>62</sup> See [https://www.ssa.gov/OP\\_Home/hallex/I-02/I-2-1-60.html](https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-60.html).

<sup>63</sup> See USA Jobs announcement number SV-10664781, closed December 6, 2019, available at <https://www.usajobs.gov/GetJob/ViewDetails/552976200>.

or representative to decide issues based on the record.<sup>64</sup> Therefore, AAJs have additional responsibilities than what the comment asserts.

We also disagree that the skill sets for AAJ and ALJ jobs are radically different. To become an ALJ or AAJ, applicants must have at least 7 years of progressively more responsible experience as a licensed attorney preparing for, participating in, or reviewing formal hearings or trials involving litigation or administrative law at the Federal, State, or local level. An applicant for either position is required to have experience in preparation, presentation, or hearing of formal cases before courts or governmental bodies. Additionally, in April 2001, Congress made the pay scales for AAJs identical to that of ALJs, which further supports similarities in the skill sets required for the two positions.<sup>65</sup> Moreover, we note that under our current rules, AAJs, like ALJs, issue individualized decisions using the same skill of applying agency policy to the facts of the case.<sup>66</sup> In the past, we have had ALJs detailed on a temporary basis to serve as AAJs, further demonstrating that the two positions share similar skill sets.

*Comment:* One commenter questioned if an ALJ's knowledge, skills, and abilities and other qualifications would be identical to an AAJ's requirements when we release a new position description for ALJs now that we are responsible for our own ALJ hiring. According to another commenter, the most recent job announcements for AAJs and ALJs do not support the contention that AAJs and ALJs have the same skills and experience. The commenter said that the AAJ position requires formulating, determining, or influencing the policies of the agency. According to the commenter, AAJs review cases for policy compliance<sup>67</sup> and may take a variety of actions, including: Dismissing or denying a request for review of an ALJ decision; issuing a decision affirming, modifying or reversing the ALJ decision; and conducting own motion pre-effectuation and other quality reviews. The commenter said, while AAJs engage in a range of activities, their adjudication “. . . mostly involves error

correction.”<sup>68</sup> In addition, unlike ALJs, AAJs cannot complete some actions on their own. Two AAJs are required to grant a request for review or to initiate a review on own motion, and as a result, about one-fifth of Appeals Council annual actions involve sign-off by two AAJs. According to the commenter, ALJs play a very different role. They do not set policy or perform a quality review function. Instead, ALJs' day-to-day work is holding non-adversarial, on the record, *de novo* hearings. As noted in the position description, ALJs make and issue decisions directly and their decisions “may not be substantively reviewed before issuance.” ALJs must possess “special knowledge and abilities” that are not required for AAJs, outlined in the ALJ position description.

*Response:* While we have not yet finalized any new ALJ position description, we disagree with any assertion that the position description would have to be identical to the knowledge, skills, and abilities, and other qualifications of an AAJ, because the primary duties of these positions are not identical. Nonetheless, the qualifying knowledge, skills, and abilities will be substantially similar, if not identical to the requirements of the AAJ position.

We also disagree that the most recent job announcements for AAJs and ALJs do not require the same skills and experience. While we acknowledge that the required skills and experience in the recent postings for AAJ and ALJs use different terminology in describing the required experiences, the required underlying skills and experience are the same and can be obtained through at least 7 years of experience preparing for, participating in, or reviewing cases at formal hearings or trials involving administrative law or courts.<sup>69</sup> In

<sup>68</sup> The commenter cited “ACUS, A Study of Social Security Litigation in the Federal Courts” (2016), available at <https://www.acus.gov/report/report-study-social-security-litigation-federal-courts>.

<sup>69</sup> The ALJ posting indicates that individuals may meet the minimum qualifications for the position through a general description of qualifying experiences (e.g., participate in settlement or plea negotiations in advance of hearing cases or trial; prepare for trial or hearings; prepare opinions; hear cases; participate in or conduct arbitration, mediation, or other alternative dispute resolution approved by the court; or participate in appeals related to the types of cases above). An individual can meet the qualifying experiences for the AAJ position through the same types of tasks listed under the ALJ position description; however, the minimum qualifications use different terminology. For example, instead of using the broad description of “preparing opinions” in the ALJ posting, the AAJ posting lists specific examples of qualifying experiences (e.g., review, analyze, evaluate, and recommend action to be taken; assimilate, analyze, and evaluate complex facts; interpret and apply

addition, qualifications for both positions require the applicant to be licensed and authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution.<sup>70</sup>

This final rule clarifies under section 422.205(a) that Appeals Council decisions and dismissals issued on hearing requests removed under sections 404.956 or 416.1456 require only one AAJ's signature. Two AAJ signatures will continue to be required when the Appeals Council grants a request for review or decides on its own motion to review an action.

*Comment:* Some commenters offered the fact that we hired our current ALJs through the competitive service hiring process overseen by OPM as evidence that they were more highly qualified than AAJs. The commenters said that the OPM screening process was extensive and included a rigorous interview process as well as an exam to evaluate the competencies, knowledge, skills, and abilities essential to performing the work of an ALJ. Some commenters questioned if AAJs take an exam before we hire them, and, if so, how it compares to the exam ALJs took. They also asked what experience is required to be an AAJ compared to ALJs. Commenters said we did not provide evidence, data, or information to allow the public to evaluate if AAJs possess the same skills and experience as that of our ALJs.

*Response:* The President issued Executive Order 13843 in July 2018 requiring appointments of ALJs be made under Schedule E of the excepted service.<sup>71</sup> Therefore, the comments regarding ALJs hiring through the OPM and competitive service process are moot. Although AAJs are not required to take an exam before we hire them, we note that the most recent ALJ posting<sup>72</sup> does not require an exam. Further, as discussed above, the knowledge, skills, and underlying experience required in

law, regulations, court decisions, and other precedents; propose fair and equitable solutions in accordance with applicable law and regulations; and write clear, cogent opinions). Compare ALJ job posting (USA Jobs announcement SV-10423180, closed April 12, 2019, available at <https://www.usajobs.gov/GetJob/ViewDetails/529866200>) with AAJ job posting (USA Jobs announcement number SV-10664781, closed December 6, 2019, available at <https://www.usajobs.gov/GetJob/ViewDetails/552976200>).

<sup>70</sup> We note that AAJs must remain licensed attorneys throughout their tenure, while incumbent ALJs need not maintain licensure (see 5 CFR 930.204(b); 78 FR 71987 (Dec. 2, 2013) (eliminating the licensure requirement for incumbent ALJs)).

<sup>71</sup> 83 FR 32755 (July 10, 2018).

<sup>72</sup> See <https://www.usajobs.gov/GetJob/ViewDetails/529866200/>.

<sup>64</sup> See 20 CFR 404.976 and 416.1476.

<sup>65</sup> See <https://www.chcoc.gov/content/new-pay-system-administrative-appeals-judges>; 5 U.S.C. 5372 and 5372b.

<sup>66</sup> See 20 CFR 404.979 and 416.1479.

<sup>67</sup> The commenter cited the Social Security Administration, “Fiscal Year 2020 Congressional Justification,” 16 (2019), available at [https://www.ssa.gov/budget/FY20Files/FY20-JEAC\\_2.pdf](https://www.ssa.gov/budget/FY20Files/FY20-JEAC_2.pdf).

the job postings for AAJ and ALJ are very similar, if not the same.

*Comment:* Some commenters asked what type of training AAJs receive and how it is different from the training ALJs undergo. One commenter asked what additional training AAJs would receive to ensure they have the skills needed to conduct hearings at the ALJ level. These commenters questioned the cost of additional training, asked when AAJs would receive the training, and inquired how long it would take to get AAJs trained if we exercise the authority.

*Response:* When we exercise this authority, we will ensure that the AAJs possess the knowledge, skills, and training required to conduct hearings. We would use existing ALJ training materials, as applicable, to train our AAJs. Because any AAJs who may have to use this authority will have experience with our programs due to their work as Appeals Council members, we do not anticipate the training to take as long as for someone unfamiliar with our programs. While newly-hired ALJs receive four weeks of in-person training, only about one of those four weeks focuses on conducting hearings. The remaining three weeks focus on training ALJs on our programs and other internal procedures related to our disability adjudication process. So, we do not anticipate that AAJs will need more than a week or two of training in order to exercise this authority. In addition, AAJs currently have access, and will continue to have access, to the Office of Hearings Operations' Continuing Education Program, so continuing education will be available to AAJs as well.

*Comment:* Commenters said that candidates for ALJ positions must have significant experience prior to being hired through the OPM screening process and they questioned if AAJs possess the same experience. According to the commenter, the most important experience requirement is participation in hearings or similar proceedings. The commenter said that the ability to assess the credibility of claimants and other witnesses, to effectively question claimants and other witnesses to establish facts and prove or disprove assertions of claimants, and to oversee a hearing proceeding in a fair, respectful, and impartial manner are extremely important skills for an adjudicator holding hearings. Commenters noted that applicants for ALJ positions hired through the OPM screening process were required to demonstrate 7 years of experience as a licensed attorney preparing for, participating in, or reviewing formal

hearings or trials involving litigation or administrative law. The commenter questioned if any of the current AAJs comprising the Appeals Council have experience holding or participating in hearings, and if so, the amount of time that may have elapsed since AAJs last participated in hearings. According to the commenter, hearings experience between an AAJ and an ALJ would not be equivalent because an ALJ holds hearings as a regular, routine, ongoing duty, and we would be asking AAJs to hold hearings only periodically.

Another commenter said that ALJs regularly exercise the skill of independently reviewing copious amounts of medical records and conducting their own independent analysis of the evidence when performing their work. In contrast, the commenter asserted, AAJs do not.

*Response:* As discussed in our responses above, AAJs and ALJs have similar hiring requirements and skills, and we will ensure that AAJs receive the proper initial and continuing training in order to conduct hearings.

We disagree that AAJs do not possess the skill to review and analyze medical records. Currently, in acting on requests for review and performing own motion review of ALJ decisions, AAJs review the same record that was before the ALJ in order to assess the sufficiency of the ALJ's decision.

*Comment:* One commenter said that AAJs use other SSA employees, known as analysts, who do the bulk of the work for them. The commenter said that the analysts are not vetted as ALJs are, and more importantly, they are subject to performance evaluations.

*Response:* We disagree that analysts do the bulk of the work for AAJs. In any event, ALJs also receive support from non-adjudicator employees, known as "decision writers," who are subject to performance evaluations. Decision writers assist ALJs in preparing for hearings and drafting decisions, and the ALJ/decision writer relationship is analogous to the AAJ/analyst relationship.

*Comment:* One commenter asserted the Appeals Council was never intended to conduct initial hearings and make decisions on whether to grant benefits. Instead, the Appeals Council was created to "oversee the hearings and appeals process, promote national consistency in hearing decisions made by . . . administrative law judges . . . and make sure that the Social Security Board's (now Commissioner's) records were adequate for judicial review."<sup>73</sup> The

<sup>73</sup> The commenter cited [https://www.ssa.gov/appeals/about\\_ac.html](https://www.ssa.gov/appeals/about_ac.html).

commenter also said that appeals officers in the Appeals Council are not judges and this rule creates a new position for the work that Attorney-Examiners/appeals officers had been doing. The commenter further asserted that we sought a new position description from OPM to give these employees the title of administrative appeals judges.

*Response:* We disagree. Our proposal to clarify when AAJs may conduct hearings and issue decisions under the same rules that apply to ALJs is supported by our existing regulations (see sections 404.956 and 416.1456), which have authorized this option since the beginning of our hearings and appeals process in 1940.<sup>74</sup> Indeed, as we noted previously, the original vision for our hearings and appeals process, the *Basic Provisions*, which predated our 1940 regulations,<sup>75</sup> expressly contemplated that the Appeals Council would hold hearings on occasion. Under section 205(b) of the Act, the authority to hold hearings rests with the Commissioner. In accordance with section 205(l) of the Act, the Commissioner's predecessor, the Social Security Board, delegated the authority to hold hearings and issue decisions to the Appeals Council and to the agency's referees (now ALJs) when the Board established the Appeals Council in 1940.<sup>76</sup> The Appeals Council has continued to retain that authority from 1940 to the present.

#### *Comments About the Perceived Effectiveness and Consequences of the Rule*

*Comment:* Several commenters assumed that we would spend more money to employ AAJs to act in lieu of ALJs, since ALJs are not eligible for bonuses, whereas AAJs are. Thus, the proposal is not cost effective.

*Response:* We are revising our regulations to increase our adjudicative capacity so that we will be better prepared to address challenges that may arise in the future, including spikes in requests for hearings and hiring freezes. We disagree that having AAJs hold hearings would necessarily be more costly than employing ALJs. For example, during a hiring freeze, we may be prohibited from hiring new ALJs, and therefore, if there were a need to increase adjudicative capacity, we could use our existing AAJs to conduct hearings and issue decisions during that

<sup>74</sup> 5 FR 4169, 4172 (Oct. 22, 1940) (codified at 20 CFR 403.709(d) (1940 Supp.)).

<sup>75</sup> See supra note 17.

<sup>76</sup> 11 FR 177A-567 (Sept. 11, 1946) (codified at 20 CFR 421.6(a) (1946 Supp.)).



time. As such, we see this flexibility as being cost effective.

*Comment:* Another commenter stated that the Appeals Council has only approximately 53 AAJs available to perform the Appeals Council's review function. Several commenters stated that backlogs and processing time at the Appeals Council increase significantly when requests for hearings increase, such as during the recent historically large backlog in disability hearings that began in 2010. Having a particular AAJ adjudicate claims at the hearings level necessarily means that the AAJ is not available to review ALJ decisions in his or her role at the Appeals Council. According to the commenters, it is likely that if we use AAJs to hold hearings and issue hearing level decisions, we will shift backlogs and increased processing times from the hearings level to the Appeals Council level.

*Response:* We acknowledge the commenters' concerns about how having AAJs hold hearings and issue hearing level decisions could affect the workloads and processing times associated with existing Appeals Council review. We would consider these implications after assessing all relevant factors at the time we implement this rule. We are publishing this final rule now to clarify the Appeals Council's authority to hold hearings and issue decisions so that the authority will be available for us to use when we need it.

*Comment:* Commenters opined that these changes could substantially alter workflows within the agency and create significant complications in the appeals process for claimants and agency employees alike.

*Response:* We disagree with this comment. Our intention is to use the Appeals Council's authority to hold hearings and issue hearing level decisions to assist with our workflow as needed, including addressing any hearings backlog and helping to reduce case processing time by increasing our adjudicative capacity. Other than substituting AAJs for ALJs in some cases, our hearings level process will remain the same. Furthermore, regardless of whether an ALJ or AAJ issues a hearing decision, our ordinary request for review procedures will apply, except that if an AAJ issued the hearing decision, he or she will not participate in any action associated with the request for Appeals Council review. As we explained in the preamble of our NPRM, regardless of whether an ALJ or AAJ holds a hearing, the claimant will receive all the same due process protections. Thus, we do not expect that

this final rule will complicate the process for claimants or agency employees.

*Comment:* According to a commenter, the constitutional litigation in *Hart v. Colvin* and *Lucia v. SEC*<sup>77</sup> resulted in uncertainty as to whether adequate due process was provided in individual claims, a disruption and delay of ongoing claims and appeals, and a diversion of agency attention toward administering agency-wide relief. The commenter said that the due process and APA concerns arising from this final rule could very well lead to the same experience for claimants who have their hearings presided over by an AAJ, and may require the agency to expend resources to remediate the final rule. Another commenter said any hearing held and decision issued by an AAJ would be subject to remand and rehearing, as is presently happening across the country with decisions issued by non-Commissioner appointed ALJs in the aftermath of the *Lucia* decision. The commenter said that decisions issued by AAJs who are "not impartial" would be held invalid, and these cases could usher in class action lawsuits in light of *Lucia*. Another commenter stated that this rule change would have a negative impact on due process and increase the likelihood of claimants appealing decisions directly to the Federal district courts.

*Response:* We disagree with these comments. There is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs. With respect to the issue of who may be a decisionmaker in an adjudicatory proceeding, the fundamental requirement of due process is that the decisionmaker be fair and impartial.

As we explained above and in the preamble of our NPRM, we will not implement this final rule in a way that could undermine the decisional independence of our adjudicators or the integrity of our existing administrative review process. We take seriously our responsibility to ensure that claimants receive accurate decisions from impartial decisionmakers, arrived at through a fair process that provides each claimant with the full measure of due process protections. Since the beginning of our administrative review process in 1940, we have held an unwavering commitment to a full and fair hearings process. This final rule will not alter the fundamental fairness of our longstanding hearings process. Our AAJs will continue to possess the same responsibility and independence they

have always had to make fair and accurate decisions, free from agency interference.

Further, in response to the commenter who suggested that an AAJ hearing level decision would be subject to remand based on the Supreme Court's decision in *Lucia v. SEC*,<sup>78</sup> we note that the Acting Commissioner of Social Security ratified the appointment of our AAJs in July 2018.<sup>79</sup>

*Comment:* According to one commenter, the lack of clarity in the NPRM, and the likelihood that our implementation would result in different claimants facing different processes, will create confusion and inconsistency in the appeals process to the detriment of our agency and claimants alike.

*Response:* When we implement this final rule, we will use uniform procedures and processes for all claimants. Regardless of whether an ALJ or an AAJ hears a claimant's case, we are required to apply the same rules and procedures to all cases.

#### *Comments About Our 2016 Proposal To Use AAJs To Hear and Decide Cases*

*Comment:* Many commenters alleged that since we did not pursue an earlier proposal to use AAJs to hear and decide cases in 2016 (as part of our Compassionate and Responsive Services (CARES) backlog reduction plan), we should not pursue it now.

*Response:* In January 2016, we recommended that AAJs hold hearings in certain cases as part of our adjudication augmentation strategy under the CARES backlog reduction plan.<sup>80</sup> We ultimately decided against implementing the adjudication augmentation strategy due to resource constraints.<sup>81</sup> We then decided to address the issue through changes to our regulation, adopted in accordance with the APA's notice and comment rulemaking procedures.

<sup>78</sup> 138 S. Ct. 2044 (2018).

<sup>79</sup> See Social Security Ruling 19–1p, *Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) On Cases Pending at the Appeals Council*, 84 FR 9582, 9583 (Mar. 15, 2019).

<sup>80</sup> The adjudication augmentation strategy was part of our 2016 Plan for Compassionate and Responsive Service (CARES), available at [https://www.ssa.gov/appeals/documents/cares\\_plan\\_2016.pdf](https://www.ssa.gov/appeals/documents/cares_plan_2016.pdf). Under the strategy, we would have expanded (on a temporary basis) the number of cases in which AAJs on the Appeals Council could hold hearings under the authority of the regulations.

<sup>81</sup> See letter from Theresa Gruber, then Deputy Commissioner for Disability Adjudication and Review, to The Honorable James Lankford, dated August 4, 2016, available at page 89 of <https://www.govinfo.gov/content/pkg/CHRG-114shrg21182/pdf/CHRG-114shrg21182.pdf>.

<sup>77</sup> 138 S.Ct. 2044 (2018).

*Comment:* One commenter, referring to our proposal for AAJs to hold hearings in 2016 as part of our CARES backlog reduction plan, asked why we changed the types of cases we would have AAJs hear. The commenter said when we proposed to exercise our existing regulatory authority for AAJs to hold hearings in 2016 as part of the CARES backlog reduction plan, we proposed to have AAJs hold hearings in “nondisability” cases specifically. According to the commenter, we indicated that we made this decision because, “the cases targeted for the augmentation strategy represent only 3.6 percent of our hearings pending and the non-disability cases often involve issues that ALJs do not typically encounter. A small number of AAJs and staff will specialize in adjudicating the non-disability issues, thus freeing up critical ALJ resources to handle disability hearings.”<sup>82</sup> The commenter asserted that the rationale we presented for using AAJs to hold hearings and issue decisions in 2016 undercuts our assertions that AAJs and ALJs have the same experience and skills and that AAJs should be able to obtain jurisdiction over any type of claim. The commenter questioned what changed between our rationale in 2016 and now, and what data, studies, or evidence we relied on in making this determination. The commenter said that we must provide the public with whatever evidence led us to change our proposal and allow the public to examine and comment on that information. According to the commenter, not doing so is a procedural error under the rulemaking requirements of the APA because the public cannot understand and meaningfully comment on the NPRM.

*Response:* When we proposed our adjudication augmentation strategy under the CARES backlog reduction plan in 2016, we intended for AAJs to hold hearings and issue decisions in non-disability cases. Our proposal attracted significant public and congressional interest,<sup>83</sup> and we ultimately decided to pursue clarifying

changes to our regulations instead of pursuing the adjudication augmentation strategy. Although we decided to have AAJs hold hearing and issue decisions in non-disability cases as part of our backlog reduction plan in 2016, we do not believe it would be prudent to specify in our regulations that AAJs are always limited to non-disability cases when they hold hearings and issue decisions. As previously stated, we are clarifying our regulations in order to be better prepared to address unforeseen challenges that may arise in the future.

Furthermore, the fact that we thought it would be best for AAJs to hold hearing and issue decisions in non-disability cases as part of our 2016 backlog reduction plan does not signify that AAJs and ALJs have different experience and skills. Indeed, in our CARES plan,<sup>84</sup> we also emphasized that AAJs and ALJs have the same experience and skills. Our position on that issue has not changed in promulgating this final rule.

#### *Comments About Notices of Appeals Council Review*

*Comment:* In the NPRM, we proposed to add a statement to sections 404.973 and 416.1473 that says, “However, when the Appeals Council plans to issue a decision that is fully favorable to all parties or plans to remand the case for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.” Some commenters disagreed with this proposed language.

According to one commenter, under our current process, when the Appeals Council reviews a fully or partially favorable case on its own motion and the Appeals Council intends to remand the case, we must give notice to the claimant. The commenter noted that the Appeals Council mails an interim notice that outlines the proposed action, and gives the claimant 30 days to respond to the Appeals Council with arguments or evidence that may cause the Appeals Council to take a different action. The Appeals Council then issues an order that outlines the Appeals Council’s final action. According to the commenter, responses from claimants frequently do not change the Appeals Council’s decision to remand the case, but the current process gives the claimant the opportunity to change the Appeals Council’s mind before it remands the case to the hearing level. The commenter also opined that it would be a violation of due process to allow the Appeals Council to exercise own motion

review of a favorable hearing level decision and remand the case to the hearing level without giving the claimant any opportunity to weigh in or correct the deficiencies identified by the Appeals Council.

The commenter also said that if the Appeals Council is too slow in taking its final action, claimants could continue to receive interim benefits while the Appeals Council has jurisdiction over the matter. According to the commenter, remanding the case without giving the claimant an opportunity to respond would result in the termination of benefits without due process. The commenter said to allow the Appeals Council to remand a case to the hearing level without allowing the claimant to respond is in direct conflict with the requirements of due process, and is more problematic given the length of time that a claimant would have to wait before appearing at another hearing. The commenter proposed that we remove “or plans to remand the case for further proceedings” from the proposed sections.

*Response:* We disagree with the commenters’ assertions that the proposed language would violate due process. In terms of fully favorable Appeals Council decisions, we revised our rules for administrative efficiency and to codify our longstanding practice.<sup>85</sup> By sending the notice with the fully favorable decision, the claimant does not have to wait for a separate notice.

In terms of removing the notice requirement for Appeals Council remands, we are revising our rules for administrative efficiency. As the commenter aptly points out, responses to our notices rarely change the Appeals Council’s proposed action to remand a case. We expect that this final rule will result in claimants receiving final decisions on their claim(s) faster and will help to streamline our business processes. Moreover, if the Appeals Council decides to remand a case to the hearing level, the claimant will have an opportunity to be heard before the agency issues its final decision.

We disagree with the commenter’s statement that remanding a fully favorable or partially favorable case on own motion review would result in a termination of benefits without due process. Section 1631(a)(8) of the Act requires us to pay prospective monthly benefits (“interim benefits”) to the

<sup>82</sup> The commenter cited “Theresa Gruber, Statement for the Record, Hearing Examining Due Process in Administrative Hearings,” Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, United States Senate, May 12, 2016. See <https://www.hsgac.senate.gov/imo/media/doc/Gruber%20Statement.pdf>.

<sup>83</sup> “Examining Due Process in Administrative Hearings,” Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, United States Senate, May 12, 2016, available at <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg21182/pdf/CHRG-114shrg21182.pdf>.

<sup>84</sup> [https://www.ssa.gov/appeals/documents/cares\\_plan\\_2016.pdf](https://www.ssa.gov/appeals/documents/cares_plan_2016.pdf).

<sup>85</sup> See HALLEX I-3-6-20 A, available at [https://www.ssa.gov/OP\\_Home/hallex/I-03/I-3-6-20.html](https://www.ssa.gov/OP_Home/hallex/I-03/I-3-6-20.html), which includes a note that, “[w]hen the [Appeals Council] exercises its own motion review authority and issues a fully favorable decision, notice is not required.”

claimant if we have not made a final decision within 110 calendar days after the date of the ALJ decision. Those interim benefits do not end until the month in which we make a final decision. Therefore, the claimant would continue to receive benefits until there is a final agency decision.

We also note that there are situations where a claimant is not in pay status, following the issuance of favorable decision, because an effectuating component cannot process payments. If, for example, the decision is contrary to the Act, regulations or a published ruling, or the decision is vague, ambiguous, internally inconsistent, or otherwise does not resolve the issues under dispute, the effectuating component may refer the cases to the Appeals Council to consider taking own motion review or reopening and revising the decision.<sup>86</sup> In these cases, the claimant would not receive benefits until 110 days after the favorable hearing level decision. If the Appeals Council were unable to correct the deficiency and issue a fully favorable decision, the Appeals Council's ability to remand the case to correct the deficiency without prior notice would expedite the claimant receiving a final decision on his or her case.

*Comment:* One commenter suggested that in sections 404.973 and 416.1473, we clarify that if the Appeals Council plans to issue a combined partially favorable decision (finding, for example, that the claimant became disabled after his or her alleged onset date) and a remand order (ordering further proceedings regarding the period the claimant alleged to be disabled to the date the claimant was found to be disabled), it may send the notice of Appeals Council review to all parties with the combined decision and remand order (without sending a prior notice of review).

*Response:* We agree with this suggestion. We further revised sections 404.973 and 416.1473 to clarify that when the Appeals Council plans to issue a decision that is favorable in part and remand the remaining issues for further proceedings, we may send the notice of Appeals Council review to all parties with the decision or remand order.

#### *Adding a "Reasonable Probability" Standard to Sections 404.970 and 416.1470*

*Comment:* We received many comments relating to our proposed inclusion of paragraph (d) to sections

404.970 and 416.1470.<sup>87</sup> We proposed to revise paragraph (d) of these sections to state that the Appeals Council would not review a case based on an error or abuse of discretion in the admission or exclusion of evidence or based on an error, defect, or omission in any ruling or decision unless the Appeals Council found a reasonable probability that the error, abuse of discretion, defect, or omission, either alone or when considered with other aspects of the case, changed the outcome of the case or the amount of benefits owed to any party. Commenters expressed perceived due process concerns, stating that the proposed rule would limit the Appeals Council's ability to review an ALJ's decision, and that the changed standard of review could virtually eliminate Appeals Council review in all but extremely limited circumstances, making the Appeals Council a meaningless step in the adjudication process. Commenters expressed that we would no longer know of the errors in an ALJ's decision if we do not remand these cases to the ALJ to correct the error. Commenters also expressed concerns that there would be no cost savings associated with the proposed change, as the Appeals Council would have to evaluate the entire record, which would increase the time to review a case. Additionally, commenters expressed concerns that the proposal would increase the number of claimants who appeal to Federal court, potentially straining court resources and increasing the time that individuals must wait to receive final decisions.

Some commenters also misconstrued the proposed standard of review at the Appeals Council level of review with the "preponderance of the evidence" standard that applies when an adjudicator issues a determination or decision.<sup>88</sup> Other commenters expressed alternative language for paragraph (d) or suggested ways to clarify how the reasonable probability standard would apply to the substantial evidence standard.

*Response:* Upon consideration of the comments regarding our proposal to add a reasonable probability standard in paragraph (d) of sections 404.970 and 416.1470, we have decided not to proceed with that proposal. Because we are not finalizing proposed paragraph (d) of sections 404.970 and 416.1470, we are not finalizing the corresponding language that we proposed to add to the beginning of paragraph (a) of the same sections, "Subject to paragraph (d) of

this section, . . . ." Additionally, we will not respond to the individual comments regarding our proposal to add a reasonable probability standard in paragraph (d) of sections 404.970 and 416.1470, because they are no longer relevant.

#### *Comments Regarding Federal Court Cases*

*Comment:* One commenter suggested changes to proposed sections 404.984 and 416.1484, which provide that when a Federal court remands a case and the Appeals Council remands the case to an ALJ, the ALJ's decision will become the Commissioner's final decision unless the Appeals Council assumes jurisdiction using the standard set forth in section 404.970 or 416.1470, as applicable. The commenter said it is imprudent for the Appeals Council to use a reasonable probability standard when deciding whether to assume jurisdiction of a case that was previously remanded by Federal court. The commenter stated that the Appeals Council must grant review of a case that is remanded from the Federal court. The commenter opined that failure to grant review because of the "reasonable probability" standard would be viewed unfavorably by the court if the claimant requested judicial review once again. The commenter stated that any action by the Appeals Council must be consistent with the court's remand. If the court orders a remand, the Appeals Council must remand the case (unless it can issue a fully favorable decision).

*Response:* Appeals Council review of court remands under sections 404.983 and 416.1483 should not be confused with its review of hearing decisions issued after a court remand under sections 404.984 and 416.1484. If a Federal court remands a case, the Appeals Council may issue a decision pursuant to sections 404.983(b) and 416.1484(b), hold a hearing and issue a decision pursuant to sections 404.983(c) and 416.1484(c), or remand the case to an ALJ with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. However, this situation is distinct from when the Appeals Council decides whether to assume jurisdiction after an ALJ, or AAJ, issues a hearing decision in a case remanded by Federal court. In that situation, the Appeals Council may assume jurisdiction based on written exceptions to the hearing decision filed by the claimant or based on its authority pursuant to paragraph (c) of sections 404.984 and 416.1484. However, we do not currently have a regulatory standard to govern how the Appeals Council will

<sup>86</sup> See generally 20 CFR 404.969, 416.1469, 404.987, and 416.1487.

<sup>87</sup> See 84 FR 70085, 70087.

<sup>88</sup> The commenter cited 20 CFR 404.953, 404.979, 416.1453, and 416.1479.

decide whether to assume jurisdiction after an ALJ, or AAJ, issues a hearing decision in a case remanded by Federal court. The revisions to sections 404.984 and 416.1484 make clear that the standard for assuming jurisdiction after an ALJ, or AAJ, issues a hearing decision in a case remanded by Federal court is the same as the standard that applies when the Appeals Council decides whether to review a hearing decision or dismissal under sections 404.970 and 416.1470. We will not respond to any comments relating to our proposal to add a reasonable probability standard in paragraph (d) of sections 404.970 and 416.1470 because, as previously explained, we are not proceeding with that proposal.

#### *Comments About Additional Evidence at the Appeals Council Level of Review*

*Comment:* A commenter stated that our proposal to revise sections 404.976(b) and 416.1476(b) to clarify that the Appeals Council will consider all evidence it receives, but will exhibit that evidence only if it meets the requirements of sections 404.970(a)(5) and (b) and 416.1470(a)(5) and (b) would be unhelpful and superfluous. The commenter said there were three possible options. First, if the evidence were sufficient to warrant review and the Appeals Council issues a decision, it would be exhibited in the record. Second, if the evidence were sufficient to warrant review and a remand to the hearing level, it would not be exhibited. Rather, it would be returned to the hearing office for the ALJ's consideration. Lastly, if the evidence did not warrant review, there would be an open question of when it could be used to provide a protective filing date for a subsequent application (Social Security Ruling 11–1p).<sup>89</sup> The commenter questioned the purpose of this additional reasonable probability standard.

*Response:* We disagree that the revisions to sections 404.976(b) and 416.1476(b) are unhelpful and superfluous. As we explained in the preamble of our NPRM, the revisions to sections 404.976(b) and 416.1476(b) clarify when the Appeals Council will mark additional evidence as an exhibit and make it part of the official record. Additionally, we already provide the claimant a protective filing date for a new application whenever a claimant submits additional evidence to the

Appeals Council that does not relate to the period on or before the date of the hearing decision, or whenever the Appeals Council finds that the claimant did not have good cause for missing the deadline to submit written evidence.<sup>90</sup>

*Comment:* Regarding our proposed revisions to sections 404.976(b) and 416.1476(b), one commenter suggested that we should: (1) Eliminate paragraph (b) altogether; (2) if the paragraph stays, add a sentence stating that any evidence that meets the “reasonable probability standard” in sections 404.970(a)(5) and 416.1470(a)(5) automatically meets the “good cause” standard in sections 404.970(b) and 416.1470(b); or (3) create a truly clarifying and time-saving policy that the Appeals Council, when it grants review to issue a decision, will evaluate and mark as exhibit(s) all relevant evidence.

*Response:* We disagree with these suggestions. As explained above, regarding (1), we are revising sections 404.976(b) and 416.1476(b) to clarify when the Appeals Council marks additional evidence as an exhibit and makes it part of the official administrative record. Regarding (2), we disagree that good cause for missing the deadline to submit evidence under sections 404.970(b) and 416.1470(b) would always exist whenever the Appeals Council finds, under sections 404.970(a)(5) and 416.1470(a)(5), that there is a reasonable probability that additional evidence would change the outcome of the hearing decision. The good cause requirement in sections 404.970(b) and 416.1470(b) is based on the 5-day rule set forth in sections 404.935(a) and 416.1435(a). Under the 5-day rule, a claimant generally must inform us about or submit written evidence at least 5 business days before the date of his or her scheduled hearing. We adopted the 5-day rule, in part, to ensure that the evidentiary record is more complete when ALJs hold hearings.<sup>91</sup> The commenter's suggestion that we revise our regulations to state that any evidence that meets the “reasonable probability standard” in sections 404.970(a)(5) and 416.1470(a)(5) automatically meets the “good cause” standard in sections 404.970(b) and 416.1470(b) would be inconsistent with the intent of the 5-day rule. Finally, regarding the third suggestion, it is altogether unclear to us how revising our regulations as the commenter proposed would result in greater clarity and save time.

*Comment:* One commenter agreed with the Appeals Council's current

practice of including in a certified administrative record filed in Federal court any additional evidence that the Appeals Council receives, regardless of whether the Appeals Council marks the evidence as an exhibit and makes it part of the official record. The commenter suggested that we memorialize this practice in the regulatory text at section 404.970(a)(5).

*Response:* We decline to add language about including additional evidence in certified administrative records to be filed in Federal court in sections 404.970(a)(5) and 416.1470(a)(5), because those rules regard when the Appeals Council will review a case. However, we agree that it would be helpful to clarify in our regulations that additional evidence the Appeals Council received during the administrative review process, including additional evidence that the Appeals Council received but did not exhibit or make part of the official record, would be included in the certified administrative record filed in Federal court. We have added that clarifying language to sections 404.976(b) and 416.1476(b) in this final rule.

#### *Comments About the Wording of Our Paperwork Reduction Act (PRA) Information in the NPRM*

*Comment:* One commenter referred to the PRA section of the NPRM, in which we proposed to update forms to reflect the new regulatory language stating that “Judges” will review the cases, hold hearings, and issue decisions. Currently, our forms use the narrow, specific designation, “Administrative Law Judges.” In the NPRM, we stated that once we published the final rule, we would obtain approval from the Office of Management and Budget for this revision through non-substantive change requests for these information collections, which does not require public notice and comment under the PRA. The commenter disagreed with our statement that this is a “non-substantive change” that does not require public comment.

The commenter said ALJs and AAJs do completely different jobs and treating them the same is either a misunderstanding of the system or a breach of public trust. The commenter said that the public should know what kind of judge they have in a case, and that we should not hide this from the public by changing the title.

*Response:* The PRA statement in our NPRM focused on the significance of the changes we were planning to make to information collections associated with the regulation. In the NPRM, we

<sup>89</sup> The commenter refers to Social Security Ruling 11–1p: *Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits*, available here: [https://www.ssa.gov/OP\\_Home/rulings/di/01/SSR2011-01-di-01.html](https://www.ssa.gov/OP_Home/rulings/di/01/SSR2011-01-di-01.html).

<sup>90</sup> 20 CFR 404.970(c) and 416.1470(c).

<sup>91</sup> 81 FR 90987, 90989 (Dec. 16, 2016).

indicated plans to change “Administrative Law Judges” to “judges” to reflect that if the rule were finalized, there would be a possibility that a claimant’s case could be heard and decided by an AAJ from the Appeals Council. In that case, the “Administrative Law Judge” appellation would not be accurate. However, to the commenter’s point about whether this change is significant, we note that the change will not occur at the forms/PRA level. We are merely proposing a language change to reflect our revised regulations. The appropriate time for interested parties to express comments about our proposed rule was during the notice-and-comment period, not in the PRA/forms arena. We note that many interested parties did submit public comments on this issue, and we addressed those comments in this preamble to the final rule. To the commenter’s assertion that the public should know what kind of judge they have in a case, we note that this is a policy issue outside the realm of the PRA, as addressed in the final rule. We have transparently conveyed our proposed change in the NPRM. For these reasons, we will not be changing the PRA statement.

#### *Comments That Suggested Alternate Proposals*

*Comment:* One commenter suggested assigning ALJs to the Appeals Council, and eliminating the position of AAJs. According to the commenter, ALJs on the Appeals Council would bolster the independence of disability hearings at all levels within the agency.

*Response:* We acknowledge the commenter’s suggestion. However, the goal of this final rule is to increase our adjudicative capacity when needed, allowing us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level. Eliminating current positions would be at odds with this goal.

*Comment:* One commenter said that we should change our rule so the only people who can be AAJs are retired and rehired ALJs or ALJs sent to the Appeals Council on special detail. The commenter said that would allow for flexibility and would eliminate the issue of claimants having inexperienced and agency-controlled AAJs conduct their hearings. Further, according to the commenter, it would improve the quality of the appellate decisions. Another commenter suggested having interested AAJs apply for long-term details as ALJs.

*Response:* We disagree that the commenter’s proposal to use rehired

ALJs to act as AAJs would create more flexibility, because the rehired ALJs would have to be retrained in current policies and procedures. We also disagree with the suggestion to have currently serving ALJs apply for details to the Appeals Council, as that would defeat the purpose of the revised rule, which is to increase our adjudicative capacity. We seek to use AAJs to assist with hearing level workloads, so taking ALJs away from those workloads would be counter-productive. Lastly, we believe that detailing AAJs to serve as ALJs may be a feasible option, depending on the circumstances surrounding the need; however, as we do not know all the circumstances that may arise in the future, we want to be prepared and have options available to us to best address all potential situations. Our goal is to clarify the Appeals Council’s existing authority to hold hearings and issue decisions.

*Comment:* Some commenters said we should keep the hearings and appeals level adjudications separate and distinct, as they have been traditionally. They recommended that if the AAJs wish to have a more significant role in the adjudication process, that they hold oral arguments to address important broad policy or procedural issues that affect the general public interest. According to the commenter, this would be in keeping with the AAJs’ primary role to ensure our decisions are uniform and consistent.

*Response:* We understand the concerns of keeping hearings and appeals level adjudications separate and distinct. In effect, the hearings and appeals will remain separate and distinct. As discussed above, under this final rule, the claimant will still have the opportunity to appear at a hearing, receive a hearing decision, and request Appeals Council review. The only change is that, in some cases, the hearing and decision may be by an AAJ. Furthermore, this final rule specifies that if an AAJ conducts a hearing, issues a hearing decision, or dismisses a hearing request, he or she will not participate in any action associated with a request for Appeals Council review of that case. In addition, as discussed above, AAJs are expected to recuse themselves from a case if they have any interest in the case, as ALJs would. We will be vigilant in ensuring that the hearings and Appeals Council review levels of administrative review remain separate and distinct, and that claimants are afforded fair and impartial hearing decisions and reviews of those hearing decisions, as we always have.

We also disagree about the “primary role” of the Appeals Council, as the

Appeals Council’s role has evolved over the years to address current needs. For example, we created the Appeals Council’s Division of Quality to exercise quality review responsibilities to oversee and help improve the accuracy and policy compliance of ALJ decisions. Moreover, we are not expanding the role of AAJs. AAJs have long had the authority to conduct hearings, but we have not exercised this authority.

*Comment:* One commenter said we should provide additional information related to our statement that we would remove the regulations at sections 404.966 and 416.1466, which authorize us to test the elimination of the request for Appeals Council review. The commenter said that the NPRM does not state the conclusions reached by the test or the Appeals Council’s fate.

*Response:* As we explained in the preamble to our proposed rule, given our experience over the last 21 years, we no longer intend to test the elimination of the request for Appeals Council review. We amended our rules to establish authority to test request for review elimination (RRE) in September 1997.<sup>92</sup> Our goal in testing elimination of the request for Appeals Council review was to assess the effects of that change in conjunction with other modifications in the disability claim process under the full process model (FPM), established in April 1997.<sup>93</sup> In July 1998, we provided notice of limited extended testing of the FPM with two additional features designed to maximize the resources of a Federal processing center.<sup>94</sup> Thereafter, in June 2000, we published a notice announcing a new test of the elimination of the request for Appeals Council review in conjunction with our disability prototype test.<sup>95</sup> At that time, we explained that before making any decision on the merits of eliminating the request for review, we would obtain valid and reliable data about the effects

<sup>92</sup> 62 FR 49598 (Sept. 23, 1997).

<sup>93</sup> *Id.* at 49598–99. Under the FPM, also known as the integrated model, we originally tested four modifications to the disability claim process: the use of a single decisionmaker, conducting predecisional interviews in certain cases, eliminating the reconsideration step in the administrative review process, and use of an adjudication officer to conduct prehearing proceedings and, if appropriate, issue fully favorable decisions. See 62 FR 16210 (Apr. 4, 1997); see also 63 FR 58444 (noting case selection for testing ended in January 1998). Testing elimination of the request for Appeals Council review was the fifth modification to the FPM. See 62 FR 49598 (Sept. 23, 1997); see also 63 FR 40946 (July 31, 1998).

<sup>94</sup> See 63 FR 40946 (July 31, 1998). We announced the beginning of additional testing in October 1998, but that testing did not include RRE. See 63 FR 58444 (Oct. 30, 1998).

<sup>95</sup> See 65 FR 36210 (June 7, 2000).

of such elimination.<sup>96</sup> Our testing results showed that the number of cases that would be appealed to the courts would likely increase substantially.<sup>97</sup> Additionally, other attempts to remove the Appeals Council level of review have not been successful.<sup>98</sup> As such, we no longer intend to test eliminating the request for Appeals Council review, and we are removing that authority in sections 404.966 and 416.1466.

*Comment:* One commenter recommended adding the sentence, “The Appeals Council comprises the AAJs, the Appeals Officers, and the Deputy Chair of the Appeals Council” to sections 404.2(b)(2), 416.120(b)(2), and 408.110(b)(2). The commenter said that this expanded definition may be useful when considering section 422.205(c).

*Response:* We disagree with this recommendation. Currently, sections 404.2(b)(2), 416.120(b)(2), and 408.110(b)(2) indicate that the Appeals Council includes the member or members thereof as may be designated by the Chair of the Appeals Council. We do not intend to adopt the commenter’s suggestion because we seek to remain flexible in our staffing.

*Comment:* One commenter suggested that we clarify what the commenter perceived as an inconsistency in sections 404.976(c) and 416.1476(c). This rule provides, “If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date.” The

commenter said that in the summary, we indicate the Appeals Council would be required to follow the rules that govern ALJ hearings, which include mailing a notice of hearing at least 75 days before the date of the hearing.

*Response:* The commenter conflates a request to appear before the Appeals Council to present oral argument with a request for a hearing. Paragraph (c) of final sections 404.976 and 416.1476 regard a claimant’s ability to request to appear before the Appeals Council to present oral argument, which the Appeals Council will grant if it decides that the case raises an important question of law or policy, or that oral argument would help to reach a proper decision. However, if the Appeals Council assumes responsibility for a hearing request under section 404.956 or 416.1456, we would mail a notice of hearing pursuant to the relevant section(s) 404.938(a) or 416.1438(a), which generally require that we mail a notice of a hearing at least 75 days before the date of the hearing.

*Comment:* One commenter made suggestions for editing sections 404.984 and 416.1484. According to the commenter, these sections require that, if the Appeals Council assumes jurisdiction of an ALJ decision after remand, the Appeals Council will “either make a new, independent decision based on the preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss a claim(s), or remand the case to an administrative law judge for further proceedings, including a new decision.” First, the commenter recommended changing the phrase “dismiss a claim(s)” to “dismiss the request for a hearing or request for review, consistent with the Federal court’s remand.” Second, the commenter recommended that the Appeals Council never dismiss a request for a hearing or a request for review after the case has been considered and remanded by the court, including a sentence four remand.<sup>99</sup>

*Response:* We partially adopted the commenter’s first suggestion and revised paragraph (a) of sections 404.984 and 416.1484 to use the more specific phrase “dismiss the request for a hearing.” However, we did not adopt the suggestion to include “dismiss a

request for review.” When the Appeals Council assumes jurisdiction after an ALJ or AAJ has issued a hearing decision in a case remanded by a Federal court, the request for review is no longer at issue. The Appeals Council may assume jurisdiction of the case based on written exceptions filed by the claimant or based on its authority pursuant to paragraph (c) of section 404.984 or section 416.1484.

We also partially adopted the commenter’s second recommendation. Since the Federal court retains jurisdiction for remands under sentence six of section 205(g) of the Act (42 U.S.C. 405(g)), we added language to clarify that the Appeals Council will not dismiss the request for a hearing in these cases. We disagree that the Appeals Council cannot dismiss a request for a hearing in cases remanded under sentence four of section 205(g) of the Act. Once a Federal court has remanded a case under sentence four, jurisdiction returns to the Appeals Council to take appropriate action, which may include dismissing a request for a hearing.

*Comment:* One commenter questioned the reason for changing the procedure in section 422.205(a). The commenter noted that proposed section 422.205(a) provides that an Appeals Council decision on a case removed under sections 404.956 or 416.1456 may be signed by one Appeals Council member. The commenter further noted that currently two AAJs sign Appeals Council decisions, and that appeals officers are also members of the Appeals Council, but, currently, they have no authority to sign decisions or dismissals. The commenter questioned whether we sought to change this authority deliberately, or if it was an oversight. The commenter also questioned if this proposed change would alter current policy permitting AAJs only to sign Appeals Council decisions and dismissals, as well as Appeals Council denials of review of ALJ dismissals.

*Response:* We acknowledge that it would be helpful to clarify in section 422.205(a) who has authority to sign hearings level decisions and dismissals. We do not intend for appeals officers to sign hearings level decisions or dismissals. As such, we revised the language in section 422.205(a) to clarify the requirement of one AAJ to sign decisions and dismissals on requests for hearings removed under sections 404.956 or 416.1456 for consistency with the signature requirement for ALJs. One signature by an appeals officer, or by such member of the Appeals Council as may be designated by the Chair or

<sup>96</sup> 65 FR 36210.

<sup>97</sup> See the January 2001 report from the Social Security Advisory Board (SSAB), “Charting the Future of Social Security’s Disability Programs: The Need for Fundamental Change,” available at <https://www.ssab.gov/research/charting-the-future-of-social-securitys-disability-programs-the-need-for-fundamental-change/>. See also the June 28, 2001 testimony of Hon. Ronald G. Bernoski, at the Hearing Before Subcommittee on Social Security of the Committee on Ways and Means House of Representative, where he noted “the SSAB Report also correctly points out the impracticality of this step [to eliminate the Appeals Council level of review], since the SSA has shown by testing that this would result in a large increase in court appeals.” Our initial RRE testing failed to produce sufficient data. See 65 FR 36210 (June 7, 2000).

<sup>98</sup> For example, we tested the elimination of the Appeals Council, under a different authority, the Disability Service Improvement (DSI) Process, by creation of the Disability Review Board (DRB). Under the DSI Process, an ALJ’s decision became final unless the claim was referred to the DRB. If the DRB reviewed a claim and issued a decision, that decision was our final decision, and if a claimant was dissatisfied with it, he or she could seek judicial review in Federal court. The Appeals Council had no involvement with the DRB, which we established with the intent to phase out the Appeals Council. See 71 FR 16424 (Mar. 31, 2006); and correction 71 FR 17990 (Aug. 10, 2006). Ultimately, we eliminated the DRB because it did not function as intended and did not provide efficiencies in reducing the hearings backlog. See 76 FR 24802 (May 3, 2011).

<sup>99</sup> Under sentence four of section 205(g) of the Act, a court may remand a case in conjunction with a judgment affirming, modifying, or reversing the decision of the Commissioner. The judgment of the court ends the court’s jurisdiction over the case, but either the claimant or agency may appeal the district court’s action to a court of appeals. See HALLEX I-4-6-1 available here: [https://www.ssa.gov/OP\\_Home/hallex/I-04/I-4-6-1.html](https://www.ssa.gov/OP_Home/hallex/I-04/I-4-6-1.html).

Deputy Chair, continues to be the requirement for denials of requests for reviews as set forth in section 422.205(c). Furthermore, the signatures of at least two AAJs will continue to be required for decisions issued on requests for review or own motion review when the claimant does not appear before the Appeals Council to present oral argument, but that requirement now appears in section 422.205(d). Therefore, we are not changing the signature requirements for Appeals Council actions on requests for review or own motion reviews of hearing level decisions or dismissals.

*Comment:* One commenter said section 422.205(c) contains a redundancy because it provides that a request for review may be denied by an appeal officer, appeals officers, or members of the Appeals Council, as designated. The commenter noted that appeals officers are members of the Appeals Council. According to the commenter, appeals officers need not be listed separately from the Appeals Council, and it might be clearer to state that the request for review may be denied by an AAJ, an appeals officer, or any member of the Appeals Council, as designated.

*Response:* We disagree that the language, which appears in current section 422.205(c), is redundant. This final rule merely adds a title to paragraph (c), and does not revise the rest of the section including who may deny a request for review.

*Comment:* One commenter suggested that a statement of when judicial review is available after an Appeals Council dismissal might prove useful for section 422.210(a). The commenter noted that that regulation does not provide that judicial review is available when the Appeals Council dismisses the request for review or the request for a hearing.

*Response:* We are considering whether and how to change our regulations based on the Supreme Court's holding in *Smith v. Berryhill*.<sup>100</sup> Therefore, we are not revising section 422.210(a) to clarify when a claimant may seek judicial review following an Appeals Council dismissal as part of this final rule. We will propose any changes we plan to make based on the Supreme Court's decision in *Smith* as part of a separate rulemaking proceeding.

## Regulatory Procedures

*Executive Order 12866, as Supplemented by Executive Order 13563*

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the criteria for a significant regulatory action under Executive Order 12866 and is subject to OMB review. Details about the impacts of our rule follow.

### Anticipated Benefits

We expect this final rule will benefit us by providing additional flexibility and by allowing us to increase our hearing capacity without incurring permanent new costs. Having AAJs hold hearings and issue decisions will create flexibility for us to shift resources when there is an increase in pending cases at the hearings level. Before using AAJs to hold hearings and issue decisions, we will determine whether it makes sense to do so, considering the Appeals Council's workload relative to the hearing level workload. If necessary, we will hire additional AAJs to augment the current number of ALJs conducting hearings. Additionally, the numbers of new AAJs could be increased or decreased based on the demand of the workload.

### Anticipated Costs

We anticipate that this final rule would result in minimal, if any, quantified costs when implemented. Before implementing, we would provide appropriate training to our AAJs, make minor systems updates, and perhaps obtain additional equipment. As discussed above, when we exercise this authority, we would ensure that the AAJs possess the knowledge, skills, and training required to conduct hearings. However, we expect that the cost of training AAJs would be minimal because the AAJs would already have experience with our programs, and we could use existing ALJ training materials, as applicable. We expect that we would need to train our AAJs and other Appeals Council personnel, in particular, on the procedural and technical issues involved in conducting hearings. For example, AAJs would need to be trained on how to (1) prepare for a hearing (e.g., handle specific development issues such as requesting medical records, if necessary; scheduling consultative examinations; issuing subpoenas; and ensuring proper notices are sent), and (2) conduct a hearing (e.g., handle technical matters regarding the hearing recording; ensure that unrepresented claimants receive proper notice of the right to

representation; and work with interpreters, witnesses, and experts). Because we believe AAJs holding a hearing will be equivalently trained to ALJs and will be following the same set of hearing policies as ALJs, we do not believe, as suggested by some commenters, that AAJ determinations are more likely to increase the volume of claimants who choose to appeal a decision that is not fully favorable to the Appeals Council level.

In addition, we would need to train our Appeals Council personnel how to use the hearings systems. We expect this would be a minimal cost as such systems are similar to systems our Appeals Council personnel already use. Lastly, we would need to equip our Appeals Council offices to hold hearings. For example, we would need to provide computers for video teleconference hearings and recording equipment. We may be able to utilize existing internal resources to meet these needs.

Qualitatively, we acknowledge that some commenters have suggested that the use of AAJs at the hearing level could create a perception of lessened impartiality than a hearing held by an ALJ. This is largely a qualitative cost related to the perception of received due process, although claimants who believe they did not receive a fair hearing may be more likely to pursue a review at the Appeals Council and in a Federal district court. However, for the reasons outlined above as well as reasons discussed previously in the preamble, we do not believe there will be different outcomes in adjudications between hearings held by AAJs and ALJs, and as such do not believe this is, in fact, either a qualitative or quantitative cost.

### *Executive Order 13132 (Federalism)*

We analyzed this final rule in accordance with the principles and criteria established by Executive Order 13132, and determined that the rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. We also determined that this rule would not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

### *Executive Order 13771*

This final rule is not subject to the requirements of Executive Order 13771 because it is administrative in nature and will result in no more than de minimis costs.

<sup>100</sup> 139 S. Ct. 1765 (2019).

*Regulatory Flexibility Act*

We certify that this final rule will not have a significant economic impact on a substantial number of small entities, because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

*Paperwork Reduction Act*

SSA already has existing OMB PRA-approved information collection tools relating to this final rule: The Request for Review of ALJ Decision or Dismissal (Form HA-520, OMB No. 0960-0277); the Waiver of Your Right to Personal Appearance Before an Administrative Law Judge (Form HA-4608, OMB No. 0960-0284); the Request to Withdraw a Hearing Request (Form HA-85, OMB No. 0960-0710); the Acknowledgement of Receipt of Notice of Hearing (Form HA-504, OMB No. 0960-0671); the Request to Show Case for Failure to Appear (Form HA-L90, OMB No. 0960-0794); and the Request for Hearing by Administrative Law Judge (Form HA-501, OMB No. 0960-0269). Because this final rule will allow for both Administrative Appeals Judges and Administrative Law Judges to hold hearings and issue decisions, we will update the content of these forms to reflect the new language stating that “Judges” will review the cases, hold hearings, and issue decisions; however, we will not change the titles of these forms. Currently these forms use the narrow, specific designation, “Administrative Law Judges.” Once we publish this final rule, we will obtain OMB approval for this revision through non-substantive change requests for these information collections, which does not require public notice and comment under the PRA. Thus, this final rule does not create or significantly alter any existing information collections under the PRA.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

**List of Subjects**

*20 CFR Part 404*

Administrative practice and procedure, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Social security.

*20 CFR Part 408*

Administrative practice and procedure, Reporting and recordkeeping requirements, Social security,

Supplemental Security Income (SSI), Veterans.

*20 CFR Part 411*

Administrative practice and procedure, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

*20 CFR Part 416*

Administrative practice and procedure, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

*20 CFR Part 422*

Administrative practice and procedure, Reporting and recordkeeping requirements, Social security.

The Commissioner of the Social Security Administration, Andrew Saul, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for SSA, for purposes of publication in the **Federal Register**.

**Faye I. Lipsky,**

*Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.*

For the reasons set out in the preamble, we amend 20 CFR chapter III, parts 404, 408, 411, 416 and 422, as set forth below:

**PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)**

**Subpart A—Introduction, General Provisions and Definitions**

■ 1. The authority citation for subpart A of part 404 continues to read as follows:

**Authority:** Secs. 203, 205(a), 216(j), and 702(a)(5) of the Social Security Act (42 U.S.C. 403, 405(a), 416(j), and 902(a)(5)) and 48 U.S.C. 1801.

■ 2. Amend § 404.2 by revising paragraph (b) to read as follows:

**§ 404.2 General definitions and use of terms.**

\* \* \* \* \*

(b) *Commissioner; Appeals Council; Administrative Law Judge; Administrative Appeals Judge defined—*  
(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

(4) *Administrative Appeals Judge* means an Administrative Appeals Judge serving as a member of the Appeals Council.

\* \* \* \* \*

**Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions**

■ 3. The authority citation for subpart J of part 404 continues to read as follows:

**Authority:** Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 4. Revise § 404.929 to read as follows:

**§ 404.929 Hearing before an administrative law judge—general.**

If you are dissatisfied with one of the determinations or decisions listed in § 404.930, you may request a hearing. Subject to § 404.956, the Deputy Commissioner for Hearings Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 404.936(c)(1)(i) through (iii), and in the limited circumstances described in § 404.936(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 404.935), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 404.935, any new evidence that may have been submitted for consideration.



■ 5. Amend § 404.955 by revising the section heading, redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and adding new paragraph (c) to read as follows:

**§ 404.955 The effect of a hearing decision.**  
\* \* \* \* \*

(c) The Appeals Council decides on its own motion to review the decision under the procedures in § 404.969;

\* \* \* \* \*

■ 6. Revise § 404.956 to read as follows:

**§ 404.956 Removal of a hearing request(s) to the Appeals Council.**

(a) *Removal.* The Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process.

(b) *Notice.* We will mail a notice to all parties at their last known address telling them that the Appeals Council has assumed responsibility for the case(s).

(c) *Procedures applied.* If the Appeals Council assumes responsibility for a hearing request(s), it shall conduct all proceedings in accordance with the rules set forth in §§ 404.929 through 404.961, as applicable.

(d) *Appeals Council review.* If the Appeals Council assumes responsibility for your hearing request under this section and you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action following the procedures in §§ 404.967 through 404.982. The Appeals Council may also decide on its own motion to review the action that was taken in your case under § 404.969. The administrative appeals judge who conducted a hearing, issued a hearing decision in your case, or dismissed your hearing request will not participate in any action associated with your request for Appeals Council review of that case.

(e) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of part 404 shall apply to authorize a member of the Appeals Council to exercise the functions performed by an administrative law judge under subpart J of part 404.

**§ 404.966 [Removed and Reserved]**

■ 7. Section 404.966 is removed and reserved.

■ 8. Amend § 404.970 by revising paragraph (a) to read as follows:

**§ 404.970 Cases the Appeals Council will review.**

(a) The Appeals Council will review a case at a party's request or on its own motion if—

(1) There appears to be an abuse of discretion by the administrative law judge or administrative appeals judge who heard the case;

(2) There is an error of law;

(3) The action, findings or conclusions in the hearing decision or dismissal order are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

\* \* \* \* \*

■ 9. Revise § 404.973 to read as follows:

**§ 404.973 Notice of Appeals Council review.**

When the Appeals Council decides to review a case, it shall mail a prior notice to all parties at their last known address stating the reasons for the review and the issues to be considered. However, when the Appeals Council plans to issue a decision that is fully favorable to all parties, plans to remand the case for further proceedings, or plans to issue a decision that is favorable in part and remand the remaining issues for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.

■ 10. Amend § 404.976 by revising the section heading, revising paragraph (b), and adding paragraph (c) to read as follows:

**§ 404.976 Procedures before the Appeals Council.**  
\* \* \* \* \*

(b) *Evidence the Appeals Council will exhibit.* The Appeals Council will evaluate all additional evidence it receives, but will only mark as an exhibit and make part of the official record additional evidence that it determines meets the requirements of § 404.970(a)(5) and (b). If we need to file a certified administrative record in Federal court, we will include in that record all additional evidence the Appeals Council received during the administrative review process, including additional evidence that the Appeals Council received but did not exhibit or make part of the official record.

(c) *Oral argument.* You may request to appear before the Appeals Council to present oral argument in support of your request for review. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance will be by video teleconferencing or in person, or, when the circumstances described in § 404.936(c)(2) exist, the Appeals Council may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 404.936(c)(4).

■ 11. Revise § 404.983 to read as follows:

**§ 404.983 Case remanded by a Federal court.**

(a) *General rule.* When a Federal court remands a case to the Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner, may make a decision following the provisions in paragraph (b) or (c) of this section, dismiss the proceedings, except as provided in paragraph (d) of this section, or remand the case to an administrative law judge following the provisions in paragraph (e) of this section with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. Any issues relating to the claim(s) may be considered by the Appeals Council or administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in the case.

(b) *Appeals Council decision without a hearing.* If the Appeals Council assumes responsibility under paragraph (a) of this section for issuing a decision without a hearing, it will follow the procedures explained in §§ 404.973 and 404.979.

(c) *Administrative appeals judge decision after holding a hearing.* If the Appeals Council assumes responsibility for issuing a decision and a hearing is necessary to complete adjudication of the claim(s), an administrative appeals judge will hold a hearing using the procedures set forth in §§ 404.929 through 404.961, as applicable.

(d) *Appeals Council dismissal.* After a Federal court remands a case to the

Commissioner for further consideration, the Appeals Council may dismiss the proceedings before it for any reason that an administrative law judge may dismiss a request for a hearing under § 404.957. The Appeals Council will not dismiss the proceedings in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(e) *Appeals Council remand.* If the Appeals Council remands a case under paragraph (a) of this section, it will follow the procedures explained in § 404.977.

■ 12. Revise § 404.984 to read as follows:

**§ 404.984 Appeals Council review of hearing decision in a case remanded by a Federal court.**

(a) *General.* In accordance with § 404.983, when a case is remanded by a Federal court for further consideration and the Appeals Council remands the case to an administrative law judge, or an administrative appeals judge issues a decision pursuant to § 404.983(c), the decision of the administrative law judge or administrative appeals judge will become the final decision of the Commissioner after remand on your case unless the Appeals Council assumes jurisdiction of the case. The Appeals Council may assume jurisdiction, using the standard set forth in § 404.970, based on written exceptions to the decision which you file with the Appeals Council or based on its authority pursuant to paragraph (c) of this section. If the Appeals Council assumes jurisdiction of the case, it will not dismiss the request for a hearing where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(b) *You file exceptions disagreeing with the hearing decision.* (1) If you disagree with the hearing decision, in whole or in part, you may file exceptions to the decision with the Appeals Council. Exceptions may be filed by submitting a written statement to the Appeals Council setting forth your reasons for disagreeing with the decision of the administrative law judge or administrative appeals judge. The exceptions must be filed within 30 days of the date you receive the hearing decision or an extension of time in which to submit exceptions must be requested in writing within the 30-day period. A timely request for a 30-day extension will be granted by the Appeals Council. A request for an

extension of more than 30 days should include a statement of reasons as to why you need the additional time.

(2) If written exceptions are timely filed, the Appeals Council will consider your reasons for disagreeing with the hearing decision and all the issues presented by your case. If the Appeals Council concludes that there is no reason to change the hearing decision, it will issue a notice to you addressing your exceptions and explaining why no change in the hearing decision is warranted. In this instance, the hearing decision is the final decision of the Commissioner after remand.

(3) When you file written exceptions to the hearing decision, the Appeals Council may assume jurisdiction at any time, even after the 60-day time period which applies when you do not file exceptions. If the Appeals Council assumes jurisdiction of your case, any issues relating to your claim may be considered by the Appeals Council whether or not they were raised in the administrative proceedings leading to the final decision in your case or subsequently considered by the administrative law judge or administrative appeals judge in the administrative proceedings following the court's remand order. The Appeals Council will either make a new, independent decision pursuant to § 404.983(b) or § 404.983(c), based on a preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an administrative law judge for further proceedings, including a new decision.

(c) *Appeals Council assumes jurisdiction without exceptions being filed.* Any time within 60 days after the date of the hearing decision, the Appeals Council may decide to assume jurisdiction of your case even though no written exceptions have been filed. Notice of this action will be mailed to all parties at their last known address. You will be provided with the opportunity to file briefs or other written statements with the Appeals Council about the facts and law relevant to your case. After the Appeals Council receives the briefs or other written statements, or the time allowed (usually 30 days) for submitting them has expired, the Appeals Council will either make a new, independent decision pursuant to § 404.983(b) or § 404.983(c), based on a preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an

administrative law judge for further proceedings, including a new decision.

(d) *Exceptions are not filed and the Appeals Council does not otherwise assume jurisdiction.* If no exceptions are filed and the Appeals Council does not assume jurisdiction of your case, the decision of the administrative law judge or administrative appeals judge becomes the final decision of the Commissioner after remand.

■ 13. Amend § 404.999c by revising paragraph (d)(3)(i)(C) to read as follows:

**§ 404.999c What travel expenses are reimbursable.**

\* \* \* \* \*

(d) \* \* \*

(3) \* \* \*

(i) \* \* \*

(C) The designated geographic service area of the Office of Hearings Operations hearing office having responsibility for providing the hearing.

\* \* \* \* \*

**PART 408—SPECIAL BENEFITS FOR CERTAIN WORLD WAR II VETERANS**

**Subpart A—Introduction, General Provision and Definitions**

■ 14. The authority citation for subpart A of part 408 continues to read as follows:

**Authority:** Secs. 702(a)(5) and 801–813 of the Social Security Act (42 U.S.C. 902(a)(5) and 1001–1013).

■ 15. Amend § 408.110 by revising paragraph (b) to read as follows:

**§ 408.110 General definitions and use of terms.**

\* \* \* \* \*

(b) *Commissioner; Appeals Council; Administrative Law Judge defined—*(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

\* \* \* \* \*

**PART 411—THE TICKET TO WORK AND SELF-SUFFICIENCY PROGRAM**

■ 16. The authority citation for part 411 continues to read as follows:

**Authority:** Secs. 702(a)(5) and 1148 of the Social Security Act (42 U.S.C. 902(a)(5) and 1320b–19); sec. 101(b)–(e), Public Law 106–

170, 113 Stat. 1860, 1873 (42 U.S.C. 1320b-19 note).

**Subpart C—Suspension of Continuing Disability Reviews for Beneficiaries Who Are Using a Ticket**

- 17. Amend § 411.175 by revising paragraph (a) to read as follows:

**§ 411.175 What if a continuing disability review is begun before my ticket is in use?**

(a) If we begin a continuing disability review before the date on which your ticket is in use, you may still assign the ticket and receive services from an employment network or a State vocational rehabilitation agency acting as an employment network under the Ticket to Work program, or you may still receive services from a State vocational rehabilitation agency that elects the vocational rehabilitation cost reimbursement option. However, we will complete the continuing disability review. If in this review we determine that you are no longer disabled, in most cases you will no longer be eligible to receive benefit payments. However, if your ticket was in use before we determined that you are no longer disabled, in certain circumstances you may continue to receive benefit payments (see §§ 404.316(c), 404.337(c), 404.352(d), and 416.1338 of this chapter). If you appeal the decision that you are no longer disabled, you may also choose to have your benefits continued pending reconsideration or a hearing before a judge on the cessation determination (see §§ 404.1597a and 416.996 of this chapter).

\* \* \* \* \*

**PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED**

**Subpart A—Introduction, General Provisions and Definitions**

- 18. The authority citation for subpart A of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5) and 1601–1635 of the Social Security Act (42 U.S.C. 902(a)(5) and 1381–1383d); sec. 212, Pub. L. 93–66, 87 Stat. 155 (42 U.S.C. 1382 note); sec. 502(a), Pub. L. 94–241, 90 Stat. 268 (48 U.S.C. 1681 note).

- 19. Amend § 416.120 by revising paragraph (b) to read as follows:

**§ 416.120 General definitions and use of terms.**

\* \* \* \* \*

(b) *Commissioner; Appeals Council; Administrative Law Judge; Administrative Appeals Judge defined—*

(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

(4) *Administrative Appeals Judge* means an Administrative Appeals Judge serving as a member of the Appeals Council.

\* \* \* \* \*

**Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions**

- 20. The authority citation for subpart N of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

- 21. Revise § 416.1429 to read as follows:

**§ 416.1429 Hearing before an administrative law judge—general.**

If you are dissatisfied with one of the determinations or decisions listed in § 416.1430, you may request a hearing. Subject to § 416.1456, the Deputy Commissioner for Hearings Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 416.1436 (c)(1)(i) through (iii), and in the limited circumstances described in § 416.1436(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 416.1435), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a

decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 416.1435, any new evidence that may have been submitted for consideration.

- 22. Amend § 416.1455 by revising the section heading, redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and adding new paragraph (c) to read as follows:

**§ 416.1455 The effect of a hearing decision.**

\* \* \* \* \*

(c) The Appeals Council decides on its own motion to review the decision under the procedures in § 416.1469;

\* \* \* \* \*

- 23. Revise § 416.1456 to read as follows:

**§ 416.1456 Removal of a hearing request(s) to the Appeals Council.**

(a) *Removal.* The Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process.

(b) *Notice.* We will mail a notice to all parties at their last known address telling them that the Appeals Council has assumed responsibility for the case(s).

(c) *Procedures applied.* If the Appeals Council assumes responsibility for a hearing request(s), it shall conduct all proceedings in accordance with the rules set forth in §§ 416.1429 through 416.1461, as applicable.

(d) *Appeals Council review.* If the Appeals Council assumes responsibility for your hearing request under this section and you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action following the procedures in §§ 416.1467 through 416.1482. The Appeals Council may also decide on its own motion to review the action that was taken in your case under § 416.1469. The administrative appeals judge who conducted a hearing, issued a hearing decision in your case, or dismissed your hearing request will not participate in any action associated with your request for Appeals Council review of that case.

(e) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of part 416 shall apply to authorize a member of the Appeals Council to exercise the functions performed by an administrative law judge under subpart N of part 416.

**§ 416.1466 [Removed and Reserved]**

- 24. Section 416.1466 is removed and reserved.

■ 25. Amend § 416.1470 by revising paragraph (a) to read as follows:

**§ 416.1470 Cases the Appeals Council will review.**

(a) The Appeals Council will review a case at a party's request or on its own motion if—

(1) There appears to be an abuse of discretion by the administrative law judge or administrative appeals judge who heard the case;

(2) There is an error of law;

(3) The action, findings or conclusions in the hearing decision or dismissal order are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

\* \* \* \* \*

■ 26. Revise § 416.1473 to read as follows:

**§ 416.1473 Notice of Appeals Council review.**

When the Appeals Council decides to review a case, it shall mail a prior notice to all parties at their last known address stating the reasons for the review and the issues to be considered. However, when the Appeals Council plans to issue a decision that is fully favorable to all parties, plans to remand the case for further proceedings, or plans to issue a decision that is favorable in part and remand the remaining issues for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.

■ 27. Amend § 416.1476 by revising the section heading, revising paragraph (b), and adding paragraph (c) to read as follows:

**§ 416.1476 Procedures before the Appeals Council.**

\* \* \* \* \*

(b) *Evidence the Appeals Council will exhibit.* The Appeals Council will evaluate all additional evidence it receives, but will only mark as an exhibit and make part of the official record additional evidence that it determines meets the requirements of § 416.1470(a)(5) and (b). If we need to file a certified administrative record in Federal court, we will include in that record all additional evidence the Appeals Council received during the administrative review process,

including additional evidence that the Appeals Council received but did not exhibit or make part of the official record.

(c) *Oral argument.* You may request to appear before the Appeals Council to present oral argument in support of your request for review. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance will be by video teleconferencing or in person, or, when the circumstances described in § 416.1436(c)(2) exist, the Appeals Council may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 416.1436(c)(4).

■ 28. Revise § 416.1483 to read as follows:

**§ 416.1483 Case remanded by a Federal court.**

(a) *General rule.* When a Federal court remands a case to the Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner, may make a decision following the provisions in paragraph (b) or (c) of this section, dismiss the proceedings, except as provided in paragraph (d) of this section, or remand the case to an administrative law judge following the provisions in paragraph (e) of this section with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. Any issues relating to the claim(s) may be considered by the Appeals Council or administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in the case.

(b) *Appeals Council decision without a hearing.* If the Appeals Council assumes responsibility under paragraph (a) of this section for issuing a decision without a hearing, it will follow the procedures explained in §§ 416.1473 and 416.1479.

(c) *Administrative appeals judge decision after holding a hearing.* If the Appeals Council assumes responsibility for issuing a decision and a hearing is necessary to complete adjudication of the claim(s), an administrative appeals judge will hold a hearing using the

procedures set forth in §§ 416.1429 through 416.1461, as applicable.

(d) *Appeals Council dismissal.* After a Federal court remands a case to the Commissioner for further consideration, the Appeals Council may dismiss the proceedings before it for any reason that an administrative law judge may dismiss a request for a hearing under § 416.1457. The Appeals Council will not dismiss the proceedings in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(e) *Appeals Council remand.* If the Appeals Council remands a case under paragraph (a) of this section, it will follow the procedures explained in § 416.1477.

■ 29. Revise § 416.1484 to read as follows:

**§ 416.1484 Appeals Council review of hearing decision in a case remanded by a Federal court.**

(a) *General.* In accordance with § 416.1483, when a case is remanded by a Federal court for further consideration and the Appeals Council remands the case to an administrative law judge, or an administrative appeals judge issues a decision pursuant to § 416.1483(c), the decision of the administrative law judge or administrative appeals judge will become the final decision of the Commissioner after remand on your case unless the Appeals Council assumes jurisdiction of the case. The Appeals Council may assume jurisdiction, using the standard set forth in § 416.1470, based on written exceptions to the decision which you file with the Appeals Council or based on its authority pursuant to paragraph (c) of this section. If the Appeals Council assumes jurisdiction of the case, it will not dismiss the request for a hearing in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(b) *You file exceptions disagreeing with the hearing decision.* (1) If you disagree with the hearing decision, in whole or in part, you may file exceptions to the decision with the Appeals Council. Exceptions may be filed by submitting a written statement to the Appeals Council setting forth your reasons for disagreeing with the decision of the administrative law judge or administrative appeals judge. The exceptions must be filed within 30 days of the date you receive the hearing decision or an extension of time in which to submit exceptions must be

requested in writing within the 30-day period. A timely request for a 30-day extension will be granted by the Appeals Council. A request for an extension of more than 30 days should include a statement of reasons as to why you need the additional time.

(2) If written exceptions are timely filed, the Appeals Council will consider your reasons for disagreeing with the hearing decision and all the issues presented by your case. If the Appeals Council concludes that there is no reason to change the hearing decision, it will issue a notice to you addressing your exceptions and explaining why no change in the hearing decision is warranted. In this instance, the hearing decision is the final decision of the Commissioner after remand.

(3) When you file written exceptions to the hearing decision, the Appeals Council may assume jurisdiction at any time, even after the 60-day time period which applies when you do not file exceptions. If the Appeals Council assumes jurisdiction of your case, any issues relating to your claim may be considered by the Appeals Council whether or not they were raised in the administrative proceedings leading to the final decision in your case or subsequently considered by the administrative law judge or administrative appeals judge in the administrative proceedings following the court's remand order. The Appeals Council will either make a new, independent decision pursuant to § 416.1483(b) or § 416.1483(c), based on a preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an administrative law judge for further proceedings, including a new decision.

(c) *Appeals Council assumes jurisdiction without exceptions being filed.* Any time within 60 days after the date of the hearing decision, the Appeals Council may decide to assume jurisdiction of your case even though no written exceptions have been filed. Notice of this action will be mailed to all parties at their last known address. You will be provided with the opportunity to file briefs or other written statements with the Appeals Council about the facts and law relevant to your case. After the Appeals Council receives the briefs or other written statements, or the time allowed (usually 30 days) for submitting them has expired, the Appeals Council will either make a new, independent decision pursuant to § 416.1483(b) or § 416.1483(c), based on a preponderance of the evidence in the record that will

be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an administrative law judge for further proceedings, including a new decision.

(d) *Exceptions are not filed and the Appeals Council does not otherwise assume jurisdiction.* If no exceptions are filed and the Appeals Council does not assume jurisdiction of your case, the decision of the administrative law judge or administrative appeals judge becomes the final decision of the Commissioner after remand.

■ 30. Amend § 416.1498 by revising paragraph (d)(3)(i)(C) to read as follows:

**§ 416.1498 What travel expenses are reimbursable.**

\* \* \* \* \*

(d) \* \* \*

(3) \* \* \*

(i) \* \* \*

(C) The designated geographic service area of the Office of Hearings Operations hearing office having responsibility for providing the hearing.

\* \* \* \* \*

**PART 422—ORGANIZATION AND PROCEDURES**

■ 31. Revise the heading for subpart C to read as follows:

**Subpart C—Hearings, Appeals Council Review, and Judicial Review Procedures**

■ 32. The authority citation for subpart C of part 422 continues to read as follows:

**Authority:** Secs. 205, 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405, 421, and 902(a)(5)); 30 U.S.C. 923(b).

■ 33. Amend § 422.201 by revising the introductory text to read as follows:

**§ 422.201 Material included in this subpart.**

This subpart describes in general the procedures relating to hearings, review by the Appeals Council of the hearing decision or dismissal, and court review in cases decided under the procedures in parts 404, 408, 410, and 416 of this chapter. It also describes the procedures for requesting a hearing or Appeals Council review, and for instituting a civil action for court review of cases decided under these parts. For detailed provisions relating to hearings, review by the Appeals Council, and court review, see the following references as appropriate to the matter involved:

\* \* \* \* \*

■ 34. Amend § 422.203 by revising paragraphs (b) and (c) to read as follows:

**§ 422.203 Hearings.**

\* \* \* \* \*

(b) *Request for a hearing.* (1) A request for a hearing under paragraph (a) of this section may be made using the form(s) we designate for this purpose, or by any other writing requesting a hearing. The request shall be filed either electronically in the manner we prescribe or at an office of the Social Security Administration, usually a district office or a branch office, or at the Veterans' Administration Regional Office in the Philippines (except in title XVI cases), or at a hearing office of the Office of Hearings Operations, or with the Appeals Council. A qualified railroad retirement beneficiary may choose to file a request for a hearing under part A of title XVIII with the Railroad Retirement Board.

(2) Unless an extension of time has been granted for good cause shown, a request for a hearing must be filed within 60 days after the receipt of the notice of the reconsidered or revised determination, or after an initial determination described in 42 CFR 498.3(b) and (c) (see §§ 404.933, 410.631, and 416.1433 of this chapter and 42 CFR 405.722, 498.40, and 417.260.)

(c) *Hearing decision or other action.* Generally, the administrative law judge, or an administrative appeals judge under § 404.956 or § 416.1456 of this chapter, will either decide the case after hearing (unless hearing is waived) or, if appropriate, dismiss the request for a hearing. With respect to a hearing on a determination under paragraph (a)(1) of this section, the administrative law judge may certify the case with a recommended decision to the Appeals Council for decision. The administrative law judge, or an attorney advisor under § 404.942 or § 416.1442 of this chapter, or an administrative appeals judge under § 404.956 or § 416.1456 of this chapter, must base the hearing decision on the preponderance of the evidence offered at the hearing or otherwise included in the record.

■ 35. Revise § 422.205 to read as follows:

**§ 422.205 Proceedings before the Appeals Council.**

(a) *Administrative Appeals Judge hearing decisions.* Administrative Appeals Judge decisions and dismissals issued on hearing requests removed under §§ 404.956 and 416.1456 of this chapter and decisions and dismissals described in § 422.203(c) require the signature of one Administrative Appeals Judge. Requests for review of hearing decisions issued by an Administrative Appeals Judge may be filed pursuant to

§§ 404.968 and 416.1468 of this chapter and paragraph (b) of this section.

(b) *Appeals Council review.* Any party to a hearing decision or dismissal may request a review of such action by the Appeals Council. This request may be made on Form HA-520, Request for Review of Hearing Decision/Order, or by any other writing specifically requesting review. Form HA-520 may be obtained from any Social Security district office or branch office, or at any other office where a request for a hearing may be filed. (For time and place of filing, see §§ 404.968 and 416.1468 of this chapter.)

(c) *Review of a hearing decision, dismissal, or denial.* The denial of a request for review of a hearing decision concerning a determination under § 422.203(a)(1) shall be by such appeals officer or appeals officers or by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair. The denial of a request for review of a hearing dismissal, the dismissal of a request for review, the denial of a request for review of a hearing decision whenever such hearing decision after such denial would not be subject to judicial review as explained in § 422.210(a), or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair.

(d) *Appeals Council review panel.* Whenever the Appeals Council reviews a hearing decision under §§ 404.967, 404.969, 416.1467, or 416.1469 of this chapter and the claimant does not appear personally or through representation before the Appeals Council to present oral argument, such review will be conducted by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chair or

Deputy Chair of the Appeals Council. In the event of disagreement between a panel composed of only two members, the Chair or Deputy Chair, or his or her delegate, who must be a member of the Appeals Council, shall participate as a third member of the panel. When the claimant appears in person or through representation before the Appeals Council in the location designated by the Appeals Council, the review will be conducted by a panel of not less than three members of the Appeals Council designated in the manner prescribed by the Chair or Deputy Chair. Concurrence of a majority of a panel shall constitute the decision of the Appeals Council unless the case is considered as provided under paragraph (e) of this section.

(e) *Appeals Council meetings.* On call of the Chair, the Appeals Council may meet en banc or a representative body of Appeals Council members may be convened to consider any case arising under paragraph (c) or (d) of this section. Such representative body shall be comprised of a panel of not less than five members designated by the Chair as deemed appropriate for the matter to be considered. The Chair or Deputy Chair shall preside, or in his or her absence, the Chair shall designate a member of the Appeals Council to preside. A majority vote of the designated panel, or of the members present and voting, shall constitute the decision of the Appeals Council.

(f) *Temporary assignments of ALJs.* The Chair may designate an administrative law judge to serve as a member of the Appeals Council for temporary assignments. An administrative law judge shall not be designated to serve as a member on any panel where such panel is conducting review on a case in which such individual has been previously involved.

■ 36. Amend § 422.210 by revising paragraph (a) and adding paragraph (e) to read as follows:

**§ 422.210 Judicial review.**

(a) *General.* A claimant may obtain judicial review of a decision by an administrative law judge or administrative appeals judge if the Appeals Council has denied the claimant's request for review, or of a decision by the Appeals Council when that is the final decision of the Commissioner. A claimant may also obtain judicial review of a reconsidered determination, or of a decision of an administrative law judge or an administrative appeals judge, where, under the expedited appeals procedure, further administrative review is waived by agreement under § 404.926 or § 416.1426 of this chapter or as appropriate. There are no amount-in-controversy limitations on these rights of appeal.

\* \* \* \* \*

(e) *Appeals Council review panel after Federal court remand.* When the Appeals Council holds a hearing under § 404.983 or § 416.1483 of this chapter, such hearing will be conducted and a decision will be issued by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chair or Deputy Chair of the Appeals Council. When the Appeals Council issues a decision under §§ 404.983 and 416.1483 of this chapter without holding a hearing, a decision will be issued by a panel of not less than two members of the Council designated in the same manner prescribed by the Chair or Deputy Chair of the Council. In the event of disagreement between a panel composed of only two members, the Chair or Deputy Chair, or his or her delegate, who must be a member of the Council, shall participate as a third member of the panel.

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Part III

## Department of the Interior

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Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Review of Domestic Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions; Proposed Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-HQ-ES-2020-0003;  
FF09E21000 FXES1111090000 212]

**Endangered and Threatened Wildlife and Plants; Review of Domestic Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notification of review.

**SUMMARY:** In this document, known as a Candidate Notice of Review (CNOR), we, the U.S. Fish and Wildlife Service (Service), present an updated list of domestic plant and animal species that we regard as candidates for or have proposed for addition to the Lists of Endangered and Threatened Wildlife and Plants under the Endangered Species Act of 1973, as amended. This document also includes our findings on resubmitted petitions and describes our progress in revising the Lists of Endangered and Threatened Wildlife and Plants (Lists) during the period October 1, 2018, through September 30, 2020. Combined with other decisions for individual species that were published separately from this CNOR in the past year, the current number of domestic species that are candidates for listing is 11. Identification of candidate species can assist environmental planning efforts by providing advance notice of potential listings, and by allowing landowners and resource managers to alleviate threats and thereby possibly remove the need to list species as endangered or threatened. Even if we subsequently list a candidate species, the early notice provided here could result in more options for species management and recovery by prompting earlier candidate conservation measures to alleviate threats to the species. This document also adds the Sonoran desert tortoise back to the candidate list as a result of an August 3, 2020, court-approved settlement agreement.

**DATES:** We will accept information on any of the species in this document at any time.

**ADDRESSES:** This document is available on the internet at <http://www.regulations.gov> and <http://www.fws.gov/endangered/what-we-do/cnor.html>.

Species assessment forms with information and references on a particular candidate species' range, status, habitat needs, and listing priority assignment are available for review on our website ([http://ecos.fws.gov/tess\\_public/reports/candidate-species-report](http://ecos.fws.gov/tess_public/reports/candidate-species-report)). Please submit any new information, materials, comments, or questions of a general nature on this CNOR to the address listed under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions pertaining to a particular species to the address of the Regional Director in the appropriate office listed under Request for Information in **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:**

Caitlin Snyder, Chief, Branch of Domestic Listing, U.S. Fish and Wildlife Service, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041-3803 (telephone 703-358-1796).

Persons who use a telecommunications device for the deaf may call the Federal Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Background**

The Endangered Species Act of 1973 (Act), as amended (ESA; 16 U.S.C. 1531 *et seq.*), requires that we identify species of wildlife and plants that are endangered or threatened based solely on the best scientific and commercial data available. As defined in section 3 of the Act, an endangered species is any species that is in danger of extinction throughout all or a significant portion of its range, and a threatened species is any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Through the Federal rulemaking process, we add species that meet these definitions to the List of Endangered and Threatened Wildlife in title 50 of the Code of Federal Regulations (CFR) at § 17.11 (50 CFR 17.11) or the List of Endangered and Threatened Plants at 50 CFR 17.12. As part of this program, we maintain a list of species that we regard as candidates for listing. A candidate species is one for which we have on file sufficient information on biological vulnerability and threats to support a proposal for listing as endangered or threatened, but for which preparation and publication of a proposal is precluded by higher priority listing actions. We may identify a species as a candidate for listing after we have conducted an evaluation of its status—either on our own initiative, or in

response to a petition we have received. If we have made a finding on a petition to list a species, and have found that listing is warranted, but precluded by other higher priority listing actions, we will add the species to our list of candidates.

We maintain this list of candidates for a variety of reasons: (1) To notify the public that these species are facing threats to their survival; (2) to provide advance knowledge of potential listings that could affect decisions of environmental planners and developers; (3) to provide information that may stimulate and guide conservation efforts that will remove or reduce threats to these species and possibly make listing unnecessary; (4) to request input from interested parties to help us identify those candidate species that may not require protection under the Act, as well as additional species that may require the Act's protections; and (5) to request necessary information for setting priorities for preparing listing proposals. We encourage collaborative conservation efforts for candidate species and offer technical and financial assistance to facilitate such efforts. For additional information regarding such assistance, please contact the appropriate Office listed under Request for Information, below, or visit our website at: <http://www.fws.gov/endangered/what-we-do/cca.html>.

**Previous Candidate Notices of Review**

We have been publishing CNORs since 1975. The most recent was published on October 10, 2019 (84 FR 54732). CNORs published since 1994 are available on our website at <http://www.fws.gov/endangered/what-we-do/cnor.html>. For copies of CNORs published prior to 1994, please contact the Branch of Domestic Listing (see **FOR FURTHER INFORMATION CONTACT**, above).

On September 21, 1983, we published guidance for assigning an LPN for each candidate species (48 FR 43098). Using this guidance, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats, immediacy of threats, and taxonomic status; the lower the LPN, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). Section 4(h)(3) of the Act (16 U.S.C. 1533(h)(3)) requires the Secretary to establish guidelines for such a priority-ranking system. As explained below, in using this system, we first categorize based on the magnitude of the threat(s), then by the immediacy of the threat(s), and finally by taxonomic status.

Under this priority-ranking system, magnitude of threat can be either "high" or "moderate to low." This criterion



helps ensure that the species facing the greatest threats to their continued existence receive the highest listing priority. All candidate species face threats to their continued existence, so the magnitude of threats is in relative terms. For all candidate species, the threats are of sufficiently high magnitude to put them in danger of extinction or make them likely to become in danger of extinction in the foreseeable future. However, for species with higher magnitude threats, the threats have a greater likelihood of bringing about extinction or are expected to bring about extinction on a shorter timescale (once the threats are imminent) than for species with lower-magnitude threats. Because we do not routinely quantify how likely or how soon extinction would be expected to occur absent listing, we must evaluate factors that contribute to the likelihood and time scale for extinction. We therefore consider information such as: (1) The number of populations or extent of range of the species affected by the threat(s), or both; (2) the biological significance of the affected population(s), taking into consideration the life-history characteristics of the species and its current abundance and distribution; (3) whether the threats affect the species in only a portion of its range, and, if so, the likelihood of persistence of the species in the unaffected portions; (4) the severity of the effects and the rapidity with which they have caused or are likely to cause mortality to individuals and accompanying declines in population levels; (5) whether the effects are likely to be permanent; and (6) the extent to which any ongoing conservation efforts reduce the severity of the threat(s).

As used in our priority-ranking system, immediacy of threat is categorized as either “imminent” or “nonimminent,” and is based on when the threats will begin. If a threat is currently occurring or likely to occur in the very near future, we classify the threat as imminent. Determining the immediacy of threats helps ensure that species facing actual, identifiable threats are given priority for listing proposals over species for which threats are only potential or species that are intrinsically vulnerable to certain types of threats but are not known to be presently facing such threats.

Our priority-ranking system has three categories for taxonomic status: Species that are the sole members of a genus; full species (in genera that have more than one species); and subspecies and distinct population segments of vertebrate species (DPS).

The result of the ranking system is that we assign each candidate a listing priority number of 1 to 12. For example, if the threats are of high magnitude, with immediacy classified as imminent, the listable entity is assigned an LPN of 1, 2, or 3 based on its taxonomic status (*i.e.*, a species that is the only member of its genus would be assigned to the LPN 1 category, a full species to LPN 2, and a subspecies or DPS would be assigned to LPN 3). In summary, the LPN ranking system provides a basis for making decisions about the relative priority for preparing a proposed rule to list a given species. No matter which LPN we assign to a species, each species included in this CNOR as a candidate is one for which we have concluded that we have sufficient information to prepare a proposed rule for listing because it is in danger of extinction or likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

For more information on the process and standards used in assigning LPNs, a copy of the 1983 guidance is available on our website at: [http://www.fws.gov/endangered/esa-library/pdf/1983\\_LPN\\_Policy\\_FR\\_pub.pdf](http://www.fws.gov/endangered/esa-library/pdf/1983_LPN_Policy_FR_pub.pdf). Information on the LPN assigned to a particular species is summarized in this CNOR, and the species assessment for each candidate contains the LPN chart and a more-detailed explanation—including citations to, and more-detailed analyses of, the best scientific and commercial data available—for our determination of the magnitude and immediacy of threat(s) and assignment of the LPN.

#### Summary of This CNOR

Since publication of the previous CNOR on October 10, 2019 (84 FR 54732), we reviewed the available information on candidate species to ensure that a proposed listing is justified for each species, and reevaluated the relative LPN assigned to each species. We also evaluated the need to emergency list any of these species, particularly species with higher priorities (*i.e.*, species with LPNs of 1, 2, or 3). This review and reevaluation ensures that we focus conservation efforts on those species at greatest risk.

We are not identifying any new candidates, changing the listing priority number of any existing candidates, or removing any candidates through this CNOR. We are putting the Sonoran desert tortoise (*Gopherus morafkai*) back on the candidate list as a result of a court-approved settlement agreement.

In addition to reviewing candidate species since publication of the last CNOR, we have worked on findings in response to petitions to list species, on

proposed rules to list species under the Act, and on final listing determinations. Some of these findings and determinations have been completed and published in the **Federal Register**, while work on others is still under way (see Preclusion and Expeditious Progress, below, for details).

Combined with other findings and determinations published separately from this CNOR, 11 species are now candidates awaiting preparation of a proposed listing rule or “not-warranted” finding. Table 1 identifies these 11 species, along with the 17 species currently proposed for listing (including 1 species proposed for listing due to similarity in appearance).

Table 2 lists the changes for species identified in the previous CNOR and includes six species identified in the previous CNOR as either proposed for listing or classified as candidates that are no longer in those categories. This includes three species for which we published a final listing rule and three candidate species for which we published separate not-warranted findings and removed them from candidate status.

#### Petition Findings

The Act provides two mechanisms for considering species for listing. One method allows the Secretary, on the Secretary’s own initiative, to identify species for listing under the standards of section 4(a)(1). The second method provides a mechanism for the public to petition us to add a species to the Lists. As described further in the paragraphs that follow, the CNOR serves several purposes as part of the petition process: (1) in some instances (in particular, for petitions to list species that the Service has already identified as candidates on its own initiative), it serves as the initial petition finding; (2) for candidate species for which the Service has made a warranted-but-precluded petition finding, it serves as a “resubmitted” petition finding that the Act requires the Service to make each year; and (3) it documents the Service’s compliance with the statutory requirement to monitor the status of species for which listing is warranted but precluded, and to ascertain if they need emergency listing.

First, the CNOR serves as an initial petition finding in some instances. Under section 4(b)(3)(A) of the Act, when we receive a petition to list a species, we must determine within 90 days, to the maximum extent practicable, whether the petition presents substantial information indicating that listing may be warranted (a “90-day finding”). If we make a

positive 90-day finding, we must promptly commence a status review of the species under section 4(b)(3)(A); we must then make, within 12 months of the receipt of the petition, one of the following three possible findings (a “12-month finding”):

(1) The petitioned action is not warranted, in which case we must promptly publish the finding in the **Federal Register**;

(2) The petitioned action is warranted (in which case we must promptly publish a proposed regulation to implement the petitioned action; once we publish a proposed rule for a species, sections 4(b)(5) and 4(b)(6) of the Act govern further procedures, regardless of whether or not we issued the proposal in response to a petition); or

(3) The petitioned action is warranted, but (a) the immediate proposal of a regulation and final promulgation of a regulation implementing the petitioned action is precluded by pending proposals to determine whether any species is endangered or threatened, and (b) expeditious progress is being made to add qualified species to the Lists. We refer to this third option as a “warranted-but-precluded finding,” and after making such a finding, we must promptly publish it in the **Federal Register**.

We define “candidate species” to mean those species for which the Service has on file sufficient information on biological vulnerability and threats to support issuance of a proposed rule to list, but for which issuance of the proposed rule is precluded (61 FR 64481; December 5, 1996). The standard for making a species a candidate through our own initiative is identical to the standard for making a warranted-but-precluded 12-month petition finding on a petition to list, and we add all petitioned species for which we have made a warranted-but-precluded 12-month finding to the candidate list.

Therefore, all candidate species identified through our own initiative already have received the equivalent of substantial 90-day and warranted-but-precluded 12-month findings. Nevertheless, if we receive a petition to list a species that we have already identified as a candidate, we review the status of the newly petitioned candidate species and through this CNOR publish specific section 4(b)(3) findings (*i.e.*, substantial 90-day and warranted-but-precluded 12-month findings) in response to the petitions to list these candidate species. We publish these findings as part of the first CNOR following receipt of the petition. We

have identified the candidate species for which we received petitions and made a continued warranted-but-precluded finding on a resubmitted petition by the code “C\*” in the category column on the left side of Table 1, below.

Second, the CNOR serves as a “resubmitted” petition finding. Section 4(b)(3)(C)(i) of the Act requires that when we make a warranted-but-precluded finding on a petition, we treat the petition as one that is resubmitted on the date of the finding. Thus, we must make a 12-month petition finding for each such species at least once a year in compliance with section 4(b)(3)(B) of the Act, until we publish a proposal to list the species or make a final not-warranted finding. We make these annual resubmitted petition findings through the CNOR. To the extent these annual findings differ from the initial 12-month warranted-but-precluded finding or any of the resubmitted petition findings in previous CNORs, they supersede the earlier findings, although all previous findings are part of the administrative record for the new finding, and in the new finding, we may rely upon them or incorporate them by reference as appropriate, in addition to explaining why the finding has changed.

Third, through undertaking the analysis required to complete the CNOR, the Service determines if any candidate species needs emergency listing. Section 4(b)(3)(C)(iii) of the Act requires us to “implement a system to monitor effectively the status of all species” for which we have made a warranted-but-precluded 12-month finding and to “make prompt use of the [emergency listing] authority [under section 4(b)(7)] to prevent a significant risk to the well being of any such species.” The CNOR plays a crucial role in the monitoring system that we have implemented for all candidate species by providing notice that we are actively seeking information regarding the status of those species. We review all new information on candidate species as it becomes available, prepare an annual species assessment form that reflects monitoring results and other new information, and identify any species for which emergency listing may be appropriate. If we determine that emergency listing is appropriate for any candidate, we will make prompt use of the emergency listing authority under section 4(b)(7) of the Act. For example, on August 10, 2011, we emergency listed the Miami blue butterfly (76 FR 49542). We have been reviewing and will continue to review, at least annually, the status of every candidate, whether or not we have received a

petition to list it. Thus, the CNOR, the accompanying species assessment forms, and the process by which the Service generates and reviews those documents together constitute the Service’s system for monitoring and making annual findings on the status of petitioned species under sections 4(b)(3)(C)(i) and 4(b)(3)(C)(iii) of the Act.

A number of court decisions have elaborated on the nature and specificity of information that we must consider in making and describing the petition findings in the CNOR. The CNOR that published on November 9, 2009 (74 FR 57804), describes these court decisions in further detail. As with previous CNORs, we continue to incorporate information of the nature and specificity required by the courts. For example, we include a description of the reasons why the listing of every petitioned candidate species is both warranted and precluded at this time. We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis (see below). Our preclusion determinations are further based upon our budget for listing activities for unlisted species only, and we explain the priority system and why the work we have accomplished has precluded action on listing candidate species.

In preparing this CNOR, we reviewed the current status of, and threats to, the 11 candidates for which we have received a petition to list and the 4 listed species for which we have received a petition to reclassify from threatened to endangered, where we found the petitioned action to be warranted but precluded. We find that the immediate issuance of a proposed rule and timely promulgation of a final rule for each of these species has been, for the preceding months, and continues to be, precluded by higher priority listing actions. However, for all of these candidate species, we are currently engaged in a thorough review of all available data to determine whether to proceed with a proposed listing rule; as a result of this review, we may conclude that listing is no longer warranted. For the two grizzly bear ecosystem populations, we are engaged in a thorough review of all available data to determine the appropriate status for those entities (see Petitions To Reclassify Species Already Listed, below). For the remaining two listed species—delta smelt and Pariette cactus, which are candidates for reclassification from threatened to endangered—we are providing updated species assessment

forms and a summary of those assessments in this CNOR (see Petitions to Reclassify Species Already Listed, below). Additional information that is the basis for this finding is found in the species assessments and our administrative record for each species.

The immediate publication of proposed rules to list these species was precluded by our work on higher priority listing actions, listed below, during the period from October 1, 2018, through September 30, 2020. Below we describe the actions that continue to preclude the immediate proposal and final promulgation of a regulation implementing each of the petitioned actions for which we have made a warranted-but-precluded finding, and we describe the expeditious progress we are making to add qualified species to, and remove species from, the Lists. We will continue to monitor the status of all candidate species, including petitioned species, as new information becomes available to determine if a change in status is warranted, including the need to emergency list a species under section 4(b)(7) of the Act. As described above, under section 4 of the Act, we identify and propose species for listing based on the factors identified in section 4(a)(1)—either on our own initiative or through the mechanism that section 4 provides for the public to petition us to add species to the Lists of Endangered or Threatened Wildlife and Plants.

#### **Preclusion and Expeditious Progress**

To make a finding that a particular action is warranted but precluded, the Service must make two determinations: (1) That the immediate proposal and timely promulgation of a final regulation is precluded by pending proposals to determine whether any species is endangered or threatened; and (2) that expeditious progress is being made to add qualified species to either of the Lists and to remove species from the Lists (16 U.S.C. 1533(b)(3)(B)(iii)).

#### *Preclusion*

A listing proposal is precluded if the Service does not have sufficient resources available to complete the proposal, because there are competing demands for those resources, and the relative priority of those competing demands is higher. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a proposed listing regulation or whether promulgation of such a proposal is precluded by higher priority listing actions—(1) The amount of resources available for completing the listing function, (2) the estimated cost of completing the proposed listing

regulation, and (3) the Service's workload, along with the Service's prioritization of the proposed listing regulation, in relation to other actions in its workload.

#### *Available Resources*

The resources available for listing actions are determined through the annual Congressional appropriations process. In FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds that may be expended for the Listing Program (spending cap). This spending cap was designed to prevent the listing function from depleting funds needed for other functions under the Act (for example, recovery functions, such as removing species from the Lists), or for other Service programs (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997). The funds within the spending cap are available to support work involving the following listing actions: Proposed and final rules to add species to the Lists or to change the status of species from threatened to endangered; 90-day and 12-month findings on petitions to add species to the Lists or to change the status of a species from threatened to endangered; annual “resubmitted” petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed rules designating critical habitat or final critical habitat determinations; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat).

For more than two decades the size and cost of the workload in these categories of actions have far exceeded the amount of funding available to the Service under the spending cap for completing listing and critical habitat actions under the Act. Since we cannot exceed the spending cap without violating the Anti-Deficiency Act (31 U.S.C. 1341(a)(1)(A)), each year we have been compelled to determine that work on at least some actions was precluded by work on higher-priority actions. We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first, and because we allocate our listing budget on a nationwide basis. Through the listing cap and the amount of funds needed to complete court-mandated actions within the cap, Congress and the courts have in effect determined the amount of money

remaining (after completing court-mandated actions) for listing activities nationwide. Therefore, the funds that remain within the listing cap—after paying for work needed to comply with court orders or court-approved settlement agreements—set the framework within which we make our determinations of preclusion and expeditious progress.

For FY 2019, through the Consolidated Appropriations Act of 2019, (Pub. L. 116–6, February 15, 2019), Congress appropriated the Service \$18,318,000 under a consolidated cap for all domestic and foreign listing work, including status assessments, listing determinations, domestic critical habitat designations, and related activities. For FY 2020, through the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94, December 20, 2019), Congress appropriated \$20,318,000 for all domestic and foreign listing work. The amount of funding Congress will appropriate in future years is uncertain.

#### *Costs of Listing Actions*

The work involved in preparing various listing documents can be extensive, and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer-review comments on proposed rules and incorporating relevant information from those comments into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. Our practice of proposing to designate critical habitat concurrent with listing species requires additional coordination and an analysis of the economic impacts of the designation, and thus adds to the complexity and cost of our work. Since completing all of the work for outstanding listing and critical habitat actions has for so long required more funding than has been available within the spending cap, the Service has developed several ways to determine the relative priorities of the actions within its workload to identify the work it can complete with the funding it has available for listing and critical habitat actions each year.

#### *Prioritizing Listing Actions*

The Service's Listing Program workload is broadly composed of four types of actions, which the Service

prioritizes as follows: (1) Compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations or critical habitat designations be completed by a specific date; (2) essential litigation-related, administrative, and listing program-management functions; (3) section 4 (of the Act) listing and critical habitat actions with absolute statutory deadlines; and (4) section 4 listing actions that do not have absolute statutory deadlines.

In previous years, the Service received many new petitions, including multiple petitions to list numerous species, *e.g.*, a single petition sought to list 404 domestic species. The emphasis that petitioners placed on seeking listing for hundreds of species at a time through the petition process significantly increased the number of actions within the third category of our workload—actions that have absolute statutory deadlines for making findings on those petitions. In addition, the necessity of dedicating all of the Listing Program funding towards determining the status of 251 candidate species and complying with other court-ordered requirements between 2011 and 2016 added to the number of petition findings awaiting action. Because we are not able to work on all of these at once, the Service's most recent effort to prioritize its workload focuses on addressing the backlog in petition findings that has resulted from the influx of large multi-species petitions and the 5-year period in which the Service was not making 12-month findings for most of those petitions. The number of petitions that are awaiting status reviews and accompanying 12-month findings illustrates the considerable extent of this backlog; as a result of the outstanding petitions to list hundreds of species, and our efforts to make initial petition findings within 90 days of receiving the petition to the maximum extent practicable, at the beginning of FY 2020 we had 422 12-month petition findings for domestic species yet to be initiated and completed.

To determine the relative priorities of the outstanding 12-month petition findings, the Service developed a prioritization methodology (methodology) (81 FR 49248; July 27, 2016), after providing the public with notice and an opportunity to comment on the draft methodology (81 FR 2229; January 15, 2016). Under the methodology, we assign each 12-month finding to one of five priority bins: (1) The species is critically imperiled; (2) strong data are already available about the status of the species; (3) new science

is underway that would inform key uncertainties about the status of the species; (4) conservation efforts are in development or underway and likely to address the status of the species; or (5) the available data on the species are limited. As a general rule, 12-month findings with a lower bin number have a higher priority than, and are scheduled before, 12-month findings with a higher bin number. However, we make some limited exceptions—for example, we may schedule a lower-priority finding earlier if batching it with a higher-priority finding would generate efficiencies. We may also consider where there are any special circumstances whereby an action should be bumped up (or down) in scheduling. One limitation that might result in divergence from priority order is when the current highest priorities are clustered in a geographic area, such that our scientific expertise at the field office level is fully occupied with their existing workload. We recognize that the geographic distribution of our scientific expertise will in some cases require us to balance workload across geographic areas. Since before Congress first established the spending cap for the Listing Program in 1998, the Listing Program workload has required considerably more resources than the amount of funds Congress has allowed for the Listing Program. Therefore, it is important that we be as efficient as possible in our listing process.

After finalizing the prioritization methodology, we then applied that methodology to develop a multi-year National Listing Workplan (Workplan) for completing the outstanding status assessments and accompanying 12-month findings. The purpose of the Workplan is provide transparency and predictability to the public about when the Service anticipates completing specific 12-month findings while allowing for flexibility to update the Workplan when new information changes the priorities. In May 2019, the Service released its updated Workplan for addressing the Act's domestic listing and critical habitat decisions over the subsequent 5 years. The updated Workplan identified the Service's schedule for addressing all domestic species on the candidate list and conducting 267 status reviews and accompanying 12-month findings by FY 2023 for domestic species that have been petitioned for Federal protections under the Act. As we implement our Workplan and work on proposed rules for the highest-priority species, we increase efficiency by preparing multi-species proposals when appropriate,

and these may include species with lower priority if they overlap geographically or have the same threats as one of the highest-priority species. The National Listing Workplan is available online at: <https://www.fws.gov/endangered/what-we-do/listing-workplan.html>.

An additional way in which we determine relative priorities of outstanding actions in the section 4 program is application of the listing priority guidelines (48 FR 43098; September 21, 1983). Under those guidelines, which apply primarily to candidate species, we assign each candidate a listing priority number (LPN) of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: Monotypic genus (a species that is the sole member of a genus), a species, or a part of a species (subspecies or distinct population segment)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority). A species with a higher LPN would generally be precluded from listing by species with lower LPNs, unless work on a proposed rule for the species with the higher LPN can be combined for efficiency with work on a proposed rule for other high-priority species.

Finally, proposed rules for reclassification of threatened species status to endangered species status are generally lower in priority because, as listed species, they are already afforded the protections of the Act and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to reclassify a species to endangered species status if we can combine this with higher-priority work.

#### Listing Program Workload

The National Listing Workplan that the Service released in 2019 outlined work for domestic species over the period from 2019 to 2023. Tables 1 and 2 under *Expeditious Progress*, below, identify the higher-priority listing actions that we completed through FY 2020 (September 30, 2020), as well as those we have been working on in FY 2020 but have not yet completed. For FY 2020, our National Listing Workplan includes 74 12-month findings or proposed listing actions that are at various stages of completion at the time of this finding. In addition to the actions scheduled in the National Listing Workplan, the overall Listing Program workload also includes the development

and revision of listing regulations that are required by new court orders or settlement agreements, or to address the repercussions of any new court decisions, as well as proposed and final critical habitat designations or revisions for species that have already been listed. The Service’s highest priorities for spending its funding in FY 2019 and FY 2020 are actions included in the Workplan and actions required to address court decisions.

*Expeditious Progress*

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists. Please note that in the Code of Federal Regulations, the “Lists” are grouped as one list of endangered and threatened wildlife (50 CFR 17.11(h)) and one list of endangered and threatened plants (50 CFR 17.12(h)). However, the “Lists” referred to in the Act mean one list of endangered species (wildlife and plants) and one list of threatened species (wildlife and plants). Therefore, under the Act, expeditious progress includes actions to reclassify species—that is, either remove them from the list of threatened species and add them to the list of endangered species, or remove them from the list of endangered species and add them to the list of threatened species.

As with our “precluded” finding, the evaluation of whether expeditious progress is being made is a function of the resources available and the competing demands for those funds. As discussed earlier, the FY 2020 appropriations law included a spending cap of \$20,318,000 for listing activities, and the FY 2019 appropriations law included a spending cap of \$18,318,000 for listing activities.

As discussed below, given the limited resources available for listing, the competing demands for those funds, and the completed work catalogued in the tables below, we find that we are making expeditious progress in adding qualified species to the Lists.

The work of the Service’s domestic listing program in FY 2019 and FY 2020 (as of September 30, 2020) includes all three of the steps necessary for adding

species to the Lists: (1) Identifying species that may warrant listing (90-day petition findings); (2) undertaking an evaluation of the best available scientific data about those species and the threats they face to determine whether or not listing is warranted (a status review and accompanying 12-month finding); and (3) adding qualified species to the Lists (by publishing proposed and final listing rules). We explain in more detail how we are making expeditious progress in all three of the steps necessary for adding qualified species to the Lists (identifying, evaluating, and adding species). Subsequent to discussing our expeditious progress in adding qualified species to the Lists, we explain our expeditious progress in removing from the Lists species that no longer require the protections of the Act.

First, we are making expeditious progress in identifying species that may warrant listing. In FY 2019 and FY 2020 (as of September 30, 2020), we completed 90-day findings on petitions to list 14 species.

Second, we are making expeditious progress in evaluating the best scientific and commercial data available about species and threats they face (status reviews) to determine whether or not listing is warranted. In FY 2019 and FY 2020 (as of September 30, 2020), we completed 12-month findings for 69 species. In addition, we funded and worked on the development of 12-month findings for 34 species and proposed listing determinations for 9 candidates. Although we did not complete those actions during FY 2019 or FY 2020 (as of September 30, 2020), we made expeditious progress towards doing so by initiating and making progress on the status reviews to determine whether adding the species to the Lists is warranted.

Third, we are making expeditious progress in adding qualified species to the Lists. In FY 2019 and FY 2020 (as of September 30, 2020), we published final listing rules for 7 species, including final critical habitat designations for 1 of those species and final protective regulations under the Act’s section 4(d) for 2 of those species. In addition, we published proposed rules to list an additional 20 species

(including concurrent proposed critical habitat designations for 13 species and concurrent protective regulations under the Act’s section 4(d) for 14 species).

The Act also requires that we make expeditious progress in removing species from the Lists that no longer require the protections of the Act. Specifically, we are making expeditious progress in removing (delisting) domestic species, as well as reclassifying endangered species to threatened species status (downlisting). This work is being completed under the Recovery program in light of the resources available for recovery actions, which are funded through the recovery line item in the budget of the Endangered Species Program. Because recovery actions are funded separately from listing actions, they do not factor into our assessment of preclusion; that is, work on recovery actions does not preclude the availability of resources for completing new listing work. However, work on recovery actions does count towards our assessment of making expeditious progress because the Act states that expeditious progress includes both adding qualified species to, and removing qualified species from, the Lists of Endangered and Threatened Wildlife and Plants. During FY 2019 and FY 2020 (as of September 30, 2020), we finalized downlisting of 1 species, finalized delisting rules for 7 species, proposed downlisting of 7 species, and proposed delisting of 11 species. The rate at which the Service has completed delisting and downlisting actions in FY 2019 and FY 2020 (as of September 30, 2020) is higher than any point in the history of the Act.

The tables below catalog the Service’s progress in FY 2019 and FY 2020 (as of September 30, 2020) as it pertains to our evaluation of making expeditious progress. Table 1 includes completed and published domestic listing actions; Table 2 includes domestic listing actions funded and initiated in previous fiscal years and in FY 2020 that are not yet complete as of September 30, 2020; and Table 3 includes completed and published proposed and final downlisting and delisting actions for domestic species.

TABLE 1—COMPLETED DOMESTIC LISTING ACTIONS IN FY 2019 AND FY 2020  
[As of September 30]

| Publication date | Title  | Action(s)   | Federal Register Citation |
|------------------|--|---|---------------------------|
| 10/9/2018 .....  | Threatened Species Status for Coastal Distinct Population Segment of the Pacific Marten. | Proposed Listing—Threatened with Section 4(d) Rule and 12-Month Petition Finding. | 83 FR 50574–50582         |

TABLE 1—COMPLETED DOMESTIC LISTING ACTIONS IN FY 2019 AND FY 2020—Continued  
 [As of September 30]

| Publication date | Title  | Action(s)   | Federal Register Citation |
|------------------|--|---|---------------------------|
| 10/9/2018 .....  | Threatened Species Status for Black-Capped Petrel With a Section 4(d) Rule.  | Proposed Listing—Threatened with Section 4(d) Rule and 12-Month Petition Finding.   | 83 FR 50560–50574         |
| 10/9/2018 .....  | 12-Month Petition Finding and Threatened Species Status for Eastern Black Rail With a Section 4(d) Rule.   | Proposed Listing—Threatened with Section 4(d) Rule and 12-Month Petition Finding.   | 83 FR 50610–50630         |
| 10/9/2018 .....  | Threatened Species Status With Section 4(d) Rule and Critical Habitat Designation for Slenderclaw Crayfish.  | Proposed Listing—Threatened with Section 4(d) Rule and Critical Habitat and 12-Month Finding.   | 83 FR 50582–50610         |
| 10/11/2018 ..... | Threatened Species Status With Section 4(d) Rule and Critical Habitat Designation for Atlantic Pigtoe.   | Proposed Listing—Threatened with Section 4(d) Rule and Critical Habitat and 12-Month Finding.   | 83 FR 51570–51609         |
| 11/21/2018 ..... | Endangered Species Status for the Candy Darter   | Final Listing—Endangered .....  | 83 FR 58747–58754         |
| 12/19/2018 ..... | 12-Month Findings on Petitions to List 13 Species as Endangered or Threatened Species.   | 12-Month Petition Findings .....  | 83 FR 65127–65134         |
| 12/28/2018 ..... | Threatened Species Status for Trispot Darter .....   | Final Listing—Threatened .....  | 83 FR 67131–67140         |
| 4/4/2019 .....   | 12-Month Findings on Petitions to List Eight Species as Endangered or Threatened Species.  | 12-Month Petition Findings .....  | 84 FR 13237–13242         |
| 4/4/2019 .....   | 12-Month Petition Finding and Endangered Species Status for the Missouri Distinct Population Segment of Eastern Hellbender.  | Proposed Listing—Endangered and 12-Month Petition Finding.  | 84 FR 13223–13237         |
| 4/26/2019 .....  | 90-Day Findings for Four Species (3 domestic species and 1 foreign species)*.  | 90-Day Petition Findings .....  | 84 FR 17768–17771         |
| 5/22/2019 .....  | Threatened Species Status with Section 4(d) Rule for Neuse River Waterdog and Endangered Species Status for Carolina Madtom and Proposed Designations of Critical Habitat. | Proposed Listings—Threatened Status with Section 4(d) Rule with Critical Habitat; Endangered Status with Critical Habitat and 12-Month Petition Findings. | 84 FR 23644–23691         |
| 8/13/2019 .....  | Endangered Species Status for Franklin's Bumble Bee.   | Proposed Listing—Endangered and 12-Month Petition Finding.  | 84 FR 40006–40019         |
| 8/15/2019 .....  | 12-Month Findings on Petitions to List Eight Species as Endangered or Threatened Species.  | 12-Month Petition Findings .....  | 84 FR 41694–41699         |
| 8/15/2019 .....  | 90-Day Findings for Three Species .....  | 90-Day Petition Findings .....  | 84 FR 41691–41694         |
| 9/6/2019 .....   | 90-Day Findings for Three Species .....  | 90-Day Petition Findings .....  | 84 FR 46927–46931         |
| 10/07/2019 ..... | Twelve Species Not Warranted for Listing as Endangered or Threatened Species.  | 12-Month Petition Findings .....  | 84 FR 53336–53343         |
| 10/21/2019 ..... | Endangered Species Status for Barrens Topminnow.   | Final Listing—Endangered .....  | 84 FR 56131–56136         |
| 11/08/2019 ..... | 12-Month Finding for the California Spotted Owl  | 12-Month Petition Finding .....   | 84 FR 60371–60372         |
| 11/21/2019 ..... | Threatened Species Status for Meltwater Ledian Stonefly and Western Glacier Stonefly With a Section 4(d) Rule.   | Final Listing—Threatened with Section 4(d) Rule   | 84 FR 64210–64227         |
| 12/06/2019 ..... | Endangered Species Status for Beardless Chinchweed With Designation of Critical Habitat, and Threatened Species Status for Bartram's Stonecrop With Section 4(d) Rule.     | Proposed Listings—Endangered with Critical Habitat; Threatened with Section 4(d) Rule and 12-Month Petition Findings.                                     | 84 FR 67060–67104         |
| 12/19/2019 ..... | Five Species Not Warranted for Listing as Endangered or Threatened Species.  | 12-Month Petition Findings .....  | 84 FR 69707–69712         |
| 12/19/2019 ..... | 90-Day Findings for Two Species .....  | 90-Day Petition Findings .....  | 84 FR 69713–69715         |
| 01/08/2020 ..... | Threatened Species Status for the Hermes Copper Butterfly With 4(d) Rule and Designation of Critical Habitat.  | Proposed Listing—Threatened with Section 4(d) Rule and Critical Habitat.  | 85 FR 1018–1050           |
| 01/08/2020 ..... | Endangered Status for the Sierra Nevada Distinct Population Segment of the Sierra Nevada Red Fox.  | Proposed Listing—Endangered .....   | 85 FR 862–872             |
| 05/05/2020 ..... | Endangered Status for the Island Marble Butterfly and Designation of Critical Habitat.   | Final Listing—Endangered with Critical Habitat ...  | 85 FR 26786–26820         |
| 05/15/2020 ..... | Endangered Species Status for Southern Sierra Nevada Distinct Population Segment of Fisher.  | Final Listing—Endangered .....  | 85 FR 29532–29589         |
| 7/16/2020 .....  | 90-Day Finding for the Dunes Sagebrush Lizard  | 90-Day Petition Finding .....   | 85 FR 43203–43204         |
| 7/22/2020 .....  | 90-Day Findings for Two Species .....  | 90-Day Petition Findings .....  | 85 FR 44265–44267         |
| 7/23/2020 .....  | Four Species Not Warranted for Listing as Endangered or Threatened Species.  | 12-Month Petition Findings .....  | 85 FR 44478–44483         |
| 8/26/2020 .....  | Endangered Species Status for Marron Bacora and Designation of Critical Habitat.   | Proposed Listing—Endangered with Critical Habitat and 12-Month Petition Finding.  | 85 FR 52516–52540         |
| 9/1/2020 .....   | Two Species Not Warranted for Listing as Endangered or Threatened Species.   | 12-Month Petition Findings .....  | 85 FR 54339–54342         |
| 9/16/2020 .....  | Findings on a Petition To Delist the Distinct Population Segment of the Western Yellow-Billed Cuckoo and a Petition To List the U.S. Population of Northwestern Moose**.   | 12-Month Petition Finding .....   | 85 FR 57816–57818         |

TABLE 1—COMPLETED DOMESTIC LISTING ACTIONS IN FY 2019 AND FY 2020—Continued  
[As of September 30]

| Publication date | Title   | Action(s)   | Federal Register Citation |
|------------------|---|---|---------------------------|
| 9/17/2020 .....  | Threatened Species Status for Chapin Mesa milkvetch and Section 4(d) Rule with Designation of Critical Habitat.   | Proposed Listing—Threatened With Section 4(d) Rule and Critical Habitat.                              | 85 FR 58224–58250         |
| 9/17/2020 .....  | Threatened Species Status for Big Creek crayfish and St. Francis River Crayfish and With Section 4(d) Rule with Designation of Critical Habitat.                                    | Proposed Listings—Threatened With Section 4(d) Rule and Critical Habitat.                             | 85 FR 58192–58222         |
| 9/29/2020 .....  | Threatened Species Status for longsolid and round hickorynut mussel and Section 4(d) Rule With Designation of Critical Habitat, Not Warranted 12-Month Finding for purple Lilliput. | Proposed Listings—Threatened With Section 4(d) Rule and Critical Habitat; 12-Month Petition Findings. |                           |
| 9/29/2020 .....  | Threatened Species Status for Wright’s Marsh Thistle and Section 4(d) Rule With Designation of Critical Habitat.  | Proposed Listing—Threatened With Section (4) Rule and Critical Habitat.                               |                           |

\* 90-day finding batches may include findings regarding both domestic and foreign species. The total number of 90-day findings reported in this assessment of expeditious progress pertains to domestic species only.

\*\* Batched 12-month findings may include findings regarding listing and delisting petitions. The total number of 12-month findings reported in this assessment of expeditious progress pertains to listing petitions only.

TABLE 2—DOMESTIC LISTING ACTIONS FUNDED AND INITIATED IN PREVIOUS FYS AND IN FY 2020 THAT ARE NOT YET COMPLETE  
[As of September 30, 2020]

| Species   | Action   |
|---|--|
| northern spotted owl .....                        | 12-month finding.  |
| false spike .....                                 | 12-month finding.  |
| Guadalupe fatmucket .....                         | 12-month finding.  |
| Guadalupe orb .....                               | 12-month finding.  |
| Texas fatmucket .....                             | Proposed listing determination or not warranted finding. |
| Texas fawnsfoot .....                             | Proposed listing determination or not warranted finding. |
| Texas pimpleback .....                            | Proposed listing determination or not warranted finding. |
| South Llano Springs moss .....                    | 12-month finding.  |
| peppered chub .....                               | 12-month finding.  |
| whitebark pine .....                              | Proposed listing determination or not warranted finding. |
| Key ringneck snake .....                          | 12-month finding.  |
| Rimrock crowned snake .....                       | 12-month finding.  |
| <i>Euphilotes ancilla cryptica</i> .....          | 12-month finding.  |
| <i>Euphilotes ancilla purpura</i> .....           | 12-month finding.  |
| Hamlin Valley pyrg .....                          | 12-month finding.  |
| longitudinal gland pyrg .....                     | 12-month finding.  |
| sub-globose snake pyrg .....                      | 12-month finding.  |
| Louisiana pigtoe .....                            | 12-month finding.  |
| Texas heelsplitter .....                          | 12-month finding.  |
| triangle pigtoe .....                             | 12-month finding.  |
| prostrate milkweed .....                          | 12-month finding.  |
| alligator snapping turtle .....                   | 12-month finding.  |
| Black Creek crayfish .....                        | 12-month finding.  |
| bracted twistflower .....                         | Proposed listing determination or not warranted finding. |
| Canoe Creek clubshell .....                       | 12-month finding.  |
| Clear Lake hitch .....                            | 12-month finding.  |
| Doll’s daisy .....                                | 12-month finding.  |
| frecklebelly madtom .....                         | 12-month finding.  |
| longfin smelt (San Francisco Bay-Delta DPS) ..... | Proposed listing determination or not warranted finding. |
| magnificent Ramshorn .....                        | Proposed listing determination or not warranted finding. |
| Mt. Rainier white-tailed ptarmigan .....          | 12-month finding.  |
| Ocmulgee skullcap .....                           | 12-month finding.  |
| Penasco least chipmunk .....                      | Proposed listing determination or not warranted finding. |
| Puerto Rico harlequin butterfly .....             | Proposed listing determination or not warranted finding. |
| Puget oregonian snail .....                       | 12-month finding.  |
| relict dace .....                                 | 12-month finding.  |
| Rocky Mountain monkeyflower .....                 | 12-month finding.  |
| sickle darter .....                               | 12-month finding.  |
| southern elktoe .....                             | 12-month finding.  |
| southern white-tailed ptarmigan .....             | 12-month finding.  |
| tidewater amphipod .....                          | 12-month finding.  |
| tufted puffin .....                               | 12-month finding.  |
| western spadefoot .....                           | 12-month finding.  |

TABLE 3—COMPLETED DOMESTIC RECOVERY ACTIONS (Proposed and Final Downlistings and Delistings) IN FY 2019 AND FY 2020

[As of September 30, 2020]

| Publication date | Title   | Action(s)                       | Federal Register Citation |
|------------------|---|---------------------------------|---------------------------|
| 10/18/2018 ..... | Removing Deseret Milkvetch ( <i>Astragalus desereticus</i> ) From the Federal List of Endangered and Threatened Plants.                             | Final Rule—Delisting .....      | 83 FR 52775–52786         |
| 02/26/2019 ..... | Removing the Borax Lake Chub From the List of Endangered and Threatened Wildlife.   | Proposed Rule—Delisting .....   | 84 FR 6110–6126           |
| 03/15/2019 ..... | Removing the Gray Wolf ( <i>Canis lupus</i> ) From the List of Endangered and Threatened Wildlife.  | Proposed Rule—Delisting .....   | 84 FR 9648–9687           |
| 05/03/2019 ..... | Reclassifying the American Burying Beetle From Endangered to Threatened on the Federal List of Endangered and Threatened Wildlife With a 4(d) Rule. | Proposed Rule—Downlisting ..... | 84 FR 19013–19029         |
| 08/27/2019 ..... | Removing <i>Trifolium stoloniferum</i> (Running Buffalo Clover) From the Federal List of Endangered and Threatened Plants.                          | Proposed Rule—Delisting .....   | 84 FR 44832–44841         |
| 09/13/2019 ..... | Removing the Foscett Speckled Dace From the List of Endangered and Threatened Wildlife.   | Final Rule—Delisting .....      | 84 FR 48290–48308         |
| 10/03/2019 ..... | Removal of the Monito Gecko ( <i>Sphaerodactylus micropithecus</i> ) From the Federal List of Endangered and Threatened Wildlife.                   | Final Rule—Delisting .....      | 84 FR 52791–52800         |
| 10/07/2019 ..... | Removal of <i>Howellia aquatilis</i> (Water Howellia) From the List of Endangered and Threatened Plants.  | Proposed Rule—Delisting .....   | 84 FR 53380–53397         |
| 10/09/2019 ..... | Removing the Kirtland's Warbler From the Federal List of Endangered and Threatened Wildlife.  | Final Rule—Delisting .....      | 84 FR 54436–54463         |
| 10/24/2019 ..... | Removal of the Interior Least Tern From the Federal List of Endangered and Threatened Wildlife.   | Proposed Rule—Delisting .....   | 84 FR 56977–56991         |
| 11/05/2019 ..... | Removing <i>Oenothera coloradensis</i> (Colorado Butterfly Plant) From the Federal List of Endangered and Threatened Plants.                        | Final Rule—Delisting .....      | 84 FR 59570–59588         |
| 11/26/2019 ..... | Removing Bradshaw's Lomatium From the Federal List of Endangered and Threatened Plants.   | Proposed Rule—Delisting .....   | 84 FR 65067–65080         |
| 11/26/2019 ..... | Removal of the Nashville Crayfish From the Federal List of Endangered and Threatened Wildlife.  | Proposed Rule—Delisting .....   | 84 FR 65098–65112         |
| 11/26/2019 ..... | Reclassification of the Endangered June Sucker to Threatened With a Section 4(d) Rule.  | Proposed Rule—Downlisting ..... | 84 FR 65080–65098         |
| 12/19/2019 ..... | Reclassifying the Hawaiian Goose From Endangered to Threatened With a Section 4(d) Rule.  | Final Rule—Downlisting .....    | 84 FR 69918–69947         |
| 01/02/2020 ..... | Removing the Hawaiian Hawk From the Federal List of Endangered and Threatened Wildlife.   | Final Rule—Delisting .....      | 85 FR 164–189             |
| 01/06/2020 ..... | Removing the Kanab Ambersnail From the List of Endangered and Threatened Wildlife.  | Proposed Rule—Delisting .....   | 85 FR 487–492             |
| 01/22/2020 ..... | Reclassification of the Humpback Chub From Endangered to Threatened With a Section 4(d) Rule.   | Proposed Rule—Downlisting ..... | 85 FR 3586–3601           |
| 03/10/2020 ..... | Removing <i>Lepanthes eltoroensis</i> From the Federal List of Endangered and Threatened Plants.  | Proposed Rule—Delisting .....   | 85 FR 13844–13856         |
| 04/27/2020 ..... | Removing <i>Arenaria cumberlandensis</i> (Cumberland Sandwort) From the Federal List of Endangered and Threatened Plants.                           | Proposed Rule—Delisting .....   | 85 FR 23302–23315         |
| 06/01/2020 ..... | Removing San Benito Evening-Primrose ( <i>Camissonia benitensis</i> ) From the Federal List of Endangered and Threatened Plants.                    | Proposed Rule—Delisting .....   | 85 FR 33060–33078         |
| 06/11/2020 ..... | Removing the Borax Lake Chub From the List of Endangered and Threatened Wildlife.   | Final Rule—Delisting .....      | 85 FR 35574–35594         |
| 7/24/2020 .....  | Reclassification of Morro Shoulderband Snail ( <i>Helminthoglypta walkeriana</i> ) From Endangered to Threatened With a 4(d) Rule.                  | Proposed Rule—Downlisting ..... | 85 FR 44821–44835         |
| 8/19/2020 .....  | Reclassification of Stephens' Kangaroo Rat From Endangered To Threatened With a Section 4(d) Rule.  | Proposed Rule—Downlisting ..... | 85 FR 50991–51006         |
| 9/30/2020 .....  | Reclassification of Virgin Islands Tree Boa From Endangered To Threatened With a Section 4(d) Rule.   | Proposed Rule—Downlisting ..... |                           |
| 9/30/2020 .....  | Reclassification of beach layia ( <i>Layia carnosa</i> ) From Endangered To Threatened With a Section 4(d) Rule.                                    | Proposed Rule—Downlisting ..... |                           |

When a petitioned action is found to be warranted but precluded, the Service is required by the Act to treat the petition as resubmitted on an annual basis until a proposal or withdrawal is

published. If the petitioned species is not already listed under the Act, the species becomes a “candidate” and is reviewed annually in the “candidate notice of review” (CNOR). The number

of candidate species remaining in FY 2020 is the lowest it has been since 1975. For these species, we are working on developing a species status assessment, preparing proposed listing



determinations, or preparing not-warranted 12-month findings.

Another way that we have been expeditious in making progress in adding and removing qualified species to and from the Lists is that we have made our actions as efficient and timely as possible, given the requirements of the Act and regulations and constraints relating to workload and personnel. We are continually seeking ways to streamline processes or achieve economies of scale, such as batching related actions together for publication. Given our limited budget for implementing section 4 of the Act, these efforts also contribute toward our expeditious progress in adding and removing qualified species to and from the Lists.

### Findings for Petitioned Candidate Species

For all 11 candidates, we continue to find that listing is warranted but precluded as of the date of publication of this document. However, we are working on thorough reviews of all available data regarding these species and expect to publish either proposed listing rules or 12-month not-warranted findings prior to making the next annual resubmitted petition 12-month findings for 8 of these species. In the course of preparing proposed listing rules or not-warranted petition findings, we are continuing to monitor new information about these species' status so that we can make prompt use of our authority under section 4(b)(7) of the Act in the case of an emergency posing a significant risk to any of these species.

Below are updated summaries for the four petitioned candidates for which we published findings under section 4(b)(3)(B) of the Act. In accordance with section 4(b)(3)(C)(i), we treat any petitions for which we made warranted-but-precluded 12-month findings within the past year as having been resubmitted on the date of the warranted-but-precluded finding. We are making continued warranted-but-precluded 12-month findings on the petitions for these species.

#### Gopher tortoise

*Gopherus polyphemus* (gopher tortoise, eastern population)—The gopher tortoise is a large, terrestrial, herbivorous turtle that reaches a total length up to 15 inches (38 centimeters) and typically inhabits the sandhills, pine/scrub oak uplands, and pine flatwoods associated with the longleaf pine (*Pinus palustris*) ecosystem. A fossorial animal, the gopher tortoise is usually found in areas with well-drained, deep, sandy soils, an open tree

canopy, and a diverse, abundant herbaceous groundcover. The gopher tortoise ranges from extreme southern South Carolina south through peninsular Florida, and west through southern Georgia, Florida, southern Alabama, and Mississippi, into extreme southeastern Louisiana.

The gopher tortoise is currently federally listed as a threatened distinct population segment in the western portion of its range, which includes Alabama (west of the Mobile and Tombigbee Rivers), Mississippi, and Louisiana. We were petitioned to list the species in the remaining eastern portion of the range (South Carolina, Florida, Georgia, and Alabama (east of the Mobile and Tombigbee Rivers)). In our 12-month finding on that petition, we determined that the gopher tortoise warrants listing range wide. Thus, we consider the eastern population of the gopher tortoise, which is not yet listed, to be a candidate species. Currently, we are working on the species status assessment for the entire range of the species; that assessment will provide the science that we will use to make final decision regarding the status of the species, including the eastern population.

The primary threat to the gopher tortoise is fragmentation, destruction, and modification of its habitat, including conversion of longleaf pine forests to incompatible silvicultural or agricultural habitats, urbanization, shrub/hardwood encroachment (mainly from fire exclusion or insufficient fire management), and establishment and spread of invasive species. Other threats include disease, predation (mainly on nests and young tortoises), and inadequate regulatory mechanisms, specifically those needed to protect and enhance relocated tortoise populations into the future. The magnitude of threats to the eastern range of the gopher tortoise is considered to be low to moderate, because populations extend over a broad geographic area and conservation measures are in place in some areas. However, the species is currently being impacted by a number of threats, including destruction and modification of its habitat, predation, exotics, and inadequate regulatory mechanisms. Thus, because the magnitude of threats is low to moderate, the threats are imminent, and we are evaluating just the eastern population of the species, we have assigned a listing priority number of 8 to this species.

#### Longfin smelt

Longfin smelt (*Spirinchus thaleichthys*), Bay-Delta DPS—The following summary is based on our

information contained in our files and the April 2, 2012, 12-month finding published in the **Federal Register** (77 FR 19756). In our 12-month finding, we determined that the San Francisco Bay-Delta distinct vertebrate population segment (Bay-Delta DPS) of the longfin smelt warranted listing as an endangered or threatened species under the Act, but that listing was precluded by higher priority listing actions. Longfin smelt measure 9–11 cm (3.5–4.3 in) in length. Longfin smelt are considered pelagic (open water) and anadromous (fish that migrate up rivers from the sea to spawn) within the Bay-Delta, although anadromy in longfin smelt is not fully understood and certain populations in other parts of the species' range complete their entire life cycle in freshwater lakes and streams. Longfin smelt usually live for 2 years, spawn, and then die, although some individuals may spawn as 1- or 3-year-old fish before dying. In the San Francisco Bay-Delta, longfin smelt are believed to spawn primarily in freshwater in the lower reaches of the Sacramento River and San Joaquin River, in South Bay tributaries such as Alviso Creek and Coyote Creek, and in North Bay tributaries such as the Napa River and Petaluma River.

Longfin smelt numbers in the San Francisco Bay-Delta have declined significantly since the 1980s, with marked declines from 2002 to 2016. Longfin smelt abundance over the last decade is the lowest recorded in the 40-year history of surveys done by the California Department of Fish and Wildlife.

The primary threats to the Bay-Delta DPS of longfin smelt are reduced freshwater flows, competition from introduced species, climate change, and potential contaminants. Freshwater flows, especially winter-spring flows, are significantly correlated with longfin smelt abundance (*i.e.*, longfin smelt abundance is lower when winter-spring flows are lower). Reductions in food availability and disruptions of the Bay-Delta food web caused by establishment of the nonnative overbite clam (*Corbula amurensis*) and ammonium released into the system have also likely attributed to declines in the species' abundance within the San Francisco Bay-Delta. The threats remain high in magnitude, as they pose a significant risk to the DPS throughout its range.

The State of California has listed the longfin smelt under the California Endangered Species Act, and a new permit for operation of the State Water Project has been issued, which includes protections for longfin smelt, including winter-spring outflow requirements. In

addition, the California State Water Resources Control Board has adopted new flow objectives for the Lower San Joaquin River and will be addressing Delta flow objectives this year. Through these processes, we anticipate the State will take action to reduce the threats particularly around outflow, and is poised to do so in the near term. Therefore, the threat is not operative in the immediate future, and thus is non-imminent.

As climate change is a gradual process, the current year-round temperatures in the San Francisco Estuary may not yet be high enough to be an immediate stressor for the species, but could impact the species in the future. In addition, upgrades to the Sacramento Regional Wastewater Treatment Plant, which is the largest discharger of the contaminant ammonium in the Delta, are expected to occur in 2021–2023 and would result in significant reductions in ammonium release, thus negating the imminence of contaminants as a stressor for the species. Competition against introduced species is an ongoing threat for the species, but this stressor alone is unlikely to serve as the primary driver that would warrant listing. Thus, we have assigned an LPN of 6 to this population.

#### *Magnificent ramshorn*

The magnificent ramshorn (*Planorbella magnifica*) is the largest North American air-breathing freshwater snail in the family Planorbidae. It has a discoidal (*i.e.*, coiling in one plane), relatively thin shell that reaches a diameter commonly exceeding 35mm and heights exceeding 20mm. The great width of its shell, in relation to the diameter, makes it easily identifiable at all ages. The shell is tan/brown colored and fragile, thus indicating it is adapted to still or slow flowing aquatic habitats.

The magnificent ramshorn is believed to be a southeastern North Carolina endemic; it is known from only four sites in the lower Cape Fear River Basin in North Carolina. It now appears to be extirpated from the wild. The complete historical range of the species is unknown, although the size of the species and the fact that it was not reported until 1903 indicate that the species may have always been rare and localized. Salinity and pH are major factors limiting the distribution of the magnificent ramshorn, as the snail prefers freshwater bodies with circumneutral pH (*i.e.*, pH within the range of 6.8–7.5). While members of the family Planorbidae are hermaphroditic, it is currently unknown whether

magnificent ramshorns self-fertilize their eggs, mate with other individuals of the species, or both. Like other members of the Planorbidae family, the magnificent ramshorn is believed to be primarily a vegetarian, feeding on submerged aquatic plants, algae, and detritus.

While several factors have likely contributed to the possible extirpation of the magnificent ramshorn in the wild, the primary factors include loss of habitat associated with the extirpation of beavers (and their impoundments) in the early 20th century, increased salinity and alteration of flow patterns, as well as increased input of nutrients and other pollutants. The magnificent ramshorn appears to be extirpated from the wild due to habitat loss and degradation resulting from a variety of human-induced and natural factors.

The only known surviving individuals of the species are presently being held and propagated at a private residence, a lab at NC State University's Veterinary School, and the NC Wildlife Resources Commission's Conservation Aquaculture Center in Marion, NC. While efforts have been made to restore habitat for the magnificent ramshorn at one of the sites known to have previously supported the species, all of the sites continue to be affected and/or threatened by the same factors (*i.e.*, saltwater intrusion and other water-quality degradation, nuisance-aquatic-plant control, storms, sea-level rise, etc.) believed to have resulted in extirpation of the species from the wild. Currently, only three captive populations exist; a captive population of the species comprised of approximately 2000+ adults, one with approximately 300+ adults, and one with approximately 20 adults. Although captive populations of the species have been maintained since 1993, a single catastrophic event, such as a severe storm, disease, or predator infestation, affecting this captive population could result in the near extinction of the species. Because the threats are of high magnitude and imminence, we assigned an LPN of 2 to the species.

#### *Sonoran Desert Tortoise*

The Sonoran desert tortoise (*Gopherus morafkai*) occurs in central and southeast Arizona and in northeast Sonora, Mexico. Adult tortoises can reach 15 inches long and mainly occur on rocky, steep slopes and bajadas (lower mountain slopes) and in paloverde-mixed cacti associations at elevations between 900 to 4,200 feet. Until 2011, the Sonoran desert tortoise was considered to be a population of the desert tortoise (*Gopherus agassizii*);

however, the Sonoran desert tortoise was identified as a unique species (*Gopherus morafkai*) in 2011. In 2008, we were petitioned to list as an endangered or threatened DPS of desert tortoise what is now recognized as the Sonoran desert tortoise. We published a substantial 90-day finding on the petition on August 28, 2009 (74 FR 44335). On December 14, 2010, we found the species warranted for listing but precluded by higher priority actions, and the entity was added to our list of candidate species (75 FR 78094). After completing a species status assessment, we subsequently published a 12-month petition finding on October 6, 2015, determining that the Sonoran desert tortoise was not warranted for listing as endangered or threatened under the Act (80 FR 60321).

The petitioners filed a complaint on September 5, 2019, challenging our 2015 not-warranted finding for the Sonoran desert tortoise and alleging violations of the ESA. We reached a settlement agreement with the petitioners, which was approved by the Court on August 3, 2020, to reconsider our not-warranted finding and to develop a new 12-month finding as to whether the Sonoran desert tortoise warrants listing as an endangered or threatened species. As a result of that agreement, we are withdrawing our 2015 12-month finding and have returned the Sonoran desert tortoise back to the candidate list. We agreed to submit to the **Federal Register** a new 12-month petition finding on the status of the Sonoran desert tortoise within 18 months of the court order—by February 3, 2022. We are beginning a revised status review now and are requesting any new information, regarding the species' distribution and abundance, its habitat, conservation efforts or threats, be provided to the Service for consideration in the species status assessment.

#### *Correction From Previous CNOR (84 FR 54732)*

On October 10, 2019, we published in the **Federal Register** (84 FR 54732) the CNOR for FY 2017 and FY 2018, in which we erroneously included Berry Cave salamander as a candidate under review. On October 7, 2019, we published in the **Federal Register** (84 FR 53336) a 12-month finding that the Berry Cave salamander is not warranted for listing under the Act, which removed the species from our candidate list.

#### *Candidates in Review*

The Puerto Rico harlequin butterfly (*Atlantea tulita*), whitebark pine (*Pinus*

*albicaulis*), bracted twistflower (*Streptanthus bracteatus*), Penasco least chipmunk (*Tamias minimus atristriatus*), Texas fatmucket (*Lampsilis bracteata*), Texas fawnsfoot (*Truncilla macrodon*), and Texas pimpleback (*Cyclonaias petrina*) are candidates for which we have initiated the analysis regarding the threats to the species and status of the species, but the proposed listing rule or not-warranted finding for these species was not yet completed as of September 30, 2020. We have funded these actions and intend to complete our classification decision in the near future.

#### Petitions To Reclassify Species Already Listed

We previously made warranted-but-precluded findings on four petitions seeking to reclassify threatened species to endangered status. The taxa involved in the reclassification petitions are two populations of the grizzly bear (*Ursus arctos horribilis*), delta smelt (*Hypomesus transpacificus*), and Pariette cactus (*Sclerocactus brevispinus*). Because these species are already listed under the Act, they are not candidates for listing and are not included in Table 1.

We are currently assessing the best scientific and commercial data available pertaining to the status of the grizzly and its populations for a comprehensive 5-year review, which we plan to complete and post no later than March 31, 2021 per a stipulated settlement agreement in *Center for Biological Diversity v. Bernhardt*, No. 19-cv-00109-DLC (D. Mont. Dec. 6, 2019). We published the notice of initiation of the status review in the **Federal Register** on January 14, 2020 (85 FR 2143). In order to ensure that our resubmitted-petition finding for this species is based on the best scientific and commercial data available, we plan to complete the finding after we have completed the comprehensive 5-year review.

This CNOR and associated species assessment forms also constitute the findings for the resubmitted petitions to reclassify the delta smelt and the Pariette cactus. Our updated assessments for these species are provided below. We find that reclassification to endangered status for delta smelt and Pariette cactus are currently warranted but precluded by work identified above (see Findings for Petitioned Candidate Species, above). One of the primary reasons that the work identified above is considered to have higher priority is that the delta smelt and Pariette cactus are currently listed as threatened, and therefore already receive certain protections

under the Act. For the delta smelt, those protections are set forth in our regulations at 50 CFR 17.31 and, by reference, 50 CFR 17.21; for Pariette cactus, the protections are set forth in our regulations at 50 CFR 17.71 and, by reference, 50 CFR 17.61. It is therefore unlawful for any person, among other prohibited acts, to take (*i.e.*, to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such activity) a delta smelt, subject to applicable exceptions. Also, it is unlawful for any person, among other prohibited acts, to remove or reduce to possession Pariette cactus from an area under Federal jurisdiction, subject to applicable exceptions. Other protections that apply to these threatened species even before we complete proposed and final reclassification rules include those under section 7(a)(2) of the Act, whereby Federal agencies must insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species.

Delta smelt (*Hypomesus transpacificus*)—The following summary is based on information contained in our files and the April 7, 2010, 12-month finding published in the **Federal Register** (75 FR 17667); see that 12-month finding for additional information on why reclassification to endangered is warranted but precluded. In our 12-month finding, we determined that a change in status of the delta smelt from threatened to endangered was warranted, although precluded by other high-priority listing actions. The primary rationale for reclassifying delta smelt from threatened to endangered was the significant decline in species abundance that have occurred since 2001, and the continuing downward trend in delta smelt abundance indices supports that finding. Fourteen of the last 15 years have seen fall abundances that have been the lowest ever recorded. 2015 to 2019 results from all four of the surveys analyzed in this review have been the lowest ever recorded for the delta smelt. Delta smelt abundance in fall was exceptionally low between 2004 and 2010, increased during the wet year of 2011, and decreased again to very low levels at present. The latest 2018 and 2019 fall surveys did not detect a single delta smelt, resulting in an abundance index of 0, and the latest 2019 spring survey resulted in an abundance index of 0.4, all of which are the lowest on record.

The primary threats to the delta smelt are direct entrainments by State and Federal water export facilities; reduction of suitable habitat through summer and fall increases in salinity

and water clarity, resulting from decreases in freshwater flow into the estuary; and effects from introduced species. Ammonia in the form of ammonium may also be a significant threat to the survival of the delta smelt. Additional potential threats are predation by striped and largemouth bass and inland silversides, contaminants, climate change, and small population size. We have identified a number of existing regulatory mechanisms that provide protective measures that affect the stressors acting on the delta smelt. Despite these existing regulatory mechanisms and other conservation efforts, the stressors continue to act on the species such that it is warranted for uplisting under the ESA.

As a result of our analysis of the best scientific and commercial data available, we have retained the recommendation of reclassifying the delta smelt to an endangered species. We have assigned an LPN of 2, based on the high magnitude and high imminence of threats faced by the species. The magnitude of the threats is high because the threats occur rangewide and result in mortality or significantly reduce the reproductive capacity of the species. Threats are imminent because they are ongoing and, in some cases (*e.g.*, nonnative species), considered irreversible. Thus, we are maintaining an LPN of 2 for this species.

We note that an LPN of 2 does not mean that uplisting the species to endangered is a high priority for the Service. Since the delta smelt's current classification as threatened already provides the species the protections afforded by the Act (as set forth in our regulations at 50 CFR 17.31 and, by reference, 50 CFR 17.21), reclassifying the species to endangered status will not substantively increase protections for the delta smelt, but rather more accurately classify the species given its current status.

Pariette cactus (*Sclerocactus brevispinus*)—Pariette cactus is restricted to clay badlands of the Uinta geologic formation in the Uinta Basin of northeastern Utah. The species is known from several subpopulations that comprise a single metapopulation with an overall range of approximately 20 miles by 14 miles in extent. The species' entire range is within a developed and expanding oil and gas field. The location of the species' habitat exposes it to destruction from road, pipeline, and well-site construction in connection with oil and gas development. The species may be illegally collected as a specimen plant for horticultural use. Recreational off-road vehicle use and

livestock trampling are additional threats. The species is currently federally listed as threatened (44 FR 58868, October 11, 1979; 74 FR 47112, September 15, 2009). The threats are of a high magnitude, because any one of the threats has the potential to severely affect the survival of this species, a narrow endemic with a highly limited range and distribution. Threats are ongoing and, therefore, are imminent. Thus, we assigned an LPN of 2 to this species for uplisting. However, higher priority listing actions, including court-approved settlements, court-ordered and statutory deadlines for petition findings and listing determinations, emergency listing determinations, and responses to litigation, continue to preclude reclassifying the Pariette cactus. Furthermore, proposed rules to reclassify threatened species to endangered are generally a lower priority than listing currently unprotected species (*i.e.*, candidate species), as species currently listed as threatened are already afforded the protection of the Act and the implementing regulations.

We continue to find that reclassification of this species to endangered is warranted but precluded as of the date of publication of this document. (See 72 FR 53211, September 18, 2007, and the species assessment form (see **ADDRESSES**) for additional information on why reclassification to endangered is warranted but precluded.) However, we are working on a thorough review of all available data and expect to publish a 5-year status review and draft recovery plan prior to making the next annual resubmitted petition 12-month finding. In the course of preparing a 5-year status review and draft recovery plan, we are continuing to monitor new information about this species' status.

### Current Candidate Notice of Review

We gather data on plants and animals native to the United States that appear to merit consideration for addition to the Lists of Endangered and Threatened Wildlife and Plants (Lists). This CNOR identifies those species that we currently regard as candidates for addition to the Lists. These candidates include species and subspecies of fish, wildlife, or plants, and DPSs of vertebrate animals. This compilation relies on information from status surveys conducted for candidate assessment and on information from State Natural Heritage Programs, other State and Federal agencies, knowledgeable scientists, public and private natural resource interests, and

comments received in response to previous CNORs.

Tables 4, 5, and 6, below, list animals arranged alphabetically by common names under the major group headings, and list plants alphabetically by names of genera, species, and relevant subspecies and varieties. Animals are grouped by class or order. Useful synonyms and subgeneric scientific names appear in parentheses with the synonyms preceded by an "equals" sign. Several species that have not yet been formally described in the scientific literature are included; such species are identified by a generic or specific name (in italics), followed by "sp." or "ssp." We incorporate standardized common names in these documents as they become available. We sort plants by scientific name due to the inconsistencies in common names, the inclusion of vernacular and composite subspecific names, and the fact that many plants still lack a standardized common name.

Table 4 lists all candidate species, plus species currently proposed for listing under the Act. We emphasize that in this CNOR we are not proposing to list any of the candidate species; rather, we will develop and publish proposed listing rules for these species in the future. We encourage State agencies, other Federal agencies, and other parties to consider these species in environmental planning.

In Table 5, the "category" column on the left side of the table identifies the status of each species according to the following codes:

PE—Species proposed for listing as endangered. This category, as well as PT and PSAT (below), does not include species for which we have withdrawn or finalized the proposed rule.

PT—Species proposed for listing as threatened.

PSAT—Species proposed for listing as threatened due to similarity of appearance.

C—Candidates: Species for which we have on file sufficient information on biological vulnerability and threats to support proposals to list them as endangered or threatened. Issuance of proposed rules for these species is precluded at present by other higher priority listing actions. This category includes species for which we made a 12-month warranted-but-precluded finding on a petition to list. Our analysis for this CNOR included making new findings on all petitions for which we previously made "warranted-but-precluded" findings. We identify the species for which we made a continued warranted-but-precluded finding on a resubmitted petition by the code "C\*" in the category column (see Findings for Petitioned Candidate Species, above, for additional information).

The "Priority" column indicates the LPN for each candidate species, which

we use to determine the most appropriate use of our available resources. The lowest numbers have the highest priority. We assign LPNs based on the immediacy and magnitude of threats, as well as on taxonomic status. We published a complete description of our listing priority system in the **Federal Register** (48 FR 43098; September 21, 1983).

Following the scientific name (third column) and the family designation (fourth column) is the common name (fifth column). The sixth column provides the known historical range for the species or vertebrate population (for vertebrate populations, this is the historical range for the entire species or subspecies and not just the historical range for the distinct population segment), indicated by postal code abbreviations for States and U.S. territories. Many species no longer occur in all of the areas listed.

Species in Table 6 of this CNOR are those domestic species that we included either as proposed species or as candidates in the previous CNOR (published October 10, 2019, at 84 FR 54732) that are no longer proposed species or candidates for listing. Since October 10, 2019, we listed three species and removed three species from the candidate list by making not-warranted findings or withdrawing proposed rules. The first column indicates the present status of each species, using the following codes (not all of these codes may have been used in this CNOR):

E—Species we listed as endangered.

T—Species we listed as threatened.

SAT—Species we listed as threatened due to similarity of appearance.

Rc—Species we removed from the candidate list, because currently available information does not support a proposed listing.

Rp—Species we removed from the candidate list, because we have withdrawn the proposed listing.

The second column indicates why the species is no longer a candidate species or proposed for listing, using the following codes (not all of these codes may have been used in this CNOR):

A—Species that are more abundant or widespread than previously believed and species that are not subject to the degree of threats sufficient that the species is a candidate for listing (for reasons other than that conservation efforts have removed or reduced the threats to the species).

F—Species whose range no longer includes a U.S. territory.

I—Species for which the best available information on biological vulnerability and threats is insufficient to support a conclusion that the species is an endangered species or a threatened species.

L—Species we added to the Lists of Endangered and Threatened Wildlife and Plants.

M—Species we mistakenly included as candidates or proposed species in the last CNOR.

N—Species that are not listable entities based on the Act’s definition of “species” and current taxonomic understanding.

U—Species that are not subject to the degree of threats sufficient to warrant issuance of a proposed listing and therefore are not candidates for listing, due, in part or totally, to conservation efforts that remove or reduce the threats to the species.

X—Species we believe to be extinct.

The columns describing scientific name, family, common name, and historical range include information as previously described for Table 1.

**Request for Information**

We request additional status information that may be available for any of the candidate species identified

in this CNOR. We will consider this information to monitor changes in the status or LPN of candidate species and to manage candidates as we prepare listing documents and future revisions to the CNOR. We also request information on additional species to consider including as candidates as we prepare future updates of this CNOR.

We request you submit any further information on the species named in this document as soon as possible or whenever it becomes available. We are particularly interested in any information:

- (1) Indicating that we should add a species to the list of candidate species;
- (2) Indicating that we should remove a species from candidate status;
- (3) Recommending areas that we should designate as critical habitat, or indicating that designation of critical habitat would not be prudent;

(4) Documenting threats to any of the included species;

(5) Describing the immediacy or magnitude of threats facing candidate species;

(6) Pointing out taxonomic or nomenclature changes for any of the species;

(7) Suggesting appropriate common names; and

(8) Noting any mistakes, such as errors in the indicated historical ranges.

We will consider all information provided in response to this CNOR in deciding whether to propose species for listing and when to undertake necessary listing actions (including whether emergency listing under section 4(b)(7) of the Act is appropriate).

Submit information, materials, or comments regarding a particular species to the Regional Director identified as having the lead responsibility for the species in the table below.

TABLE 4—CANDIDATE SPECIES AND SPECIES PROPOSED FOR LISTING

| Species   | Regional director        | Address   | Telephone    |
|---|--------------------------|---|--------------|
| Atlantic pigtoe, Black-capped petrel, eastern black rail, gopher tortoise (eastern population), Neuse River waterdog, Carolina madtom, longsolid, magnificent ramshorn, Puerto Rico harlequin butterfly, Panama City crayfish, round hickorynut, slenderclaw crayfish, marron bacora. | Leo Miranda-Castro ..... | Regional Director, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345.                    | 404-679-4156 |
| Eastern hellbender (Missouri DPS) .....   | Charlie Wooley .....     | Regional Director, U.S. Fish and Wildlife Service, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437-1458.         | 612-713-5334 |
| North American wolverine (Contiguous U.S. DPS), Chapin Mesa milkvetch, whitebark pine.  | Noreen Walsh .....       | Regional Director, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225-0486.            | 303-236-7400 |
| Peñasco least chipmunk, Texas fatmucket, Texas fawnsfoot, Texas pimpleback, Wright’s marsh thistle, bracted twistflower, Sonoran desert tortoise.   | Amy Lueders .....        | Regional Director, U.S. Fish and Wildlife Service, 500 Gold Avenue SW, Room 4012, Albuquerque, NM 87102.                    | 505-248-6920 |
| Dolly Varden trout, Franklin’s bumble bee .....   | Robyn Thorson .....      | Regional Director, U.S. Fish and Wildlife Service, Eastside Federal Complex, 911 N.E. 11th Avenue, Portland, OR 97232-4181. | 503-231-6158 |
| Sierra Nevada red fox (Sierra Nevada DPS), Humboldt marten, longfin smelt (San Francisco Bay-Delta DPS), Hermes copper butterfly.   | Paul Souza .....         | Regional Director, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W2606, Sacramento, CA 95825.                     | 916-414-6464 |

We will provide information we receive to the office having lead responsibility for each candidate species mentioned in the submission, and information and comments we receive will become part of the administrative record for the species, which we maintain at the appropriate office.

**Public Availability of Comments**

Before including your address, phone number, email address, or other

personal identifying information in your submission, be advised that your entire submission—including your personal identifying information—may be made publicly available at any time. Although you can ask us in your submission to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

**Authority**

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Signed: \_\_\_\_\_

**Aurelia Skipwith,**  
Director, U.S. Fish and Wildlife Service.

TABLE 5—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)

[Note: See end of SUPPLEMENTARY INFORMATION for an explanation of symbols used in this table.]

| Status             |          | Scientific name   | Family               | Common name                                      | Historical range   |
|--------------------|----------|---|----------------------|--|--|
| Category           | Priority |   |                      |  |  |
| <b>MAMMALS</b>     |          |   |                      |  |  |
| C* .....           | 6        | <i>Tamias minimus atristriatus</i> .....                  | Sciuridae .....      | Chipmunk, Peñasco least .....                    | U.S.A. (NM).   |
| PE .....           | 3        | <i>Vulpes vulpes necator</i> .....                        | Canidae .....        | Fox, Sierra Nevada red (Sierra Nevada DPS).      | U.S.A. (CA, OR).   |
| PT .....           |          | <i>Martes caurina</i> ssp.<br><i>humboldtensis</i> .      | Mustelidae .....     | Marten, Humboldt .....                           | U.S.A. (CA).   |
| PT .....           | 6        | <i>Gulo gulo luscus</i> .....                             | Mustelidae .....     | Wolverine, North American (Contiguous U.S. DPS). | U.S.A. (CA, CO, ID, MT, OR, UT, WA, WY).   |
| <b>BIRDS</b>       |          |   |                      |  |  |
| PT .....           |          | <i>Pterodroma hasitata</i> .....                          | Procellariidae ..... | Petrel, black-capped .....                       | U.S.A. (GA, NC, SC).   |
| PT .....           |          | <i>Lateralus jamaicensis</i> ssp.<br><i>jamaicensis</i> . | Rallidae .....       | Rail, eastern black .....                        | U.S.A. (AL, AK, CO, CT, DE, FL, GA, IL, IN, IA, KN, KT, LA, MD, MA, MI, MN, MS, MO, NE, NH, NJ, NM, NY, NC, OH, OK, PA, PR, RI, SC, TN, TX, VT, VA, VI, WV, WI). |
| <b>REPTILES</b>    |          |   |                      |  |  |
| C* .....           | 8        | <i>Gopherus polyphemus</i> .....                          | Testudinidae .....   | Tortoise, gopher (eastern population).           | U.S.A. (AL, FL, GA, LA, MS, SC).   |
| C* .....           | 5        | <i>Gopherus morafkai</i> .....                            | Testudinidae .....   | Tortoise, Sonoran desert .....                   | U.S.A. (AZ), Mexico.   |
| <b>AMPHIBIANS</b>  |          |   |                      |  |  |
| PE .....           |          | <i>Cryptobranchus alleganiensis alleganiensis</i> .       | Cryptobranchidae.    | Hellbender, eastern (Missouri DPS).              | U.S.A. (MO).   |
| PT .....           |          | <i>Necturus lewisi</i> .....                              | Proteidae .....      | Waterdog, Neuse River .....                      | U.S.A. (NC).   |
| <b>FISHES</b>      |          |   |                      |  |  |
| PE .....           |          | <i>Noturus furiosus</i> .....                             | Ictaluridae .....    | Madtom, Carolina .....                           | U.S.A. (NC).   |
| C* .....           | 6        | <i>Spirinchus thaleichthys</i> .....                      | Osmeridae .....      | Smelt, longfin (San Francisco Bay-Delta DPS).    | U.S.A. (AK, CA, OR, WA), Canada.   |
| PSAT .....         | N/A      | <i>Salvelinus malma</i> .....                             | Salmonidae .....     | Trout, Dolly Varden .....                        | U.S.A. (AK, WA), Canada, East Asia.  |
| <b>CLAMS</b>       |          |   |                      |  |  |
| C* .....           | 2        | <i>Lampsilis bracteata</i> .....                          | Unionidae .....      | Fatmucket, Texas .....                           | U.S.A. (TX).   |
| C* .....           | 2        | <i>Truncilla macrodon</i> .....                           | Unionidae .....      | Fawnsfoot, Texas .....                           | U.S.A. (TX).   |
| PT .....           |          | <i>Obovaria subrotunda</i> .....                          | Unionidae .....      | Hickorynut, round .....                          | U.S.A. (AL, GA, IL, IN, KY, MI, MS, NY, OH, PA, TN, WV), Canada.   |
| PT .....           |          | <i>Fusconaia masoni</i> .....                             | Unionidae .....      | Pigtoe, Atlantic .....                           | U.S.A. (GA, NC, VA).   |
| C* .....           | 2        | <i>Quadrula petrina</i> .....                             | Unionidae .....      | Pimpleback, Texas .....                          | U.S.A. (TX).   |
| PT .....           |          | <i>Fusconaia subrotunda</i> .....                         | Unionidae .....      | Longsolid .....                                  | U.S.A. (AL, GA, IL, IN, KY, MS, MO, NY, NC, OH, PA, SC, TN, VA, WV).   |
| <b>SNAILS</b>      |          |   |                      |  |  |
| C* .....           | 2        | <i>Planorbella magnifica</i> .....                        | Planorbidae .....    | Ramshorn, magnificent .....                      | U.S.A. (NC).   |
| <b>INSECTS</b>     |          |   |                      |  |  |
| PE .....           | 1        | <i>Bombus franklini</i> .....                             | Apidae .....         | Bumble bee, Franklin's .....                     | U.S.A. (CA, OR).   |
| PT .....           | 5        | <i>Lycaena hermes</i> .....                               | Lycaenidae .....     | Butterfly, Hermes copper .....                   | U.S.A. (CA).   |
| C* .....           | 2        | <i>Atlantea tulita</i> .....                              | Nymphalidae .....    | Butterfly, Puerto Rico harlequin .....           | U.S.A. (PR).   |
| <b>CRUSTACEANS</b> |          |   |                      |  |  |
| PT .....           |          | <i>Procambarus econfinae</i> .....                        | Cambaridae .....     | Crayfish, Panama City .....                      | U.S.A. (FL).   |
| PT .....           |          | <i>Cambarus cracens</i> .....                             | Cambaridae .....     | Crayfish, slenderclaw .....                      | U.S.A. (AL).   |

TABLE 5—CANDIDATE NOTICE OF REVIEW (ANIMALS AND PLANTS)—Continued

[Note: See end of SUPPLEMENTARY INFORMATION for an explanation of symbols used in this table.]

| Status                  |          | Scientific name                      | Family             | Common name                   | Historical range   |
|-------------------------|----------|--------------------------------------|--------------------|-------------------------------|--|
| Category                | Priority |                                      |                    |                               |  |
| <b>FLOWERING PLANTS</b> |          |                                      |                    |                               |  |
| PT .....                | 8        | <i>Astragalus schmolliae</i> .....   | Fabaceae .....     | Milkvetch, Chapin Mesa .....  | U.S.A. (CO).   |
| PT .....                | 8        | <i>Cirsium wrightii</i> .....        | Asteraceae .....   | Thistle, Wright's marsh ..... | U.S.A. (AZ, NM), Mexico.                                 |
| C* .....                | 8        | <i>Pinus albicaulis</i> .....        | Pinaceae .....     | Pine, whitebark .....         | U.S.A. (CA, ID, MT, NV, OR,<br>WA, WY), Canada (AB, BC). |
| PE .....                | 2        | <i>Solanum conocarpum</i> .....      | Solanaceae .....   | Bacora, marron .....          | U.S.A. (PR).   |
| C* .....                | 8        | <i>Streptanthus bracteatus</i> ..... | Brassicaceae ..... | Twistflower, bracted .....    | U.S.A. (TX).   |

TABLE 6—ANIMALS AND PLANTS FORMERLY CANDIDATES OR FORMERLY PROPOSED FOR LISTING

[Note: See end of SUPPLEMENTARY INFORMATION for an explanation of symbols used in this table.]

| Status                  |       | Scientific name                        | Family            | Common name                              | Historical range |
|-------------------------|-------|--|-------------------|--|------------------|
| Code                    | Expl. |  |                   |  |                  |
| <b>MAMMALS</b>          |       |  |                   |  |                  |
| Rc .....                | 9     | <i>Arborimus longicaudus</i> .....     | Cricetidae .....  | Vole, red tree (north Oregon coast DPS). | U.S.A. (OR)      |
| <b>AMPHIBIANS</b>       |       |  |                   |  |                  |
| Rc .....                | A     | <i>Gyrinophilus gulolineatus</i> ..... | Plethodontidae .. | Salamander, Berry Cave .....             | U.S.A. (TN)      |
| <b>FISHES</b>           |       |  |                   |  |                  |
| E .....                 | L     | <i>Fundulus julisia</i> .....          | Fundulidae .....  | Topminnow, Barrens .....                 | U.S.A. (TN)      |
| <b>INSECTS</b>          |       |  |                   |  |                  |
| T .....                 | L     | <i>Lednia tumana</i> .....             | Nemouridae .....  | Stonefly, meltwater lednian .....        | U.S.A. (MT)      |
| T .....                 | L     | <i>Zapada glacier</i> .....            | Nemouridae .....  | Stonefly, western glacier .....          | U.S.A. (MT)      |
| <b>FLOWERING PLANTS</b> |       |  |                   |  |                  |
| Rc .....                | 8     | <i>Astragalus microcymbus</i> .....    | Fabaceae .....    | Milkvetch, skiff .....                   | U.S.A. (CO)      |

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# FEDERAL REGISTER

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Part IV

The President

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Proclamation 10118—Veterans Day, 2020





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# Presidential Documents

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Title 3—

**Proclamation 10118 of November 10, 2020**

**The President**

**Veterans Day, 2020**

**By the President of the United States of America**

## **A Proclamation**

America's veterans have fought to defend our country, its values, and its interests since the first days of our founding. They have defeated tyrants, eliminated terrorists, and secured freedom at home and abroad. Their courage and fortitude in the face of adversity serve as an example for all Americans. On Veterans Day, we pause to pay tribute to all who have proudly worn our Nation's uniform. These Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen selflessly placed lives, well-being, and security of others before their own. We enjoy the privileges of peace, prosperity, and freedom because of our veterans, and we are forever indebted to them beyond measure.

For their love of country and dedication to duty, America's veterans have endured adversity, loneliness, fatigue, loss, and made other incredible sacrifices. Many sustained life-altering physical injuries and disabilities; others bear the burden of emotional scars for the remainder of their lives. Our Nation's veterans fully understand liberty's high and precious cost, for they have paid it every day since the formation of our Republic.

As Commander in Chief, I have relentlessly fought to support America's veterans. For far too long, our Government had not fully met its obligation to provide for "him who shall have borne the battle, and for his widow and his orphan." I recognize that this country and its people are duty-bound to care for our exceptional veterans, their families, and their survivors. That is why, throughout my time in office, I have worked tirelessly to improve the health, welfare, and economic prosperity of these treasured people. In just a few short years, my Administration completely overhauled the Department of Veterans Affairs (VA), removing employees who were not giving our veterans the care and attention they deserve and making the agency more accountable to the heroes it serves. I also signed into law the VA MISSION Act, which gives eligible veterans the choice to receive timely care from providers in their own communities. In 2018, I also signed the largest funding bill in the history of the VA, and the VA has since benefited from record budgets every year. In addition, I signed a Presidential Memorandum to ensure that veterans who are totally and permanently disabled receive the Federal student loan forgiveness to which they are so justly entitled. We will continue to build on these efforts and work to create an economic environment that fosters growth and prosperity for veterans, ensuring all of our veterans have the opportunity to live productive civilian lives.

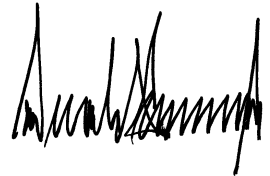
The mental health and welfare of our veterans is of critical importance, and addressing this issue has been a top priority. Tragically, an average of 20 veterans and service members die by suicide each day. We are striving with all our effort to end this alarming and unacceptable reality. Last year, I launched the largest whole-of-government program in history to end veteran suicide, the President's Roadmap to Empower Veterans and End a National Tragedy of Suicide (PREVENTS). I also recently signed the Commander John Scott Hannon Veteran Mental Health Care Improvement Act which is strengthening VA mental health, supporting suicide prevention efforts, and developing pilot programs dedicated to ending veteran suicide. I have

also bolstered the Veterans Crisis Line, so that its around-the-clock operators can deliver the best possible intervention services to vulnerable veterans.

Our veterans represent the best of America, and they deserve the best America can provide them. To recognize and respect the contributions our service men and women have made in defense of America, and to advance the cause of peace, the Congress has provided, as outlined in 5 U.S.C. 6103(a), that November 11th of each year shall be set aside as a legal public holiday to recognize America's veterans. These heroes served faithfully, humbly, and valiantly in times of war and peace, and they carried these admirable traits into the civilian workforce when their military service was fulfilled. Our precious liberty has survived and thrived because of generations of brave Americans—from every background and walk of life—who have answered the call to support and defend the United States. The gravity of their contribution is immeasurable and so is our debt to every single one of our Nation's veterans.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, do hereby proclaim November 11, 2020, as Veterans Day. I encourage all Americans to recognize the fortitude and sacrifice of our veterans through public ceremonies and private thoughts and prayers. I call upon Federal, State, and local officials to display the flag of the United States and to participate in patriotic activities in their communities. I call on all Americans, including civic and fraternal organizations, places of worship, schools, and communities to support this day with commemorative expressions and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of November, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.



# Reader Aids

## Federal Register

Vol. 85, No. 221

Monday, November 16, 2020

### CUSTOMER SERVICE AND INFORMATION

|   |                     |
|---|---------------------|
| <b>Federal Register/Code of Federal Regulations</b> |                     |
| General Information, indexes and other finding aids | <b>202-741-6000</b> |
| <b>Laws</b>   | <b>741-6000</b>     |
| <b>Presidential Documents</b>                       |                     |
| Executive orders and proclamations                  | <b>741-6000</b>     |
| <b>The United States Government Manual</b>          | <b>741-6000</b>     |
| <b>Other Services</b>                               |                     |
| Electronic and on-line services (voice)             | <b>741-6020</b>     |
| Privacy Act Compilation                             | <b>741-6050</b>     |

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### FEDERAL REGISTER PAGES AND DATE, NOVEMBER

|             |    |
|-------------|----|
| 69119-69464 | 2  |
| 69465-70026 | 3  |
| 70027-70414 | 4  |
| 70415-70954 | 5  |
| 70955-71222 | 6  |
| 71223-71528 | 9  |
| 71529-71814 | 10 |
| 71815-72550 | 12 |
| 72551-72898 | 13 |
| 72899-73184 | 16 |

### CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

#### 2 CFR

|      |       |
|------|-------|
| 376  | 72899 |
| 415  | 72912 |
| 416  | 72912 |
| 1800 | 71815 |

#### 3 CFR

|                       |       |
|-----------------------|-------|
| <b>Proclamations:</b> |       |
| 10107                 | 70027 |
| 10108                 | 70415 |
| 10109                 | 70417 |
| 10110                 | 70419 |
| 10111                 | 70421 |
| 10112                 | 70423 |
| 10113                 | 70425 |
| 10114                 | 70427 |
| 10115                 | 70429 |
| 10116                 | 72547 |
| 10117                 | 72549 |
| 10118                 | 73183 |

|                          |       |
|--------------------------|-------|
| <b>Executive Orders:</b> |       |
| 13958                    | 70951 |

#### Administrative Orders:

|                     |       |
|---------------------|-------|
| <b>Memorandums:</b> |       |
| Memorandum of       |       |
| October 31, 2020    | 70039 |
| Memorandum of       |       |
| October 26, 2020    | 71213 |
| Memorandum of       |       |
| November 9, 2020    | 72889 |

|                       |       |
|-----------------------|-------|
| <b>Notices:</b>       |       |
| Notice of October 30, |       |
| 2020                  | 69463 |
| Notice of November    |       |
| 12, 2020              | 72893 |
| Notice of November    |       |
| 12, 2020              | 72895 |
| Notice of November    |       |
| 12, 2020              | 72897 |

|                     |       |
|---------------------|-------|
| <b>Presidential</b> |       |
| Determinations:     |       |
| No. 2020-12 of      |       |
| September 28,       |       |
| 2020                | 71209 |
| No. 2021-02 of      |       |
| September 27,       |       |
| 2020                | 71219 |

|                        |       |
|------------------------|-------|
| <b>Proposed Rules:</b> |       |
| 831                    | 70502 |
| 842                    | 70502 |

#### 5 CFR

|                        |       |
|------------------------|-------|
| 1600                   | 72913 |
| 1605                   | 72913 |
| <b>Proposed Rules:</b> |       |
| 831                    | 70502 |
| 842                    | 70502 |

#### 7 CFR

|      |       |
|------|-------|
| 205  | 70431 |
| 284  | 70043 |
| 966  | 72914 |
| 1780 | 72912 |
| 3430 | 72912 |

|                        |       |
|------------------------|-------|
| <b>Proposed Rules:</b> |       |
| 1280                   | 71274 |

#### 8 CFR

|      |       |
|------|-------|
| 1001 | 69465 |
| 1003 | 69465 |
| 1292 | 69465 |

|                        |       |
|------------------------|-------|
| <b>Proposed Rules:</b> |       |
| 214                    | 69236 |

#### 10 CFR

|    |       |
|----|-------|
| 2  | 70435 |
| 72 | 71223 |

|                        |       |
|------------------------|-------|
| <b>Proposed Rules:</b> |       |
| 2                      | 70507 |
| 53                     | 71002 |
| 72                     | 71274 |
| 430                    | 70508 |

#### 12 CFR

|       |       |
|-------|-------|
| 303   | 72551 |
| 327   | 71227 |
| 347   | 72551 |
| 615   | 70955 |
| 704   | 71817 |
| Ch. X | 69482 |
| 1003  | 69119 |

|                        |       |
|------------------------|-------|
| <b>Proposed Rules:</b> |       |
| 4                      | 70512 |
| 225                    | 71580 |
| 238                    | 71580 |
| 252                    | 71580 |
| 262                    | 70512 |
| 302                    | 70512 |
| 791                    | 70512 |
| Ch. X                  | 71003 |
| 1074                   | 70512 |
| 1253                   | 71276 |

#### 13 CFR

|     |              |
|-----|--------------|
| 121 | 72916        |
| 124 | 69120        |
| 125 | 69120, 70050 |
| 129 | 69120        |

|                        |       |
|------------------------|-------|
| <b>Proposed Rules:</b> |       |
| 121                    | 72584 |

#### 14 CFR

|      |                             |
|------|-----------------------------|
| 39   | 69126, 69129, 69131,        |
|      | 69134, 69138, 69140, 69142, |
|      | 69144, 69485, 69488, 69492, |
|      | 69493, 69496, 70051, 70439, |
|      | 70442, 70955, 71229, 71232, |
|      | 71235, 71238, 71240, 71244, |
|      | 71529, 71532, 72555, 72558  |
| 71   | 69147, 69148, 71534,        |
|      | 71535, 72917, 72918         |
| 97   | 69149, 69151, 72560,        |
|      | 72562                       |
| 1221 | 71827                       |
| 1274 | 72919                       |

|                        |                             |
|------------------------|-----------------------------|
| <b>Proposed Rules:</b> |                             |
| 27                     | 69265                       |
| 39                     | 69267, 69269, 69272,        |
|                        | 69276, 69519, 69522, 70087, |

70523, 70526, 71286, 71580,  
71583, 72608  
71 .....69279, 69281, 70089,  
70092, 70093, 70096, 70532,  
70534, 71289, 71290, 71292,  
71293, 71586, 72610, 72612,  
72613

**15 CFR**

**Proposed Rules:**  
774.....71012

**17 CFR**

4.....71772  
23.....69498, 71246  
232.....69499  
240.....70240, 70898  
249.....70898

**Proposed Rules:**  
23.....70536  
200.....70716  
230.....70716  
239.....70716  
240.....70536, 70716  
270.....70716  
274.....70716

**20 CFR**

404.....73138  
408.....73138  
411.....73138  
416.....73138  
422.....73138  
655.....70445

**21 CFR**

1.....72899  
5.....72899  
12.....72899  
14.....72899  
25.....72899  
81.....72899  
133.....72899  
172.....72899  
178.....72899  
184.....72899  
201.....72899  
310.....72899  
369.....72899  
501.....72899  
582.....72899  
1301.....69153  
1306.....69153

**Proposed Rules:**  
6.....70096, 73007  
112.....71294  
1300.....69282  
1301.....69282

**23 CFR**

635.....72919

**24 CFR**

11.....71537  
3282.....71831  
3284.....71831

**Proposed Rules:**  
888.....71856  
982.....71856  
983.....71856  
985.....71856  
3282.....71856  
3284.....71856

**26 CFR**

1.....69500, 70958, 71734,

71998, 72472, 72564, 72934  
54.....71142, 72158  
301.....71998

**Proposed Rules:**  
1.....71587, 72078  
54.....71016

**27 CFR**

**Proposed Rules:**  
9.....71722, 71726

**28 CFR**

0.....69465

**29 CFR**

1695.....69167  
2201.....72564  
2509.....72846  
2510.....72934  
2550.....72846  
2590.....71142, 72158  
4022.....72565

**30 CFR**

938.....71251  
948.....70972

**31 CFR**

33.....71142  
**Proposed Rules:**  
50.....71588

**32 CFR**

253.....72566  
2402.....70054

**33 CFR**

100.....71543  
165.....69172, 71545  
**Proposed Rules:**  
165.....69299, 69301

**34 CFR**

75.....70975  
76.....70975  
106.....70975  
606.....70975  
607.....70975  
608.....70975  
609.....70975  
668.....72567

**36 CFR**

1.....69175, 72956  
4.....69175  
13.....72956

**Proposed Rules:**  
7.....71017  
222.....69303

**37 CFR**

6.....69501  
202.....71834

**Proposed Rules:**  
210.....70544

**38 CFR**

5.....72569  
17.....71838

**Proposed Rules:**  
1.....72615  
17.....71020  
70.....70551

**39 CFR**

3040.....70477

**40 CFR**

9.....69189  
52.....69504, 70483, 71264,  
71547, 71846, 72961, 72963  
60.....70487  
62.....72967  
63.....69508, 70487  
81.....71264  
122.....69189  
123.....69189  
127.....69189  
180.....69512, 70062, 70494,  
70497, 70976, 70997, 72571,  
72968  
257.....72506  
403.....69189  
503.....69189

**Proposed Rules:**  
52.....69307, 70554, 71022,  
71023, 71295  
63.....71490  
81.....71023  
271.....70558  
721.....73007

**41 CFR**

60-1.....71553  
60-2.....71553  
60-300.....71553  
60-741.....71553

**42 CFR**

23.....72899  
51c.....72899  
52i.....72899  
56.....72899  
57.....72899  
63.....72899  
124.....72899  
409.....70298  
410.....70298, 71142  
411.....71142, 72899  
412.....72899  
413.....71398  
414.....70298, 71142  
417.....71142  
422.....72899  
423.....72899  
424.....70298  
426.....72899  
433.....71142  
438.....72754  
440.....72899  
441.....72899  
447.....72899  
457.....72754  
482.....72899  
484.....70298  
485.....72899  
510.....71142  
1004.....72899  
1008.....72899

**Proposed Rules:**  
1.....70096, 73007  
100.....71046  
404.....70096, 73007  
414.....70358  
600.....69525

**43 CFR**

8340.....69206

**45 CFR**

3.....72899  
63.....72899

75.....72899  
147.....71142, 72158  
155.....71142  
158.....72158  
170.....70064  
171.....70064  
182.....71142  
305.....72899  
307.....72899  
1324.....72899  
1325.....72899  
1326.....72899  
1328.....72899

**Proposed Rules:**  
6.....70096, 73007  
1635.....70564

**46 CFR**

502.....72574  
503.....72574  
520.....72574  
530.....72574  
535.....72574  
540.....72574  
550.....72574  
555.....72574  
560.....72574

**47 CFR**

2.....69515  
9.....70500  
76.....71848  
90.....69515  
97.....69515

**Proposed Rules:**  
1.....71593  
5.....71296  
25.....71296  
73.....69311, 70569  
97.....71296

**48 CFR**

30.....72971  
302.....72899  
326.....72899

**Proposed Rules:**  
326.....71596  
352.....71596  
9904.....70572

**49 CFR**

273.....72971  
299.....69700  
572.....69898

**Proposed Rules:**  
192.....70124  
195.....70124  
571.....69388

**50 CFR**

17.....69778  
27.....69223  
216.....69515  
218.....72312  
622.....70085  
635.....71270  
648.....71575, 72579  
660.....73002  
665.....71577, 73003  
679.....69517, 71272, 72580  
680.....72581

**Proposed Rules:**  
17.....69540, 71859, 73012,  
73164  
216.....71297

---

622.....73013

648 .....70573, 71873, 72616

665.....71300

---

**LIST OF PUBLIC LAWS**

---

**Note:** No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

**Last List November 3, 2020**

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